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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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June 4, 2018

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 16-20783
BARBARA ANN THOMAS; JOHN THOMAS,
Appellants,
v.
J.J WILLIAMS,
Appellee.
Opinion Filed: February 1, 2018

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Nelita Neves Hatch, for Defendant-Appellee.

Before: BARKSDALE, DENNIS, and CLEMENT, Circuit Judges.

EDITH CLEMENT BROWN, Circuit Judge:

This is an appeal from a district court order denying Barbara Ann Thomas and John Thomas's

motion for summary judgment on their 42 U.S.C. § 1983 claim against a police officer from the Houston Police Department ("HPD") and granting summary judgment in favor of the HPD officer.

Barbara Ann Thomas and her son, John Thomas, reside at 5816 Hirsch Road, in Houston, Texas. The appellee, J.J. Williams, is a Senior Officer in HPD's narcotics division. As Williams asserted in his affidavit submitted in support of his cross-motion for summary judgment, on April 21, 2014, he began investigating claims of drug activity on the 5800 block of Hirsch Road. The initial information Williams received was that drugs were being sold from "5814 *If'* Hirsch Road. A complaint from April 30, 2014 informed of drug activity at 5814 Hirsch Road. HPD also had an email from the Mayor's office, which included the following information:

> Black truck on the street that drug dealers sleep in is used to deal drugs. Drugs are being dealt to school kids and around school kids. Dealers are threatening neighbors and damaging property. 5800 Hirsch Rd. is the block number, and the house that some of the drug dealers live in is 5814 ½ Hirsch Rd....

On May 7, 2014, Williams and a fellow officer took a confidential informant ("C.I.") to the location to attempt a narcotics purchase. During the operation,

the officers "maintained distant and rolling surveillance, so not to be 'picked off by any 'look outs,'" which had happened during a previous narcotics purchase attempt in the complex. The C.I. was sent to look for the apartment numbered 5814 ½ and returned having successfully purchased crack cocaine from a "black male on the porch." The C.I. informed the officers that he did not observe the black male coming out of or going into the apartment to get the narcotics. This is referred to as a "dirty buy," and "a search warrant cannot be generated under these circumstances because there is no proof the crack came out of the apartment." After further investigation, the officers identified a suspect named "Nash" as the seller. Williams continued surveilling the apartment complex and noticed that the suspect, Nash, was always in common areas of the complex; Williams concluded that Nash did not normally sell his narcotics from inside an apartment where he presumably kept the bulk of his narcotics. This was apparently common practice because it made it especially difficult for police officers to recover evidence and arrest dealers while in possession.

On May 20, 2014, Williams and another officer returned to the complex with the same C.I. The officers again maintained "a distant and rolling surveillance," which obstructed the officers' view of the buy. The C.I. returned with 0.19 grams of crack cocaine and told the officers that he or she observed Nash come out of his apartment. The C.I. said that the address above the door was 5-8-1-8. The officers also obtained information about the specific location of the suspect's apartment door. Lastly, Williams drew a

diagram of the apartment complex, and the C.I. indicated exactly where the suspect entered the apartment. The C.I. indicated that the relevant building was in the far southeast corner of the complex and that Nash used the door on the right, "as far in the corner of the complex as you can go." In his deposition, Williams testified that he did not walk through the complex to verify the numerical address himself because he did not want to alert anyone to their investigation. Given that the residents were predominantly black, he was worried that, as a white man, he would stand out.

Based on the information, his experience, and prior dealings with this same C.I., Williams prepared a probable cause affidavit and search warrant for 5818 Hirsh Road, and a local judge signed it. The warrant stated that 5818 Hirsch Road was located "in the far southeast corner of the location," and it included a photo of the duplexes in the 5800 block of Hirsch. On May 24, 2014, Williams and other officers executed the search warrant. According to Williams's affidavit submitted in support of his cross-motion for summary judgment, when the officers approached the apartment described by the C.I., he noticed that the address was "5816" instead of "5818." Williams decided that the C.I. must have just misread the number and that, in his experience, this mistake was generally unintentional and immaterial. Indeed, Williams also stated that the apartment's location was accurately described by his "long-time reliable and trustworthy C.I."

Before entering, the officers announced, "POLICE SEARCH WARRANT!" and pounded on the outside of the burglar bars. The police pried open the burglar bars, and "[a]lmost simultaneously, Ms. Thomas opened her door and stepped back." The officers immediately performed a "security sweep" to ensure there were no threats to the officers' safety; this sweep is not an "actual search." During the safety sweep, it became apparent that the apartment was not being used to sell or store drugs. Williams asked Ms. Thomas a few questions to determine whether it was possible someone else had a key to her apartment and could be using it without her knowledge. Williams also informed Ms. Thomas that they had a search warrant for her apartment and that was why the officers were present; she replied that the officers could "[g]o ahead and look."

When Ms. Thomas asked Williams who he was looking for, he informed her they were looking for a suspect described as "a young black male[,] 18-20 years old, who likes to wear a red shirt and goes by the nickname of 'Little Black.'" Ms. Thomas's eyes "lit up," and she responded that she knew who Williams was talking about. She informed Williams that "Little Black" used to live at 5814 ½ Hirsch Road, but that he had just moved to the apartment next door to hers, 5816 ½. Before exiting the Thomases' apartment, Williams gave Ms. Thomas his work phone number so that she could call him if she needed anything or saw suspicious activity.[1]

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[1] Indeed, the next day Ms. Thomas called Williams to report a possible robbery; she described the suspects and

A few days later, Williams spoke with the C.I. and showed the C.I. the vantage point from which the Thomases' door was visible. The C.I. realized he did not see the Thomases' door because "the brick wall that runs partially between the two apartments blocked [the C.I.'s] view of Ms. Thomas's door." The C.I. was genuinely remorseful and upset because of his or her unintentional error.

