No._____

In The

Supreme Court of the United States

BARBARA ANN THOMAS;
JOHN THOMAS,

Petitioners,

v.

J.J. WILLIAMS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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June 4, 2018

QUESTION PRESENTED

Identical to *Tolan*, this case presents a Fifth Circuit affirmation of a grant of summary judgment in favor of a police-officer defendant in a Section 1983 case from Judge Harmon's court in the Southern District of Texas (Houston Division) with a dissenting opinion from Judge Dennis observing that the majority misapprehends the summary judgment standard. See App. 25a. While Judge Dennis acknowledged that, "[s]tatistically speaking, it is highly unlikely that the Supreme Court would" again summarily reverse, he observed that "the majority appears bent on providing a very good candidate for this course of action." *Ibid*. The dissent then cataloged the ways in which the majority opinion: (1) "fails to view the evidence in the light most favorable to the nonmovant" (App. 18a), (2) "fails to credit evidence that contradicts its key factual conclusions" (*Ibid.*), (3) "ignore[es] both the evidence in the record and the Thomases' arguments" (App. 21a), and (4) "misrepresents language from *Maryland v. Buie*, 494 U.S. 325, 335 (1990)." (App. 28a at n. 5). Petitioners offered admissible evidence Respondent Williams lied to a magistrate, unlawfully entered Petitioners' home, and unlawfully remained therein after discovering he had no right to be there.

The question presented is:

> Whether the court of appeals erred by affirming the district court's grant of summary judgment and failing to adhere to "the axiom" that, at the summary judgment stage, "the evidence of the

nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014).

PARTIES TO THE PROCEEDINGS

Petitioners Barbara Thomas and John Thomas were the plaintiffs in the district court and the appellants in the court of appeals.

Respondent J.J. Williams was a defendant in the district court and the appellee in the court of appeals.

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On March 31, 2016 the district court entered an order granting summary judgment in favor of Respondents. Petitioners filed a motion for reconsideration on April 29, 2016; the district court denied same and reaffirmed its order on October 18, 2016. Final judgement against Respondent was entered November 3, 2016.

The Fifth Circuit affirmed the trial court's ruling on February 1, 2018. Petitioners sought rehearing *en banc* on February 15, 2018; the panel treated said request as a request for panel rehearing and denied same on March 6, 2018.

JURISDICTION

The court of appeals entered its judgment on February 1, 2018. Petitioners' request for rehearing *en banc* was denied on March 6, 2018. This Honorable Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Fourth Amendment to the U.S. 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.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

Despite this Honorable Court's reminder in *Tolan,* the Fifth Circuit continues to materially depart from the accepted and usual course of summary judgment proceedings in § 1983 cases as to again call for an exercise of this Court's supervisory power. (See Supreme Court Rule 10(a)). The Fifth Circuit has also:

(1) made "erroneous factual findings" which Judge Dennis's dissent describes as

- "patently untrue" (App. 20a);
- manifesting a "misapprehension of the summary judgment standard" (App. 24a-25a at n. 3); and
- "serious legal errors" (App. 18a);

(2) "decided an important federal question in a way that conflicts with relevant decisions of this Court" (Supreme Court Rule 10(c));[1] and

(3) decided an important federal question in a way that conflicts with decisions by Texas' highest criminal court (Supreme Court Rule 10(a)).[2]

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1 See pp. 17-20 at § A, *infra.*

2 See pp. 53-54 at n. 38, *infra.*

Here, Petitioners sued (*inter alia*) City of Houston police officer J.J. Williams under 42 U.S.C. § 1983 for (1) knowingly making materially false statements to a magistrate under oath, (2) entering Petitioners' home (despite knowing he lacked a valid warrant therefor) without consent or exigent circumstances, and (3) staying in Petitioners' home for an unreasonable period of time after discovering he had no right to be therein. Both parties moved for summary judgment; the district court ruled Williams was entitled to qualified immunity and granted his motion for summary judgment. The Fifth Circuit affirmed.

Judge Dennis vigorously dissented. After expressly invoking *Tolan,* he wrote:

> "Statistically speaking, it is highly unlikely that the Supreme Court would repeat this strong remedy in the instant case, but the majority appears bent on providing a very good candidate for this course of action. Because the majority opinion fails to view the evidence in the light most favorable to the nonmovant, fails to credit evidence that contradicts its key factual conclusions, and makes additional serious legal errors, I must respectfully dissent." App. 18a.

Additional noteworthy assessments from Judge Dennis include:

1. "The majority opinion's 'burden-shifting' as if it modifies the well-established rule that 'courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment,' *Tolan,* 134 S.Ct. at 1866, is emblematic of the majority opinion's misapprehension of the summary judgment standard." (App. 24a-25a at n.3 (emphasis added));

2. The panel's finding concerning the Thomases' evidence is "patently untrue" (App. 20a (emphasis added));

3. "No one can both view this evidence in the light most favorable to the Thomases and hold, as the majority does, that there is no genuine dispute as to whether Williams knew that the officers were in the wrong location *before* he entered the Thomases' apartment." (App. 24a (emphasis in the original));

4. "[T]here is evidence in the record that Williams was not only on notice of the risk that he was about to search the wrong residence but that he also *knew* that the officers had the wrong apartment before entering it." (App. 23a (emphasis in the original)); and

5. "In support of the proposition that a 'sweep' is not a search for purposes of the Fourth Amendment, the majority misrepresents language from *Maryland v. Buie*, 494 U.S. 325, 335 (1990)." (App. 28a at n. 5) (emphasis added).

The panel also made other findings that are directly contrary to unchallenged evidence in the record. Petitioners' request for *en banc* review on said grounds was nonetheless denied. App. 71a-72a.

The district court also erroneously admitted unsworn out-of-court statements from an unidentified and paid confidential informant. Petitioners objected to all such statements as hearsay. The district court overruled Petitioners' objections then expressly relied upon the purported truths thereof in its judgment. Petitioners fully briefed this hearsay issue to the Fifth Circuit; Williams did not respond thereto. The Fifth Circuit plainly erred when it failed to review (or even mention) this dispositive evidentiary issue.

STATEMENT OF THE CASE

Williams is a peace officer employed by the Houston Police Department who:

(1) signed a search warrant affidavit for 5818 Hirsch Street (the only "listed location" therein);

(2) concedes 5818 Hirsch does not exist;

(3) knew Petitioners' address would be above their front door;

(4) saw Petitioners' address (581**6**) before entering therein;

(5) knowingly allowed members of his team to forcibly open Petitioners' door;

(6) knowingly entered Petitioners' residence at 581**6** Hirsch without a warrant therefor or an exigency;

(7) knew his paid confidential informant did not ever say s/he purchased drugs from 5816 Hirsch; and

(8) admitted he did not have probable cause to believe criminal activity was occurring in Petitioners' home.

Williams expressly swore to a magistrate that he "observed [a confidential informant] go to, and return directly from, the listed location" (emphasis

added). No location other than 5818 Hirsch was listed in the affidavit. (App. G, 77a-80a). The City of Houston's 30(b)(6) representative concerning (*inter alia*) relevant training testified he believed "the listed location" referred to 5818 Hirsch.

Despite his sworn statements concerning his personal observations, Williams subsequently admitted "[t]he apartment was obstructed by other apartments at that same block of Hirsch" and that he instead merely watched the informant go to the non-particularized "building where [Petitioners'] duplex is located[.]"

Williams further conceded that:

(1) his informant did not purchase drugs from 5818 Hirsch or 5816 Hirsch;

(2) he has never used an informant to purchase drugs from 5816 Hirsch;

(3) he watched the informant go to "the area around the building which encompasses" two separate addresses;

(4) the drugs were purchased outside;

(5) he could not see the drug transaction; and

(6) he had never previously been inside Petitioners' complex.

The undisputed evidence also shows Williams did not want to go into Petitioners' complex <u>because it</u>

was predominantly black and he was afraid he would stand out.[3] Additionally, he neither took the informant with him to confirm the address nor saw the informant go inside any home; instead, he only saw the informant "between 5816 and 5816 ½". Furthermore,

(1) Williams knew Petitioners lived in a duplex;

(2) Williams believed duplexes "are a little tricky";

(3) he attempted to research 5818 Hirsch in multiple databases,

(4) he couldn't find 5818 Hirsch in any database;

(5) he didn't doubt the completeness of said databases;

(6) he never told the informant he couldn't verify the existence of 5818 Hirsch;

(7) the informant's information was based on their interpretation of the alleged drug-dealer's "body language";[4]

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[3] App. 81a ("[Williams] stated that since the complex occupancy is all black he felt that he walking through the complex being a white male would have jeopardized the investigation."). See also App. 75a (everyone in Petitioners' complex was black).

[4] App. 82a ("The C.I. explained by stating Nash gave an expression or body language which was perceived as if Nash did not want the C.I. to know where he lived."). Petitioners' timely double-hearsay objection was overruled.

(8) 5816 Hirsch Road is not 5818 Hirsch Road;

(9) the search warrant did not contain the address 5816 Hirsch Road; and

(10) there was nothing obscuring the numbers "5816" before he entered therein.

Williams concedes that when he entered Petitioners' home, Petitioners were (1) unarmed, (2) not engaged in any illegal activity, and (3) not threatening the officers in any manner. He also concedes he did not make *any* observations of illegal activity therein. The only evidence of what the informant purportedly told Williams comes from Williams; the court overruled Petitioners' hearsay objection, found said statements were not being used for the truths of the matter asserted, and did not address Petitioners' objection under Federal Rule of Evidence 403. Neither Petitioner was deposed.

Finally, Williams (1) refused to produce documents evidencing his informant's reliability, the incentives provided to her, and how long he knew her, (2) did not know whether or not she (a) had been convicted of a crime of moral turpitude, (b) had any felonies, or (c) was being prosecuted for any crime, and (3) admitted that (a) he did not do a background check on her, (b) did not know her criminal history, and (c) did not know if she had been drug tested.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition because (1) the Fifth Circuit continues to materially misapprehend and depart from fundamental principles of law in a manner that unreasonably deprives the People of their rights to relief under § 1983 and (2) said juridically entrenched misapprehension must be rectified before it (a) spreads to other courts and (b) encourages other state actors to deprive the People of their clearly established constitutional rights when they are breaking no laws in the privacy of their own homes.[5]

"A governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a search warrant, regardless of whether he signs the affidavit."[6] Williams

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[5] See *Collins v. Virginia,* 584 U.S. ___ (2018) (slip op., at 5) (citing *Florida v. Jardines,* 569 U.S. 1, 6 (2013). See also *id.* (slip op., at 14) (quoting *United States v. Ross,* 456 U.S. 798, 822 (1982)).

[6] *Hart v. O'Brien,* 127 F.3d 424, 448-49 (5th Cir.1997). See also *id.,* at 448 ("The Supreme Court in *Franks v. Delaware* established that a search violates the Fourth Amendment if it was conducted pursuant to a warrant issued by a magistrate who was misled by information in an affidavit, provided that the affiant knew the information was false or would have known it was false except for his reckless disregard for the truth."); *Franks v. Delaware*, 438 U.S. 154, 168, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *Hill v. McIntyre,* 884 F.2d 271, 275 (6th Cir.1989) (citing *Donta v. Hooper,* 774 F.2d 716, 718 (6th Cir.1985) (per curiam), *cert. denied*, 483 U.S. 1019 (1987)); and *Panaderia La Diana, Inc. v. Salt Lake City Corp.*, 342

unreasonably violated the Fourth Amendment because he deliberately or recklessly provided false, material[7] information for use in an affidavit in support of a search warrant. Specifically, he lied about where his informant went, what he personally observed, and what he did to corroborate his informant's information. Despite swearing he "observed" his informant go to "the listed location", Williams did not see his informant go to any particularized place.[8] He also impermissibly entered Petitioners' home and stayed therein after he knew he had no arguable right to be there. This Petition

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F. Supp. 2d 1013 (D. Utah 2004), *aff'd sub nom. Trevizo v. Adams*, 455 F.3d 1155 (10th Cir. 2006).

[7] See App. 74a ("Q: Do you believe that your representation that you personally observed the confidential informant go to the listed location was important to the judge who signed the search warrant? A: Sure.") (emphasis added). See also 74a-75a ("Q: Is it important to you, that representation to the magistrate that you watched them [the confidential informant] go to the listed location? … A: Would the judge like to hear it? I'm sure they would.") (emphasis added).