The Thomases brought this § 1983 suit in federal district court against Williams and others, claiming that the defendants violated their Fourth Amendment right to remain free from unreasonable searches and seizures. The plaintiffs filed a motion for summary judgment against only Williams, and Williams filed a cross-motion for summary judgment asserting qualified immunity. The district court granted summary judgment in favor of Williams on the basis of qualified immunity, dismissing only the claims against him pursuant to Federal Rule of Civil Procedure 54(b). The Thomases moved for reconsideration, and the district court denied the motion. The Thomases timely appeal the grant of summary judgment and the denial of their motion for reconsideration.

I

This court reviews "the district court's summary judgment decision *de novo,* using the same

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gave Williams information about the suspects' car and its license plate number.

standard as the district court." *Roberts v. City of Shreveport,* 397 F.3d 287, 291 (5th Cir. 2005). Summary judgment 1s appropriate if the record discloses "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The court must consider the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *See Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.,* 739 F.3d 848, 856 (5th Cir. 2014).

The qualified immunity doctrine "immunizes government officials from damages suits unless their conduct has violated a clearly established right." *Tolan v. Cotton,* 134 S. Ct. 1861, 1864 (2014). "In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry." *Id.* at 1865.

> The first asks whether the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a federal right....
>
> The second prong of the qualified-immunity analysis asks whether the right in question was clearly established at the time of the violation. Governmental actors are shielded from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable

> person would have known. The salient question is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional.

Id. at 1865-66 (cleaned up). Notwithstanding the general principle that this court must view the evidence in the light most favorable to the nonmoving party, the plaintiffs still bear the burden to show that Williams is not entitled to qualified immunity. *Trent v. Wade,* 776 F.3d 368, 376 (5th Cir. 2015); *Brown v. Callahan,* 623 F.3d 249, 253 (5th Cir. 2010).

II

The Thomases first argue that Williams 1s liable under *Franks v. Delaware,* 438 U.S. 154 (1978), because he knowingly made material misrepresentations in his probable cause affidavit. In *Franks,* the Supreme Court "established that an officer is liable for swearing to false information in an affidavit in support of a search warrant, provided that: (1) the affiant knew the information was false or [acted with] reckless disregard for the truth; and (2) the warrant would not establish probable cause without the false information." *Hart v. O'Brien,* 127 F.3d 424, 442 (5th Cir. 1997) (citing *Franks,* 438 U.S. at 171). An officer who is merely negligent or who makes an innocent mistake will not be held liable. *Id.*

The relevant portion of Williams's affidavit in support of a search warrant provides:

> After developing a tactical plan the officers with the C.I. proceeded to 5818 Hirsch. Prior to doing so, your affiant checked the C.I. for any contraband, after none were found, supplied the C.I. with an amount of city buy money. The C.I. was then directed to the listed location to purchase an amount of Crack Cocaine. Your affiant observed the C.I. go to, and return directly from, the listed location. The C.I. upon returning, handed your affiant an amount of Crack Cocaine. The C.I. is a past user of Crack Cocaine and can readily identify it by sight. The C.I. advised your affiant that while the C.I. was at the residence, the C.I. purchased the Cocaine from the listed suspect. The C.I. was advised to come back anytime to purchase more Cocaine. Your affiant checked the C.I. for any contraband, after none were found, dismissed the C.I. and returned to the office. Your affiant later determined the purchased crack to test positive for cocaine content.

The Thomases claim that Williams knowingly swore to false, material information in his affidavit in support of the search warrant. They point to the following statements in the affidavit: (1) the officers and the C.I. proceeded to 5818 Hirsch; (2) Williams observed the C.I. go to, and return directly from, the listed location; and (3) the C.I. was at the residence.

They contend that these statements were false and that Williams knew as much because (1) 5818 Hirsch Road did not exist; (2) Williams did not observe his C.I. go to any particular address or any particular door because his view was obstructed; and (3) Williams knew that the C.I. did not enter any residence and was not in front of any one particular address. The Thomases submit that these alleged misrepresentations were material because without them the affidavit would be facially insufficient to establish probable cause.

In evaluating a qualified immunity defense, this court "considers only the facts that were knowable to the defendant officers." *White v. Pauly,* 137 S. Ct. 548, 550 (2017). "Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued." *Maryland v. Garrison,* 480 U.S. 79, 85 (1987) 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.[2] Because the Thomases do not present any evidence that Williams knew the statements were false or acted

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[2] In its discussion of the *Franks* claim, the dissent does not address the legally-permitted negligence, or that that Williams is protected for any mistaken reliance on the C.I. Williams observed the C.I. go toward the apartment building and was informed that the C.I. purchased narcotics from the apartment. This fails to show he knowingly swore to false information to overcome qualified immunity.

with reckless disregard for the truth *at the time he swore the affidavit,* the district court properly held that Williams was entitled to qualified immunity.

III

The Thomases argue that Williams violated the Fourth Amendment by entering their home without a warrant. The mistaken execution of a valid search warrant on the wrong premises does not automatically violate the Fourth Amendment. *See Graham v. Connor,* 490 U.S. 386, 396 (1989); *Garrison,* 480 U.S. at 88. The validity of the execution "depends on whether the officers' failure to realize the [inaccuracy] of the warrant was objectively understandable and reasonable." *Garrison,* 480 U.S. at 88.