[8] Compare *e.g.,* App. 53a-54a (finding Williams saw the C.I. go to the "corner of the building") with App. 83a [testimony from the City of Houston's 30(b)(6) representative] ("Q: [T]he term 'listed location,'… have you seen that term utilized in search warrants before or affidavits before? A: Yes. I mean, it generally refers to what you've previously listed so you don't repeat the -- so it doesn't become redundant, that you're not writing the same street over and over again. So, sometimes, yes, it will -- you can say 'listed location' or 'previously noted location.' Q: So, in this case do you believe that refers to 5818 Hirsch? A: Based on this [Williams's] affidavit I would.") (emphasis added).

should be granted under Supreme Court Rules 10(a) and (c).

A. The Fifth Circuit's Decision Misrepresents This Honorable Court's Jurisprudence Concerning Protective Sweeps

The Fifth Circuit found that a protective sweep is not a search. App. 15a-16a. Judge Dennis dissented:

> "The majority opinion's assertion that 'a protective sweep does not constitute a search,' Op. at 11, is utterly baseless and it is most unfortunate that an opinion of this court would include such a statement. In support of the proposition that a 'sweep' is not a search for purposes of the Fourth Amendment, the majority misrepresents language from *Maryland v. Buie*, 494 U.S. 325, 335 (1990)." App. 28a at n. 5.

The Fifth Circuit erred when it found that protective sweeps are not searches. This material error directly conflicts with this Honorable Court's jurisprudence and requires correction.

This issue is material because Williams admitted he performed a protective sweep inside Petitioners' home. A protective sweep is indisputably "a quick and limited **search** of premises, incident to an arrest and conducted to protect the safety of police

officers or others."[9] Therefore, Williams and his team had no right to perform such a sweep because no one was arrested. Nonetheless, the district court concluded that "a protective sweep…is very different from a search for contraband" (App. 69a) and that Williams "was not specifically on notice that he was required to abort a protective sweep." *Ibid.*

The district court (and the Fifth Circuit) erred because Williams was on notice that (1) he had no right to be inside Petitioners' home and (2) no one had been arrested. Government actors are not authorized to enter the People's homes and move things around therein without a constitutionally valid warrant, consent, or an exigency, and none were present herein. Williams's conduct intruded upon Petitioners' reasonable expectations of privacy[10] and constituted a search as a matter of law. The Fifth Circuit avoided this issue by incorrectly concluding protective sweeps are not searches. Both sides moved for summary

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[9] *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) (emphasis added).

[10] App. 73a ("Q: Do you believe the Thomases were entitled to privacy inside their home before you entered it? A [Williams]: Yes."). See also App. 73a (Williams "could not see inside [Petitioners'] home from outside the premises."); App. 73a-74a (Williams did not make "any personal observations of illegal activity occurring in [Petitioners'] home.") and App. 93a (citing RFA 11 (Williams did not have probable cause to believe criminal activity was occurring in Petitioners' home)). Therefore, Petitioners had "an actual, subjective expectation of privacy, exhibited by measures taken to protect the privacy of the property in question" and their "subjective expectation of privacy is one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

judgment. Under these facts, Petitioners were entitled to summary judgment and Williams was not.

B. The Fifth Circuit's Decision Materially Misapprehends The Summary Judgment Standard

Judge Dennis correctly observed that the majority opinion reached its conclusion "only by ignoring both the evidence in the record and the Thomases' arguments." App. 21a. Judge Dennis accurately concluded the majority "fail[ed] to view the evidence in the light most favorable to the nonmovant, fail[ed] to credit evidence that contradicts its key factual conclusions, and ma[de] additional serious legal errors[.]" App. 18a. The panel's patent mischaracterization of the record is verifiably inaccurate.

1. The Fifth Circuit's Decision Failed To Consider Arguments And Facts

a. Williams Did Not Have Probable Cause

The majority incorrectly concluded that Petitioners failed to argue the issue of "probable cause" to the trial court. App. 17a. Petitioners introduced proof Williams did not have probable cause to believe drugs could be found inside the Thomases' home and that he impermissibly (1) lied to get inside, (2) utilized his discretion, and (3) stayed in the Thomases' home after learning there was no probable cause to believe drugs would be found therein. Even

without a most favorable light, it simply defies reason to believe (1) Petitioners could have failed to argue Williams lacked probable cause and (2) neither the district court nor Williams would ever find cause to mention it. Additionally, "[P]robable cause **cannot** be associated with an address that does not actually exist."[11]

Furthermore, the Thomases submitted a brief to the district court which included an entire section clearly entitled, "DEFENDANT DID NOT HAVE PROBABLE CAUSE" which briefed this precise issue. App. 87a. Neither Petitioners nor their counsel know of any clearer method to argue Williams lacked probable cause than to generate a brief addressing this issue

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[11] *Bonds v. State*, 355 S.W.3d 902, 910 (Tex.App.—Corpus Christi 2011) (emphasis added), *rev'd on other grounds*, 403 S.W.3d 867 (Tex.Crim.App.2013). See also *id.,* 403 S.W.3d at 877 ("Factoring the officer's knowledge into the particularity analysis is especially appropriate when the warrant's authorization to search applies to a reasonably limited number of locations, mitigating the fear of a warrant authorizing a general search"); *Bonds,* 355 S.W.2d at 910 ("[W]hen a search warrant identifies the place to be searched by an address that does not exist, then logic dictates that facts cannot exist connecting criminal activity to some fantasy address.") (citing *United States v. Gordon*, 901 F.2d 48, 50 n. 3 (5th Cir.1990) (noting that when an erroneous address in a warrant does not actually exist, there is no possibility that the wrongly noted location could have been searched), *cert. denied*, *Gordon v. United States*, 498 U.S. 981, 111 S. Ct. 510, 112 L. Ed. 2d 522 (1990)); and *Winfrey v. San Jacinto Cty.*, 481 F. App'x 969, 978 (5th Cir. 2012) (unpub.) (quoting *United States v. Leon,* 468 U.S. 897, 922 n. 23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)).

under its own dedicated and properly titled section. Additionally, Petitioners introduced Williams' *admission* that he did not have probable cause. (App. 93a (citing RFA 11)). Petitioners sought rehearing but were denied. The majority's erroneous analysis and an unambiguous record demand review and correction.

i. WILLIAMS'S AFFIDAVIT WAS CONCLUSORY

Williams's affidavit was constitutionally insufficient because it was impermissibly conclusory. Relying on this Court's guidance, the Fifth Circuit has previously held, "[C]ourts must not 'defer to a warrant based on an affidavit that does not provide the magistrate with *a substantial basis* for determining the existence of probable cause.'"[12] This requirement

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[12] *Mack v. City of Abilene,* 461 F.3d 547, 551 (5th Cir.2006) (emphasis added) (citing *Leon,* 468 U.S. at 915) (internal quotation marks omitted). See also *Illinois v. Gates,* 462 U.S. 213, 241-42 (1983) ("[A]n affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.") (citing *Jones v. United States*, 362 U.S. 257, 269, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)); *United States v. Laury*, 985 F.2d 1293, 1312 (5th Cir. 1993); *Gordon*, 901 F.2d at 50 (citing *United States v. Burke*, 784 F.2d 1090, 1093 (11th Cir. 1986); *United States v. Gahagan*, 865 F.2d 1490, 1498-99 (6th Cir.1989); *United States v. Turner*, 770 F.2d 1508 (9th Cir.1985); and *United States v. Clement*, 747 F.2d 460 (8th Cir.1984)); *Eatmon v. State,* 738 S.W.2d 723, 724 (Tex.App.—Houston [14th Dist.] 1987, pet. ref'd); and *Holt v. State*, 1993 WL 482833 (Tex. App.—Dallas 1993, no pet.) (unpublished) (typographical error in warrant did not

of "sufficient information" is designed to prevent the magistrate's action from being "a mere ratification of the bare conclusions of others."[13] A magistrate's determination of probable cause is not entitled to a presumption of validity when "the magistrate never considered the affidavit purged of its tainted material."[14] Even if this Honorable Court accepts (without admissible evidence) that the informant was credible and reliable, Williams's sworn statement (particularly when purged of the tainted material (*i.e.,* (1) "the C.I. proceeded to 5818 Hirsch", (2) he "observed the C.I. go to, and return directly from, the listed location, and (3) "the C.I. was at the residence") was similarly conclusory and devoid of any constitutionally acceptable substantial basis.

ii. THE INFORMANT'S TIP WAS NOT CORROBORATED

Additionally, there was no probable cause herein as a matter of law because the informant's tip had no indicia of reliability and was not corroborated. "Thus, corroboration of a bare tip that a person is engaging in criminal activity is insufficient to create probable cause for a search warrant; rather, it is the *amount* and *nature of* the corroborated details within

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inhibit officer because he had previously been to the location).

[13] *Gates*, 462 U.S., at 239. See also *Morris v. State*, 62 S.W.3d 817, 821 (Tex.App.—Waco 2001, no pet.).

[14] *U.S. v. Kolodziej,* 712 F.2d 975, 977 (5th Cir.1983) (per curiam) (citing *United States v. Namer*, 680 F.2d 1088, 1095 n. 12 (5th Cir. 1982) and 2 W. LAFAVE, SEARCH AND SEIZURE § 4.4, at 68 (1978)).

the tip that is important."[15] "When the tip itself provides no indicia of reliability, such as the prediction of future actions, there must be something more, such as observed activity to elevate the level of suspicion."[16] Here, the paid informant failed to provide (1) any prediction of future actions, (2) any admissible observations concerning anyone, any act, or any particular place, and (3) any information that was independently corroborated because Williams deliberately selected a position from which he could not see *any* relevant activity based on the racial composition of Petitioners' neighborhood. Therefore, there was no probable cause to believe drugs would be found in Petitioners' home as a matter of law.

b. ***Williams's Decision To Not Corroborate The C.I.'s Observations Violated The Constitution***

The panel also incorrectly found Petitioners failed to argue (again, to the district court) "that Williams' decision not to physically corroborate the C.I.'s observations because of the residential complex's racial makeup was 'facially insufficient as a matter of constitutional law.'" App. 17a. Petitioners' *same reply brief* to the district court had an entire

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[15] *United States v. Hirschhorn*, 649 F.2d 360, 363 (5th Cir. 1981) (tip from informant sufficient where it was corroborated by police investigation). See also *United States v. Fields*, 72 F.3d 1200, 1214 (5th Cir. 1996) and *Parish v. State,* 939 S.W.2d. 201, 204 (Tex.App.—Austin 1997, no pet.) (citing *Gates,* 462 U.S., at 225).

[16] *Parish*, 939 S.W.2d at 204 (emphasis added) (citing (*inter alia*) *Gates,* 462 U.S., at 245).

section entitled, "DEFENDANT'S GROUNDS FOR REFUSING TO CORROBORATE HIS INFORMANT'S INFORMATION CONSTITUTES AN INDEPENDENT VIOLATION OF THE CONSTITUTION". (App. 84a). The first sentence therein specifically averred, "Defendant's refusal to go inside Plaintiffs' complex because it was a black community is insufficient as a matter of constitutional law." *Ibid.* The Thomases proceeded to argue that:

> "Condoning Defendant Williams' refusal to corroborate his informant's information on these grounds would give officers license to circumvent the Fourth Amendment simply **by invoking a community's race**; this failure constitutes an independent violation of the Equal Protection Clause, cannot survive a strict scrutiny analysis, and cannot constitute a permissible grounds upon which a violation of the Fourth Amendment to the United States Constitution can be predicated. Defendant's argument that he failed to comport with the Constitution because he did not wish to comply with a separate provision thereof is inherently frivolous, is directly contrary to the rule of law, and cannot constitute a constitutionally acceptable excuse for (1) failing to comport with United States Supreme Court jurisprudence or (2) lying to a magistrate under oath concerning said failure." *Ibid.*

The majority's conclusion that it could ignore these arguments because Petitioners failed to raise them (App. 17a) constitutes a material departure from the accepted and usual course of summary judgment proceedings worthy of this Honorable Court's review.

c. The C.I. Was Not Reliable

The panel further erred when it concluded Petitioners failed to argue (again, to the district court) there was no evidence supporting the C.I.'s purported reliability. App. 17a. Again, Petitioners' *same reply brief* to the district court contained an entire section entitled, "THE INFORMANT'S VERACITY WAS CLEARLY QUESTIONABLE". (App. 85a-86a).[17] Because an informant is wrong about some things, she is more

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[17] See also App. 87a ("[T]here was no probable cause because the informant's tip had no indicia of reliability and was not corroborated.") (citing *Parish,* 939 S.W.2d. at 203 ("The anonymously provided information must contain some indicia of reliability or be 'reasonably corroborated' by police before it can be used to justify a search.") (citing (*inter alia*) *Gates,* 462 U.S. at 242) and App. 91a ("Specifically, Defendant repeatedly states (without evidence) that the informant was reliable and credible…Plaintiffs object thereto as inadmissible hearsay insofar as it based on an out-of-court statement being introduced for the truth of the matter asserted therein (*i.e.,* that the informant was reliable, credible, and had previously provided reliable information)."). Petitioners moved to compel the production of responses to questions concerning the reliability and veracity of the confidential informant, but their motion was denied.