In *Maryland v. Garrison,* police officers executed a search warrant for a third-floor apartment only to discover after the search that the premises contained two apartments instead of one. *Garrison,* 480 U.S. at 80. The Supreme Court upheld the search on the basis that the officers' mistake was reasonable in light of the information available to them at the time of the search. *Id.* at 88-89. The Court "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Id.* at 87.

Here, Williams obtained a warrant to search 5818 Hirsch Road, which he described in the probable cause affidavit as "located in the far southeast corner"

of "[t]he duplexes located in the 5800 block of Hirsch." Williams executed the warrant at "the far right apartment described by the C.I." He admitted that he "recognized the difference in the address in the probable cause affidavit and search warrant to that over the door of the subject apartment." As indicated in the "Investigative Report" prepared in response to the Thomases claims, Williams told the Internal Affairs Division that the differing address numbers "did raise a suspicion that something may be wrong." However, even though the address was not 5818 Hirsch Road, Williams stated in his affidavit submitted in support of his motion for summary judgment that he thought "[t]he apartment's location ... was correctly and accurately described by the long-time reliable and trustworthy C.I."

The Thomases thus presented evidence that Williams had a "suspicion that something may be wrong" when he noticed the differing address numbers.[3] But, the Thomases still failed to show that it was objectively unreasonable under clearly established law for Williams to execute a search warrant at their residence. *Garrison,* 480 U.S. at 88 (finding officers' search valid even when warrant was overly broad because the warrant was based on objective facts available to officers). Williams relied on the C.I.'s description of the location of the apartment

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[3] The Thomases also presented evidence that Williams concluded that 5816 Hirsch Road was the wrong location *after* he questioned Ms. Thomas. But this evidence is not relevant to whether Williams knew that 5816 Hirsch Road was the wrong location at the time he entered the residence.

in executing the warrant. "[W]e must judge the constitutionality of [Williams's] conduct in light of the information available to [him] at the time [he] acted." *Garrison,* 480 U.S. at 85. And the officers are entitled to "some latitude for honest mistakes." *Id.* at 87. Williams was neither "plainly incompetent" nor "knowingly violat[ing] the law" when he executed the warrant based on the locational description provided by a C.I. whom he knew and thought was reliable. *See Malley v. Briggs,* 475 U.S. 335, 341 (1986); *Hunt v. Tomplait,* 301 F. App'x 355, 359 (5th Cir. 2008) ("[L]aw enforcement officers are generally granted qualified immunity if the evidence is undisputed that they merely made an honest mistake when entering the incorrect home.".)[4]

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[4] The dissent attacks this conclusion, urging that it fails to consider the evidence in the light most favorable to the Thomases. Importantly, it never mentions the burden-shifting in the qualified immunity context: plaintiffs must show that a defendant is *not* entitled to qualified immunity. *Trent,* 776 F.3d at 376; *Brown,* 623 F.3d at 253.

The dissent also would have this court place an unrealistic burden on police officers that would essentially void well-established law that officers should not be liable for honest mistakes. Its position would force officers to act only upon completely vetted information; it is no secret that a main tenet of an officer's job is to act and react, in the most reasonable manner possible, while circumstances are rapidly unfolding in real time. To provide otherwise would allow no leeway in an officer's judgment-leeway explicitly provided for under the qualified immunity doctrine-and would also place

As Williams did not violate any clearly established law by executing a search warrant at a residence that he thought was the location described in the search warrant, the district court appropriately found that Williams's qualified immunity defense was applicable and he did not violate the Thomases' Fourth Amendment rights by entering their home without a warrant. Even if some Fourth Amendment rights were violated, the rights were not clearly established. The prevailing law does not instruct that unintentionally executing a search warrant at the wrong location automatically violates the Fourth Amendment and precludes an officer's qualified immunity defense. Accordingly, Williams could not have been "plainly incompetent" or "knowingly violat[ing] the law." *Malley,* 475 U.S. at 341.

IV

Finally, the Thomases argue that Williams violated the Fourth Amendment by remaining in their home for an unreasonable period of time. The Supreme Court has "held that police officers do not necessarily violate the Fourth Amendment when they mistakenly execute a search warrant on the wrong address." *Simmons v. City of Paris, Tex.,* 378 F.3d 476, 479 (5th Cir. 2004) (citing *Garrison,* 480 U.S. at 88). The officers are, however, required to discontinue the search immediately if they realize they have entered the wrong residence. *Id.* at 479-80. Because it is a clearly established constitutional norm that officers

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the public's safety in jeopardy.

must immediately terminate a search upon realizing it is the incorrect location, we must now determine "whether there is conflicting evidence that this constitutional rule was violated." *Id.*

After entering the Thomases' residence, the officers conducted a security sweep of the apartment for "approximately 30 to 45 seconds." Williams then spoke with Ms. Thomas for "[p]robably ten minutes." He "asked her if anybody else lived there other than" Ms. Thomas and her son, John, "if anybody else had access to her apartment," and "those type of questions." Williams testified that he questioned Ms. Thomas "because [he] still believed [the officers] were in the right location."

There is some evidence, which viewed in the light most favorable to the Thomases, that indicates Williams remained at the Thomases' residence after realizing that it was the wrong apartment. Williams testified that he "realize[d] that [he] might not have been in the right location" after "[m]aybe five minutes." He asserted in his incident report that "it became *immediately* clear that [5816 Hirsch Road was not the correct apartment" after he questioned Ms. Thomas (Emphasis added).