probably wrong about other facts.[18] The majority's *sua sponte* assessment that it was entitled to ignore Petitioners' arguments on the basis that they failed to raise them (even after being informed of its errors via a request for *en banc* review) constitutes plain error, particularly in light of the fact that neither the district court nor Williams ever complained that any of the foregoing issues had not been briefed.

d. The Locations Where The Drug Dealer Could Be Found

The majority incorrectly concluded, "Nash [the alleged drug dealer] was always in common areas of the complex." App. 3a (emphasis added). However, Petitioners' reply brief to the Fifth Circuit demonstrated that, "To the extent that the locations where Williams saw Nash is relevant, it is at least equally important that his limited and moving surveillance also revealed that Nash was in 'the parking lot of the adjacent corner store.'" App. 92a. Therefore, to the extent that the location of a non-party, non-relative, non-resident, non-guest, non-visitor alleged drug-dealer is relevant hereto,[19] the

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[18] See *Gates,* 462 U.S., at 244 ("Because an informant is right about some things, he is more probably right about other facts.") (citing *Spinelli v. United States*, 393 U.S. 410, 427, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) (WHITE, J., concurring), *abrogated by Gates*, 462 U.S. 213).

[19] Petitioners respectfully aver this detail is not relevant and that the misuse thereof further evidences the Fifth Circuit's "misapprehension of the summary judgment

majority's conclusion about the uniformity of said location despite Williams's own affidavit demonstrates an impermissible judicial insistence on viewing facts in the light least favorable to Petitioners.

e. Williams's Observations

The majority incorrectly concluded, "The Thomases rely only on observations that Williams made during the course of executing the warrant, not facts Williams was actually aware of when he submitted his probable cause Affidavit to the judge." Judge Dennis correctly concludes this characterization is "patently untrue." App. 20a. Instead, Petitioners demonstrated (according to Judge Dennis) that:

- neither Williams nor his informant "proceed[ed] to any particular address" and

- Williams did not observe the C.I. "go to, and return directly from, the listed location," *i.e.* 5818 Hirsch Road, nor did he observe the C.I. "go to, and return directly from," any particular address. See App. 20a.

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standard" (at least in § 1983 cases). See App. 24a-25a at n. 5.

These *irrefutable* facts evidence the majority's fundamental and plain error concerning an issue of critical constitutional importance to the People and is achieved only by improperly "ignoring both the evidence in the record and the Thomases' arguments." See App. 21a.

Further, Petitioners' motion for summary judgment contained an entire section entitled "Undisputed Facts" which were known to the district court at all times relevant hereto. None of those facts have ever been disputed and (as noted by Judge Dennis) many of them involved facts Williams indisputably knew *before* he entered Petitioners' home. See App. 22a. For example:

- Williams "personally saw [Petitioners'] address (*5816*) above their front door before entering therein";
- Williams "knowingly entered [Petitioners'] residence at 5816 Hirsch without a warrant therefor or an exigency";
- "Defendant Williams swore to a magistrate that he 'observed [a confidential informant] go to, and return directly from, the listed location.'";
- "No location other than 5818 Hirsch was listed in the affidavit or search warrant.";
- "Despite his sworn affidavit, Defendant Williams now admits that he did not

> personally watch a confidential informant go (1) inside a residence located at 5818 Hirsch, (2) to 5816 Hirsch, or (3) inside **any** home located in the 5800 block of Hirsch because '[t]he apartment was obstructed by other apartments at that same block of Hirsch.'"

- "Instead, he merely watched the informant 'go to the building where [Petitioners'] duplex is located[.]'"

- "Defendant Williams further concedes that (despite his sworn affidavit) the confidential informant involved in this event did not purchase drugs from 5818 Hirsch and the drugs purchased within the ambit of this event were purchased outside of any apartment."

Despite the majority's representation, *none* of the foregoing undisputed observations were "made during the course of executing the warrant." Together, these undisputed facts entitle Petitioners to reversal of summary judgment in favor of Williams (and affirmative summary judgment) because there is no admissible evidence tending to demonstrate the reasonableness of any of Williams's undisputed and relevant acts (*i.e.,* lying, entering, and remaining). The majority's erroneous analysis and indifference to the People's constitutional rights requires rectification from this Honorable Court.

f. The Fifth Circuit Fabricated A Material Fact

The Fifth Circuit impermissibly found Petitioners failed to contend "that Williams remained in her home after a request to leave." App. 16a. This conclusion transcends unfounded allegations concerning failures to brief, assumes an unfavorable fact in connection with the underlying event, and constitutes a material departure from the accepted and usual course of summary judgment proceedings despite this Honorable Court's guidance that courts should "take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan*, 134 S. Ct. at 1866. There is no evidence or argument in the record that Petitioners failed in this respect; instead, it is strictly a judicial creation.

Even worse, Ms. Thomas was forced to file an affidavit with the district court (after it made *the exact same impermissible error*)[20] and swore,

> "I instructed the officers to leave my home several times, and in response, Officer Williams instead sat down on my couch and questioned me about the people who had access to my home." App. 90a.

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[20] See App. 67a. See also App. 40a at n. 4 (striking said finding). Petitioners find it remarkable that this same false fact was improperly and *sua sponte* accepted as true by both the district and appellate courts.

The Fifth Circuit's fabrication of a purportedly material fact expressly contrary to an unequivocal and uncontested record conclusively establishes that the majority chose to (1) view the available facts of this case in the light least favorable to Petitioners despite clearly established law and (2) create unfavorable facts when least favorable facts were not available. Petitioners informed the Fifth Circuit of this material error via their request for *en banc* review.

2. The District Court Improperly Created And Resolved Fact Questions

Despite the undisputed facts, the district court erroneously concluded:

- "it is unlikely that Williams could have come to a realization that he was in the wrong apartment" (App. 38a);

- Williams' use of the phrase *listed location* "can be interpreted as Williams' seeing the C.I. go to, and return from, the far southeast duplex in the building" (App. 53a (emphasis added));[21]

- Petitioners did not demonstrate Williams intentionally or recklessly lied;[22]

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[21] Here, the courts below improperly ignored testimony from the City of Houston's 30(b)(6) representative concerning the meaning of "the listed location". See pp. 16-17 at n. 7, *supra.*

[22] App. 33a. See also App. 54a.

- there was no evidence that Williams had any doubts about the information in the affidavit (App. 60a); and

- Williams made an honest mistake (App. 59a).

The evidence, however, demonstrates Williams knew he did not know to which precise door his informant went and yet still swore that he *personally observed* something (1) he knew he did not (and intentionally could not) see and (2) no admissible evidence supports; even if such a lie were somehow constitutionally acceptable, resolving an ambiguity concerning the door to which his informant went (without any personal knowledge of the particularized home to be searched, without any corroboration, without finding the address to which his informant purportedly went, and personally believing duplexes are "tricky") remains wholly impermissible as a matter of well-settled law.[23] Either way, the district court's language evidences its subjective belief that questions of fact existed; therefore, it was clearly precluded from granting summary judgment.

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[23] *Stanford v. State of Tex.*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965) ("[N]othing is left to the discretion of the officer executing the warrant."); *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (the Fourth Amendment is reduced to a nullity if the security of the people's homes is left "in the discretion of police officers"); and *Malley v. Briggs,* 475 U.S. 335, 352, 89 L.Ed.2d 271, 106. S.Ct. 1092 (1986) (POWELL, J., concurring).

3. The Courts Erred Because The Warrant Was Invalid

Williams admitted both that (1) he had a suspicion something was wrong before entering Petitioners' home (App. 25a) and (2) the warrant was subject to more than one interpretation (App. 74a). Therefore, the warrant was facially invalid and he was precluded from legally attempting to execute same.[24] The district court erred when it concluded the warrant was valid on its face. (See App. 38a).

C. The Fifth Circuit Refused To Review The Trial Court's Improper Consideration Of Inadmissible Hearsay

Williams's summary judgment evidence included multiple inadmissible out-of-court statements from an unidentified and paid confidential informant. Petitioners sought various forms of information pertaining to said informant during discovery, but Williams invoked the law enforcement privilege and refused to respond. Petitioners timely objected to all statements from the confidential

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[24] *Jones v. Wilhelm*, 425 F.3d 455, 463 (7th Cir.2005) ("Where a warrant is open to more than one interpretation, the warrant is ambiguous and invalid on its face and, therefore, cannot be legally executed by a person who knows the warrant to be ambiguous.") (citing *Garrison*, 480 U.S. at 86–87) (officers must discontinue their search upon learning "of the risk" that they might be searching the wrong unit).

informant as hearsay. The trial court overruled said objection and held, "[T]he information complained of by [Petitioners] as hearsay was not offered for the truth of the matter asserted, but to establish a basis for [Williams's] actions and show his state of mind." App. 89a.[25]

Despite the adjudicated absence of said truths, the district court found the following (verbatim):

> (1) "The C.I. […] reported that as they were looking for suspect Nash in the common area, they saw him as he came out of his apartment and locked the door behind

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[25] Petitioners then moved to strike on the basis that Williams's state of mind was irrelevant to the Fourth Amendment analysis and cited: *Daniels v. Williams,* 474 U.S. 327, 329-30 (1986) ("§ 1983…contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.") (citing *Parratt v. Taylor,* 451 U.S. 527, 534-35 (1981)); *Anderson v. Creighton,* 483 U.S. 635, 641 (1987) ("[The officer's] subjective beliefs about the search are irrelevant.") and *Devenpeck v. Alford,* 543 U.S. 146, 153 (2004) ("[A]n arresting officer's state of mind (except for the facts that he *knows*) is irrelevant to the existence of probable cause…[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.") (internal citations omitted).

Williams' state-of-mind was also wholly irrelevant to his qualified immunity defense. *Rodriguez v. Cruz,* 296 F. Supp. 2d 726, 732 (S.D. Tex. 2003) (citing *Thompson v. Upshur County, Tx,* 245 F.3d 447, 457 (5th Cir. 2001)).

Petitioner's motion to strike the informant's out-of-court statements on the basis that Williams's state of mind was irrelevant was also denied.

him. He had come out of a different apartment than 5814 ½ Hirsch Rd., where earlier he was thought to reside. The C.I. explained that Nash gave an expression of body language which was perceived by the C.I. as if Nash did not want the C.I. to know where he lived and was surprised by the C.I.[26] The C.I. offered to buy crack cocaine from suspect Nash who then went back inside the same apartment and brought the 0.19 grams of crack cocaine out to them." App. 53a (emphasis added);

(2) "Williams was also told by the C.I. that the suspect Nash went inside the apartment 5818 to retrieve drugs, which the C.I. then purchased…These facts…demonstrate that Williams genuinely believed that the location was numbered 5818, and that the C.I. had purchased drugs from that apartment." (App. 54a (emphasis added));

(3) "[T]he C.I. himself or herself purchased drugs from the suspect at the listed location." (App. 57a);[27]

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[26] This particular evidence concerning the alleged drug-dealer's body language was also objected to as hearsay within hearsay.

[27] See also App. 52a (finding Williams explained "that the C.I. watched the suspect retrieve the drugs from the apartment[.]"). Despite the court's finding, there is zero admissible evidence that the suspect (Nash) was even present at the time in question or that he went into any particular place.

(4) "the C.I. watched the suspect retrieve drugs from the apartment" (App. 52a);

(5) "[T]he C.I had previously proven to be reliable." (App. 57a);

(6) "[T]his informant has on numerous occasions provided officers with information which has been proven true and correct. This informant has in the past provided officers with honest and reliable information." (App. 57a-58a); and

(7) "[Williams] 'believed the information provided to him by the C.I.'" (App. 59a).

Neither Nash nor the informant has testified herein. Each of the foregoing statements is (or is based upon) inadmissible hearsay.[28]

Petitioners appealed and fully briefed each of the foregoing errors. Neither Williams's appellate brief nor the Fifth Circuit's opinion ever addressed this issue (or even used the word "hearsay"). As a result, this dispositive evidentiary issue was abandoned[29] and incorrectly ignored on appeal.

No factfinder could ever conclude the out-of-court statements purportedly made by a non-party

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[28] See Fed. R. Evid. 801(d)(1). See also Fed. R. Evid. 802.