However, the violation of the constitutional right hinges upon the officers conducting a *search* even after realizing they are in the wrong location. *See Simmons,* 378 F.3d at 479 (reiterating that officers are "required to discontinue the search" upon realizing they are in the wrong residence). As the district court found, it is undisputed that Williams first conducted a sweep, which led him to decide to abort the search,

and no such search was ever conducted. This protective sweep does not constitute a search, so Williams merely entering the Thomases' residence does not constitute a "search." *See Maryland v. Buie,* 494 U.S. 325, 335 (1990) ("[A] protective sweep, aimed at protecting the arresting officers, [is] not a full search of the premises ...."). Moreover, the record does not reflect that Williams remained in the residence to perform an unconstitutional search; he remained in the residence to explain to the Thomases what had happened and to ask questions about the suspect. It was not objectively unreasonable for Williams to conduct a protective sweep and remain in the Thomases' home to explain the circumstances under which the officers inadvertently entered their home. Accordingly, because Williams did not perform a search after realizing he was at the wrong location, Williams did not violate any clearly established constitutional law. *See Simmons,* 378 F.3d at 479-80.[5]

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[5] The dissent urges that Williams's remaining in the residence violated clearly established law under *Simmons,* 378 F.3d at 481. To overcome qualified immunity, the Thomases must prove Williams did not mistakenly remain in the residence, but, rather, violated a clearly established right through remaining in the apartment to explain his presence. The facts here, however, do not support such a conclusion. Not only did Ms. Thomas tell Williams he could look around her home, but she also does not contend that Williams remained in her home after a request to leave. As such, Williams remained in the home with tacit permission and only stayed long enough to explain his presence.

The district court, again, properly granted Williams qualified immunity on this issue.

V

In their briefs on appeal, the Thomases also argue that there was no evidence that the C.I. was reliable. They also argue that Williams's 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." Though these contentions seem to challenge the basis for probable cause, the Thomases failed to raise these claims before the district court. Accordingly, this court need not address these claims. *See, e.g., In re Paige,* 610 F.3d 865, 871 (5th Cir. 2010).

For the forgoing reasons, the district court's grant of summary judgment in favor of Williams is AFFIRMED.

JAMES L. DENNIS, Circuit Judge, dissenting:

In *Tolan v. Cotton,* 134 S. Ct. 1861 (2014), the Supreme Court took the unusual step of granting certiorari simply to correct this court's misapplication of the summary judgment standard. The Supreme Court then unanimously and summarily vacated this court's affirmance of summary judgment to a defendant-officer on the basis of qualified immunity. *Tolan,* 134 S. Ct. at 1868-69. The Court stated, "[T]he Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to [the nonmovant] with respect to the central facts of this case" and "fail[ed] to credit evidence that contradicted some of its key factual conclusions," and thereby "improperly 'weighed the evidence' and resolved disputed issues in favor of the moving party." *Id.* at 1866.

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.

I

The Thomases assert that Officer Williams violated their rights under the Fourth Amendment by searching their home without a valid warrant. They

advance three basic claims that Williams's conduct violated their clearly established rights and that he is therefore liable in an action under 28 U.S.C. § 1983.

First, the Thomases assert that Williams knowingly swore to false information in his affidavit in support of a search warrant. Second, they claim that he executed the search warrant in their home even though he knew prior to entering that he was at the wrong location. Third, the Thomases argue in the alternative that, even if Williams did not suspect that he was in the wrong location at the time he entered their residence, he unlawfully remained in their residence after he realized that he wasin the wrong place. As discussed below, I would reverse the district court's grant of summary judgment in favor of Williams on all three claims.

A. Williams's Inclusion of Material Misrepresentations in His Warrant Affidavit

As the majority opinion correctly sets out, it is clearly established that, under *Franks v. Delaware,* 438 U.S. 154, 171 (1978), "an officer is liable for swearing to false information in an affidavit in support of a search warrant, provided that: (1) the affiant knew the information was false or [acted with] reckless disregard for the truth; and (2) the warrant would not establish probable cause without the false information." *Hart v. O'Brien,* 127 F.3d 424, 442 (5th Cir. 1997) (citing *Franks,* 438 U.S. at 171).

The Thomases claim that Williams knowingly swore to false, material information in his affidavit in support of a search warrant. They point to the

following statements in the affidavit: (1) the officers and the C.I. "proceeded to 5818 Hirsch"; (2) Williams "observed the C.I. go to, and return directly from, the listed location"; and (3) "the C.I. was at the residence." They contend that these statements were false and that Williams knew as much. They argue that these alleged misrepresentations were material because without them the affidavit would be facially insufficient to establish probable cause to search any residence.

The majority opinion responds to these arguments only by stating, "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." Op. at 8. That is patently untrue. As set forth below, at least two of the three statements to which the Thomases point in Williams's affidavit were false, and record evidence suggests that Williams knew that they were false at the time he submitted his affidavit.

First, the officers and the C.I. did not "proceed to 5818 Hirsch," nor did they proceed to any particular address. Instead, according to Williams's own account, the officers "took [the] C.I. to the complex in the 5000 block of Hirsch [Road]" and the informant was "looking for suspect Nash in the common areas." Second, 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. Instead, according to Williams's own deposition testimony, he observed the C.I. in the "general immediate area" of the building in which he thought unit 5818 was

located, but in which he knew that another address was also located.[1]

Williams's misrepresentations were also material. Together, his misstatements suggested both that the officers and the C.I. had planned to make a purchase at the particular address Williams wished to search and that Williams observed the C.I. going to, and returning directly from, that address. Without these misstatements, the warrant affidavit states only that the C.I. purchased drugs while outside of a "residence." The majority opinion itself recognizes that such facts would constitute a "dirty buy" that would not give rise to probable cause. Op. at 2.

The foregoing establishes, at the very least, a genuine dispute as to whether misstatements in Williams's affidavit violated clearly established law under *Franks* and *Hart*. *See Franks,* 438 U.S. at 171; *Hart,* 127 F.3d at 442. The majority opinion avoids this conclusion only by ignoring both the evidence in the record and the Thomases' arguments. I would reverse the district court's grant of summary judgment for

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[11] The majority opinion responds that "Williams observed the C.I. go toward the apartment building and was informed that the C.I. purchased narcotics from the apartment" and that "[t]his fails to show that he knowingly swore to false information." Op. at 8 n.2. But these observations do not bear upon Williams's misrepresentations-that the officers and C.I. intentionally targeted the listed apartment and that he saw the C.I. "go to, and return directly from," that apartment-and the majority opinion does not endeavor to explain how they might affect the analysis.

Williams on this claim.

B. Williams's Initial Entry into the Thomases' Residence

The Thomases argue that Williams violated the Fourth Amendment by conducting a search of their home without a valid warrant. They emphasize that the warrant Williams obtained authorized the search of 5818 Hirsch Road, that Williams knew, before executing the search, that the address he was about to enter was 5816 Hirsch Road, and that he, at the very least, suspected that something was wrong. The majority opinion asserts that Williams merely relied on the C.I.'s description of the location of the relevant apartment and therefore simply made an "honest mistake." Here, too, the majority opinion reaches this conclusion only by ignoring record evidence and improperly viewing the evidence that it does consider in the light most favorable to the movant.

The Supreme Court has clearly established that officers must terminate a search as soon as they are on notice of the risk that they are in the wrong location. In *Maryland v. Garrison,* 480 U.S. 79, 80 (1987), officers had a warrant to search the third floor premises. The officers did not know that the third floor had two apartments until after they began their search, by which time they had already discovered contraband in the erroneously-searched apartment. *Id.* The Court determined that the officers made an honest mistake and that the search of the wrong apartment was therefore valid. *See id.* at 86-88. In so concluding, the Court stated, "[A]s the officers recognized, they were required to discontinue the

search of respondent's apartment as soon as they ... were put on notice of *the risk* that they might be in a unit erroneously included within the terms of the warrant." *Id.* at 87 (emphasis added); *see also Sampson v. Reg'l Controlled Substance Apprehension Program*, No. 94-40525, 1995 WL 84186 at *3 (5th Cir. Feb. 13, 1995) (unpublished) (referring to this statement as "the rule of *Garrison*").[2]

The rule established in *Garrison* applies to specific factual circumstances and provides every reasonable officer with fair notice of what they may not do-if they are on notice of the risk that they might search a location erroneously designated by the warrant, they may not conduct the search. This court has applied this rule as clearly established law, holding that officers were not entitled to qualified immunity because they did not discontinue their search despite being "on notice of the risk that they might search the wrong residence." *Sampson,* 1995 WL 84186 at *3.

Here, there is evidence in the record suggesting 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. In his original incident report, Williams stated that, after the officers pried open the burglar bars, they waited for Ms. Thomas to open the door and at that time noticed the discrepancy in the address. Williams then stated in his report:

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[2] Under Fifth Circuit Rule 47.5.3, "[u]npublished opinions issued before January 1, 1996, are precedent."

> Taking this into consideration as Mrs. Thomas opened the door I questioned her about who was in the apartment currently and who resided at the apartment. *It became immediately clear that this was not the correct apartment and the warrant was aborted and not executed.*

(Emphasis added). Williams's original, incident-report version of the events is supported by the statement of Officer Gregory Green to the Internal Affairs Division. Green stated: "After the burglar bars were open, Ms. Thomas opened the front door of the residence. I do not recall what Officer Williams said, but he gave some indication that we were at the wrong location."

No one can both view this evidence in the light most favorable to the Thomases and hold, as the majority opinion 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. And so, the majority opinion just ignores this evidence and does not address it as it relates to this claim.[3]

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[3] The majority opinion faults this dissent for not mentioning "the burden-shifting in the qualified-immunity context," pursuant to which "plaintiffs must show that a defendant is *not* entitled to qualified immunity." Op. at 10 n.4. It is, of course, the Thomases' burden to show that Williams's conduct violated their clearly established rights. They have carried their burden by providing the opposing

Moreover, as previously discussed, Williams's conduct would have violated the rule that was clearly established in *Garrison* and *Sampson,* even if he only suspected that the Thomases' residence was the wrong location before he entered it. As the majority opinion acknowledges, Williams told the Internal Affairs Division that the differing address numbers "did raise a suspicion that something may be wrong." But the majority opinion still maintains that his conduct did not violate clearly established law, despite the clear instruction of Fifth Circuit and Supreme Court precedent that police may not search a location if they are on notice of the risk that they are in the wrong location.

As previously discussed, the summary judgment evidence in this case suggests that Williams was not only on notice of the risk that he was about to enter the wrong apartment, but that he also affirmatively knew that to be the case. Such conduct indisputably violates the rules that were clearly established in *Garrison* and *Sampson.* I would therefore reverse the district court's grant of summary judgment for Williams as to this claim.