[29] See Federal Rule of Appellate Procedure 28(b) (requiring Appellees to comply with Rule 28(a)(8)(A), which requires that briefs contain "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

drug dealer and/or an unidentified, unsworn, unproduced, and paid confidential informant were true (or that the drug dealer was even present in the 5800 block of Hirsch at any time relevant hereto) without improperly utilizing the foregoing statements for their respective and inadmissible truths.[30] Without this inadmissible and unreliable evidence, Williams has no evidence demonstrating any relevant fact concerning his lying, entering, and remaining because he admits he did not actually see or know the particular place or address to which his informant allegedly went. The Fifth Circuit's refusal to review this evidentiary issue materially departs from the accepted and usual course of proceedings and is directly contrary to this Honorable Court's

[30] This danger caused Petitioners to further object under Federal Rule of Evidence 403. The district court's utilization of said statements for the truths of the matters asserted manifested unfair prejudice, confused the factfinder, and/or confused the issues. This issue was briefed below. The district court abused its discretion when it admitted these unsworn out-of-court statements despite a timely objection under Federal Rule of Evidence 403.

jurisprudence regarding hearsay[31] (and the relevance of an officer's state of mind).[32]

D. Petitioners Were Entitled To Summary Judgment Because Williams's Conduct Was Unreasonable Per Se

"[W]hen Defendant…encountered [Petitioners] at [their] home, it was clearly established that an individual had a reasonable expectation of privacy in their home and that a warrantless search of a home was presumptively unreasonable absent consent or exigent circumstances."[33] Despite Williams's

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[31] See *Ohio v. Roberts*, 448 U.S. 56, 62, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (acknowledging the "basic rule against hearsay") (citing E. Cleary, McCormick on Evidence § 244 (2d ed. 1972) (McCormick)). See also *Cooper v. Harris*, 137 S. Ct. 1455, 1499 n. 18, 197 L.Ed.2d 837 (2017) ("[H]earsay should be viewed with great skepticism.") (citing *Ellicott v. Pearl,* 10 Pet. 412, 436, 9 L.Ed. 475 (1836) (majority opinion of Story, J.) (hearsay is "exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character"); *Queen v. Hepburn,* 7 Cranch 290, 296, 3 L.Ed. 348 (1813) (majority opinion of Marshall, C.J.) ("Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible"); and *Chambers v. Mississippi,* 410 U.S. 284, 298, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)).

[32] See, *e.g., Daniels,* 474 U.S. at 329-30; *Anderson,* 483 U.S. at 641 and *Devenpeck,* 543 U.S. at 153.

[33] *Olvera v. Alderete*, No. 4:10-CV-2127, 2010 WL 4962964, *30-31 (S.D. Tex. Dec. 1, 2010) (unpub.) (citing (*inter alia*) *Arizona v. Hicks,* 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) and *United States v. Menchaca-*

concession that Petitioners had an expectation of privacy in their home (App. 73a), he searched it (and moved things around therein) knowing he (1) materially misled a magistrate about what he observed and (2) lacked a warrant, consent, or exigent circumstances; therefore, his search was presumptively unreasonable as a matter of law. Williams has no admissible evidence in support of his purported reasonableness; this absence of evidence is incapable of overcoming the presumed unconstitutionality of Williams's conduct, particularly given the undisputed facts of this case. Therefore, Petitioners (not Williams) were entitled to summary judgment because no reasonable officer in Texas could ever believe a warrant for 5818 Hirsch (particularly one acquired via perjury) permitted a search of 5816 Hirsch under the facts herein.[34]

Castruita, 587 F.3d 283, 289 (5th Cir.2009)). See also *Steagald v. United States*, 451 U.S. 204, 211, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

[34] See *Cannady v. State*, 582 S.W.2d 467, 468-69 (**Tex.Crim.App.**1979) ("Where premises sought to be searched are described in the search warrant by a certain street number, such a description will not authorize a search of some other street number."). See also Supreme Court Rule 10 (a) and *Chavarria,* 992 S.W.2d, at 23-25 ("**Houston Police Department** officers executed a search and arrest warrant upon [a] home…The search warrant description was based on information given to the police by a confidential **informant**. The police had not seen the premises until the day of the search…

> "Upon arriving at [the home], the police became aware that [the **address** to be searched] **did not exist**. The police located and searched [another

address] instead…At the scene, the police discovered [the unit to be searched] was affixed to another unit…Together, the two residences are a **duplex** structure…The officers **had not gone** to the [place to be searched] prior to the execution of the warrant; the confidential informant **had not physically pointed out** the structure to be searched. Rather, the officers relied solely on the language in the search warrant.

"At the motion to suppress hearing, the officer in charge of the search stated that he searched [the wrong residence] based on the description he was given by his informant that was in the search warrant, as well as by using his own reasonable deduction. The trial court found the decision to search [the wrong address] was unreasonable based on the facts and circumstances at hand, especially in light of the information given to the officer by the informant, compared to the actual physical scene searched. The trial court also found that the discrepancies should have been investigated prior to the search…Thus, the trial court granted the motion to suppress.

"When testing the sufficiency of a warrant, the court uses a two prong test. First, the warrant must be sufficient to enable the executing officer to locate and distinguish the property from others in the community. *Etchieson v. State,* 574 S.W.2d 753, 759 (**Tex.Crim.App.**1978). Second, it must protect innocent parties from a reasonable probability of a mistaken execution of a defective warrant. *Bridges v. State,* 574 S.W.2d 560, 562 (**Tex.Crim.App.**1978)…

"The structure in the present case was a duplex. Where a warrant describes a multi-unit dwelling,

> the description must contain sufficient guidelines to apprise the officers executing the warrant of the particular unit to be searched. *Morales v. State,* 640 S.W.2d 273, 275 (**Tex.Crim.App.**1982); *Jones v. State,* 914 S.W.2d 675, 678 (Tex.App.—Amarillo 1996, no pet.). In this case, the trial court did not base its decision on the officer's inability to distinguish this structure from other separate structures in that area, as required by the first part of the test. Rather, the trial court was concerned with the possible invasion of privacy that could have occurred from a mistaken execution at…the other residence in the structure. In order to protect against this possibility, **the search warrant needed to be particular concerning which unit was to be searched.** *Morales*, 640 S.W.2d at 275….
>
> "[T]he possibility of the invasion of the privacy of an innocent party within the duplex was too great to validate the search without further inquiry by the officers…
>
> "The evidence supports the trial court's finding that this search was invalid. Whether we review the sufficiency of the warrant de novo, or apply the 'abuse of discretion' standard of review, we conclude the trial court did not err when it granted Chavarria's motion to suppress. Accordingly, we overrule the State's sole point of error.").

(emphases added). Cf. *Brown v. Byer,* 870 F.2d 975, 979 (5th Cir.1989) ("The existence of a facially valid warrant for the arrest of one person does not authorize a police officer to effect the arrest of another person[.]") and *Hartsfield v. Lemacks*, 50 F.3d 950, 955 (11th Cir. 1995), *as amended* (June 14, 1995) (citing *Duncan v. Barnes*, 592 F.2d 1336,

Furthermore, Williams conceded that (1) he only spent one minute conducting a protective sweep, (2) it only took him five minutes to determine that he was in the wrong house, (3) he moved things around, and (4) he nonetheless (a) stayed in Petitioners' home for approximately 10 extra minutes, (b) explained his entry to them, (c) sat on their couch, (d) told them someone else could have a key to their home, and (e) performed an investigation. Despite these undisputed facts, the district court accepted Williams's contention that the total amount of time searching Petitioners' home was zero. (App. 63a). This conclusion further evidences the courts' plain errors.

This Court has held that officers are "required to discontinue the search…as soon as they…[are] put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant."[35] The idea that officers can reasonably enter and remain inside the People's homes without a

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1337-38 (5th Cir.1979) and *Wagner v. Bonner,* 621 F.2d 675, 681-82 (5th Cir.1980)).

[35] *Garrison,* 480 U.S. at 87. See also App. at 26a (quoting *Simmons v. City of Paris, Tex.*, 378 F.3d 476, 481 (5th Cir. 2004) ("Qualified immunity does not provide a safe harbor for police who remain in a residence after they are aware that they have entered the wrong residence by mistake. A decision by law enforcement officers to remain in a residence after they realize they are in the wrong house crosses the line between a reasonable mistake and affirmative misconduct that traditionally sets the boundaries of qualified immunity.") See also *Simmons,* 378 F.3d at 479–80 ("[W]hen law enforcement officers are executing a search warrant and discover that they have entered the wrong residence, they should immediately terminate their search.").

warrant, consent, or exigency in order to conduct an investigation is contrary to this Court's Fourth Amendment jurisprudence and requires correction.

E. The Fifth Circuit Improperly Relied Upon An Untrue And Unalleged Fact

The Fifth Circuit even relied on unargued hearsay for the proposition that Ms. Thomas called Williams after he searched her home to report a "robbery". (App. 6a at n. 1). First, this "fact" is completely untrue. Second, it was cited by neither Williams nor the district court. Third, the word "robbery" appears on exactly eight of 1,904 pages in the record.

Petitioners should not be deprived of a jury trial based on a disputed (and wholly irrelevant) issue supported only by inadmissible hearsay that they never needed to counter because no one ever briefed it. The majority's reliance on such an obscure (and incorrect) fact while ignoring dispositive arguments on the purported basis that Petitioners failed to brief them creates the appearance of a judiciary that has calculatedly designed a constitutionally abhorrent route to deny Petitioners their rights to clearly-delineated remedies under the law.

CONCLUSION

Without Williams's sworn misrepresentation that he "observed the C.I. go to, and return directly from, the listed location" and that said informant was "at the residence", his affidavit would have been reduced to a constitutionally impermissible conclusion as a matter of controlling law.[36] Instead, the "totality of the circumstances analysis…[has] consistently recognized the value of corroboration of details of an informant's tip by independent police work."[37] Instead of submitting an affidavit with readily apparent defects, Williams chose to lie in order to give his affidavit the appearance of sufficiency. Williams's conduct violated the Fourth Amendment's reasonableness requirement insofar as (1) the mere conclusion at issue herein "was not even that of the affiant himself; it was that of an unidentified informant"[38] and (2) (according to the district court) Williams's affidavit was referring to the non-particularized "corner of the building, where Williams did see the C.I." (App. 53a).[39]

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[36] See *Gates,* 462 U.S., at 239.

[37] *Gates,* 462 U.S., at 241 (emphasis added).

[38] *Aguilar v. Texas,* 378 U.S. 108, 113-114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) (abrogated by *Gates*, 462 U.S. 213).

[39] Compare App. 73a (Williams specifically conceded that aside from the physical address, the remaining description of the place to be searched ("a duplex of light orange colored brick and light orange trim") describes "every duplex in the 5800 block of Hirsch" because "They're all pretty similar.") with *Cannady,* 582 S.W.2d at 468-69; *Smith v. State*, 962 S.W.2d 178, 184 (Tex.App.–Houston [1st Dist.] 1998, pet. ref'd) ("Where the warrant describes a

Neither the People nor their courts can quietly permit the rule of law to disintegrate to the point that judges consciously refuse to follow this Honorable Court's unequivocal and controlling jurisprudence concerning fundamental principles of our shared laws. Judge Harmon ruled against the § 1983 plaintiffs in *Tolan* and herein by impermissibly ignoring evidence and resolving factual disputes in favor of the defendant officers; both times, the Fifth Circuit permitted such rulings despite Judge Dennis's explicit dissents concerning fundamental issues of law (*e.g.,* summary judgment standards). Petitioners respectfully aver the denial of *certiorari* under these circumstances will unjustifiably weaken the integrity of constitutional protections (and 42 U.S.C. § 1983) nationwide, will unjustly deny them relief, and will

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multi-unit dwelling, the description therein **must** contain sufficient guidelines to apprise the officers executing that warrant of the particular unit to be searched.") (emphasis added) (citing *Haynes v. State*, 475 S.W.2d 739, 741 (**Tex.Crim.App.**1971); *Etchieson,* 574 S.W.2d, at 759; *Maxon v. State*, 507 S.W.2d 234, 235 (**Tex.Crim.App**.1974); *Smith v. State*, 478 S.W.2d 518, 521 (**Tex.Crim.App.**1972); *Ex parte Flores*, 452 S.W.2d 443, 444 (**Tex.Crim.App.**1970); and *Rhodes v. State*, 134 Tex.Crim. 553, 116 S.W.2d 395, 396 (1938)); and *Chavarria,* 992 S.W.2d at 24 (warrants "must protect innocent parties from a reasonable probability of a mistaken execution of a defective warrant.") (citing *Bridges v. State,* 574 S.W.2d 560, 562 (**Tex.Crim.App.**1978)) (all emphases added). The Fifth Circuit's affirmation conflicts with decisions from Texas' highest criminal court concerning specificity in search warrants, thereby warranting review under Supreme Court Rule 10 (a).

foreseeably embolden other members of (*inter alia*) the judiciary to ignore this Honorable Court.

PRAYER

The foregoing petition for writ of *certiorari* should be granted and the rulings of the district court should be reversed.

Respectfully submitted,

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