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summary-judgment evidence discussed above, which the majority opinion ignores. The majority opinion's invocation of "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.

C. Williams's Remaining in the Residence

"Qualified immunity does not provide a safe harbor for police to remain in a residence after they are aware that they have entered the wrong residence by mistake." *Simmons v. City of Paris,* 378 F.3d 476, 481 (5th Cir. 2004). "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." *Id.*

The Thomases argue that, even if Williams did not suspect that he was in the wrong location at the time he entered their residence, he violated their clearly established Fourth Amendment rights by remaining in the apartment after he realized that he was in the wrong residence. They complain that, despite Williams's admission that he only spent one minute conducting a protective sweep and that it only took him five minutes to determine that he was in the wrong house, he nonetheless remained in their home for several more minutes, during which he explained his entry to them, questioned them, and told them that someone else could have a key to their home.

Williams does not dispute that he remained in the residence and continued to speak with and question Ms. Thomas after he determined that he was in the wrong location. At his deposition, he stated that it took him "maybe five minutes" to realize that he was in the wrong location-during this time he conducted a one-minute "sweep" of the residence and began talking to Ms. Thomas. Williams also stated that he spoke to Ms. Thomas for approximately ten minutes.

Thus, Williams's deposition testimony suggests that he remained in the residence for approximately six minutes after he realized that he was in the wrong location. Importantly, Williams does not contend in his brief on appeal that he had the Thomases' consent to remain in their residence.[4]

Considering the evidence in the light most favorable to the Thomases, Williams's conduct violated their right not to have police remain in their home after determining that it was not the right location. This right was clearly established by this court's holding in *Simmons,* 378 F.3d at 481, that police may not "remain in a residence" after they realize that they are in the wrong home.

The majority opinion suggests that an officer does not violate the Fourth Amendment by remaining in a home after realizing that he is in the wrong place

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[4] William stated in an affidavit in support of his motion for summary judgment that Ms. Thomas told the officers they could "[g]o ahead and look." The majority opinion suggests that this statement, along with the fact the Ms. Thomas did not affirmatively ask Williams to leave her home, constituted "tacit permission" for him to remain in the residence. Op. at 13 n.5. However, the majority opinion neglects to note that Ms. Thomas's statement to Williams was in response to his assertion that the officers had a warrant to search her apartment and that she, unlike Williams, was not aware that the officers had entered the wrong residence. Understandably, then, Williams does not contend that Ms. Thomas consented to his continued presence in her home. *See United States v. Lopez,* 911 F.2d 1006, 1010 (5th Cir. 1990) ("[C]onsent must be given voluntarily and not simply in acquiescence to a claim of lawful authority").

unless he continues to actively "search" the home. Op. at 11-12. But, in announcing the governing legal rule, the *Simmons* court stated, twice, that police may not *"remain in* a residence" after they realize that they are in the wrong location. 378 F.3d at 481 (emphasis added). A physical intrusion into a person's home is a search under the Fourth Amendment. *Florida v. Jardines,* 569 U.S. 1, 5 (2013). That physical intrusion does not end merely because the officers are no longer actively searching the home.[5]

This court in *Simmons* clearly established precisely what it said: that police may not "remain in a residence" after they realize that they are in the wrong location. 378 F.3d at 481. There is therefore, at the very least, a genuine dispute as to whether Williams's decision to remain in the Thomases' residence to question them after he realized that he

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[5] 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 opinion misrepresents language from *Maryland v. Buie,* 494 U.S. 325, 335 (1990). In *Buie,* the Supreme Court cautioned that a justifiable warrantless sweep of a home incident to arrest "is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." *Id.* at 335. However, in authorizing warrantless security sweeps incident to arrest under certain circumstances, the Court was very clear that such a sweep does in fact constitute a "search" for purposes of the Fourth Amendment. *See id.* at 336 ("The type of *search* we authorize today is far removed from the 'top-to-bottom' search involved in *Chimel."* (emphasis added)).

was in the wrong place violated clearly established law under *Simmons*. Accordingly, I would reverse the district court's summary judgment dismissal of this claim.

II

I close where I began: in affirming the district court's summary judgment dismissal of the Thomases' claims, the majority opinion fails to view the evidence in the light most favorable to the nonmovants with respect to the central facts of this case, fails to credit evidence that contradicts its key factual conclusions, improperly weighs the evidence and resolves disputed issues in favor of the moving party, and makes serious legal errors regarding the scope of the Fourth Amendment. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 4:14-CV-2711.

BARBARA THOMAS, et al, Plaintiffs, v. J.J. WILLIAMS, et al, Defendants.

United States District Court, S.D. Texas,

Houston Division.

October 18, 2016.

ORDER AND OPINION

Before the Court is Plaintiffs' Motion for Reconsideration (Document No. 130), Defendants' Response (Document No. 131), and Plaintiffs' Reply (Document No. 132). After considering these documents, the facts in the record, and the applicable law, the Court finds that Plaintiffs' Motion for Reconsideration (Document No. 130) is DENIED.

Background

The facts of this case are laid out fully in the Court's April 1, 2016 Order. (Document No. 125). In that Order the Court granted Defendant J.J. Williams' ("Williams") Motion for Summary Judgment

regarding Plaintiffs' fourth and fourteenth amendment claims, because the Court found that Williams was entitled to qualified immunity on those claims. Plaintiffs then filed a Motion for Reconsideration of that Order. (Document No. 130).

Standard of Review

Although the Federal Rules of Civil Procedure do not specifically provide for a "motion for reconsideration," a motion denominated as such that challenges a prior judgment on the merits is treated as either a "motion to alter or amend a judgment" under Rule 59(e) or a motion "for relief from a final judgment" under Rule 60(b). *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990). "Under which Rule the motion falls turns on the time at which the motion is filed. If the motion is filed no later than [28] days [after] the rendition of judgment, the motion falls under Rule 59(e); if it is filed after that time, it falls under Rule 60(b)." *Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 400 (5th Cir. 2003) (alterations omitted) (quoting *Lavespere*, 910 F.2d at 173).[1] "A motion to alter or amend the judgment under Rule 59(e) must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should, have been made before the judgment issued."

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[1] Therefore this Motion will be considered under Rule 59(e).

Rosenblatt v. United Way of Greater Hous., 607 F.3d 413, 419 (5th Cir. 2010) (alterations and internal quotation marks omitted) (quoting *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)). "To prevail on a Rule 59(e) motion, the movant must show at least one of the following: 1) an intervening change in controlling law; 2) new evidence not previously available; 3) the need to correct a clear or manifest error of law or fact or to prevent manifest injustice." *United States v. Saldivar*, No. 2:03-CR-182-2, 2014 WL 357313, at *1 (S.D. Tex. Jan. 31, 2014).[2]

Discussion

Plaintiffs argue that: (1) the Court erroneously defined "listed location," (2) the Court erroneously relied upon Defendant's state of mind, (3) the Court erroneously concluded that Plaintiffs did not instruct Williams to leave their home, (4) Plaintiff did instruct Williams to leave, (5) the Court erroneously admitted hearsay, (6) the Court erroneously decided Williams is entitled to summary judgment based on his intention, (7) the Court erroneously granted summary judgment based upon an improper conclusion that a fact was unlikely, and (8) *Fifty-six Thousand, Seven Hundred Dollars in U.S. Currency v. State* and *Guzman v. State* are distinguished. (Document No. 130). The Court will

[2] With the exception of Plaintiffs' third argument, Plaintiffs clearly fail to meet this standard in their Motion, and do not show new evidence, a change in law, or manifest injustice. However, the Court will briefly address each of their arguments.

consider each argument in turn.

(1) Listed location

Plaintiffs again raise their argument that the City of Houston's 30(b)(6) representative's testimony that he interpreted "listed location" to mean "5818 Hirsch" creates a fact issue as to whether Williams intentionally or recklessly included a misstatement in his affidavit. *Id.* at 2. However, the fact that there is another possible interpretation of the affidavit does not demonstrate that the affidavit was knowingly or recklessly false; it does not show that Williams knew that any of his statements were false, nor does it show that he "in fact entertained serious doubts as to the truth" of his statements. (Document No. 125 at 11) (citing *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997)). Plaintiffs' argument fails.

(2) State of mind

Plaintiffs claim that the Court's consideration of Williams' subjective intent was inappropriate. (Document No. 130 at 3). However, the portion of the Opinion which is objected to discusses whether or not Williams intentionally or recklessly included material misstatements or omissions in his affidavit to the magistrate judge, who issued the warrant for Plaintiffs' residence. This inquiry must include consideration of what Williams knew and did. As explained in *Winfrey*,

> We recognize that the subjective motive of an officer executing a facially valid warrant generally is not an appropriate inquiry. [Plaintiff], however, alleges that the affidavits were knowingly or recklessly false. Our inquiry, then, necessarily must consider what the officers knew and did in evaluating whether it was objectively reasonable for them to believe that their conduct was lawful.

Winfrey v. San Jacinto Cty., 481 F. App'x 969, 981 at n.9 (5th Cir. 2012) (internal citations omitted). The Court therefore correctly considered what Williams knew and did in its determination that he acted in an objectively reasonable way. Plaintiffs' argument fails.

(3) Whether Plaintiffs instructed Williams to leave their home

Plaintiffs argue that the Court misapplied the summary judgment standard, stating that: "Defendant was incapable of meeting his burden to show Plaintiffs did not instruct him to leave their residence because he unilaterally elected to refrain from both (1) deposing Plaintiff and (2) arguing that Plaintiffs did not instruct him to leave. Plaintiffs had no burden to dispute facts never raised by Defendants." (Document No. 130 at 4).

First, the Court believes that Plaintiffs have misstated their burden here. It is Plaintiffs who were required to rebut the qualified immunity defense "by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Regardless, though, the Court will strike its statement that "Plaintiffs offer no evidence that either Ms. Thomas or her son asked Williams to leave." (Document No. 125 at 19). However, striking this statement does not alter the Court's finding that Williams acted reasonably under the law:

> Upon reading *Simmons* and *Pray*, it would be unreasonable for Williams to continue the search; however, Williams could have reasonably interpreted those cases as allowing him to remain in the apartment in order to explain his actions to Ms. Thomas. Therefore Williams could have "reasonably interpreted the law to conclude that" his actions were justified, and qualified immunity as to his remaining in the apartment is appropriate.

Id. at 19-20. Therefore, although the Court will strike this statement, Plaintiffs' Motion for Reconsideration still fails.

(4) Plaintiff's affidavit stating that she did ask Williams to leave

Plaintiffs then ask that the Court admit Barbara Williams' affidavit, stating that she "instructed the officers to leave my home several times." (Document No. 125-1). However, this is not new evidence, and Plaintiffs' submission of it now is untimely. The Fifth Circuit has held that "an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (citing *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991)). *See also Saldivar*, 2014 WL 357313, at *1 ("To prevail on a Rule 59(e) motion, the movant must show at least one of the following: 1) an intervening change in controlling law; 2) *new evidence not previously available*; 3) the need to correct a clear or manifest error of law or fact or to prevent manifest injustice.") (emphasis added).

Relevant factors in considering whether to allow such evidence are as follows: "[1] the reasons for the moving party's default, [2] the importance of the omitted evidence to the moving party's case, [3] whether the evidence was available to the non-movant before she responded to the summary judgment motion, and [4] the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened." *Lavespere*, 910 F.2d at 174 (5th Cir. 1990). Plaintiffs offer no reason for failing to submit this evidence previously, other than their attorney's "personal wrongdoing" (Document No. 130 at 4), and

this evidence was clearly available before Plaintiffs responded to the motion for summary judgment. Furthermore, Williams will be forced to respond to this untimely evidence if it is admitted. Although the evidence may be important, these three factors demonstrate that it should not be admitted on reconsideration. *See ICEE Distributors, Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 847-8 (5th Cir. 2006) (It was not an abuse of discretion for the district court to refuse to consider "newly proffered evidence" when it was plainly available to plaintiffs before summary judgment.).

(5) Hearsay

Plaintiffs tried multiple times previously to exclude the statements of the confidential informant (the "C.I."), but were unsuccessful. (See Document No. 73, Motion to Exclude or Strike Affidavit of Defendant Williams; Document No. 112, Motion to Exclude Defendant Williams' Summary Judgment Evidence; Document No. 123, Motion for Reconsideration). The Court has already denied each of those motions, and will not weigh this issue again. (See Document Nos. 96, 118, 139).

However, the Court will briefly explain again that this evidence was not cited for its truth. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *United States v. Montes-Salas*, 669 F.3d

240, 251 (5th Cir. 2012) (citing Fed. R. Evid. 801(c)). The Court did not rely on the truthfulness of the C.I.'s statements, *i.e.* whether he or she actually bought drugs from Nash or whether he or she actually saw Nash enter apartment 5818. The statements of the C.I. were used to show the basis for obtaining the search warrant, not for their truth.

(6) Williams' intention

Plaintiffs appear to argue[3] here that Williams intentionally violated the Fourth Amendment's particularity requirement when he requested the warrant. (Document No. 130 at 6). However, the Court already explained that the warrant did not violate the particularity requirement, and was valid when issued. *Id*. at 15-16. Therefore this argument fails.

(7) The protective sweep

Plaintiffs take issue with the Court's finding that "[c]onsidering the brevity of the protective sweep, which took 30 to 45 seconds, it is unlikely that Williams could have come to a realization that he was in the wrong apartment, and aborted the sweep, before its completion." (Document No. 130 at 7) (citing Document No. 125 at 20-21). The Court should have stated more clearly its finding that Williams did not fully realize he was in the wrong apartment until after

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[3] The Court is not entirely sure what argument Plaintiffs are making here.

the completion of the sweep. Plaintiffs do not cite any new evidence which changes this finding.

Most importantly, though, the Court noted that "there are no cases cited by Plaintiffs which would require Williams to abort a safety sweep upon realization that the officers were in the wrong apartment." *Id.* at 21. Therefore this right was not "clearly established at the time of the disputed action," and qualified immunity is appropriate. *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

(8) Fifty-Six Thousand, Seven Hundred Dollars in U.S. Currency v. State and *Guzman v. State*

Plaintiffs argue that these cases are each distinguishable from the case at hand, and therefore request reconsideration. (Document No. 130 at 7-8). However, the distinguishing facts in those cases do not change the Court's determination that Williams "made an 'honest mistake' when entering the Plaintiffs' home," and therefore is entitled to qualified immunity. (Document No. 125 at 13) (citing *Hunt v. Tomplait*, 301 F. App'x 355, 359 (5th Cir. 2008)). This finding is discussed extensively in the original opinion, and is based on a variety of case law in addition to these two cases. (*See id.* at 13-15). This argument does not warrant reconsideration.

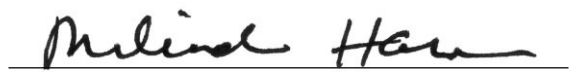
Conclusion

For the reasons stated above, the Court finds that Plaintiffs' Motion for Reconsideration (Document No. 130) is DENIED. However the Court also

ORDERS that the statement discussed in Section (3)[4] will be stricken from the Court's previous Order (Document No. 125).

SIGNED at Houston, Texas, this 18th day of October, 2016.

MELINDA HARMON



UNITED STATES DISTRICT JUDGE

[4] The stricken statement is: "Plaintiffs offer no evidence that either Ms. Thomas or her son asked Williams to leave." (Document No. 125 at 19).

APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 4:14-CV-2711.

BARBARA THOMAS, et al, Plaintiffs, v. J.J. WILLIAMS, et al, Defendants.

United States District Court, S.D. Texas,

Houston Division.

April 1, 2016.

ORDER AND OPINION

MELINDA HARMON, *District Judge.*

Before the Court are Plaintiffs' Motion for Summary Judgment (Document No. 48), Defendant J.J. Williams' ("Williams") Response and Motion for Summary Judgment (Document No. 52), Plaintiffs' Reply in Support of its Motion (Document No. 65), Plaintiffs' Response to Defendant's Motion for Summary Judgment (Document No. 74), and Plaintiffs' Supplemental Brief (Document No. 100). Having considered these filings, the facts in the record, and the applicable law, the Court concludes that Plaintiffs Motion for Summary Judgment is denied, and Defendant's Motion for Summary Judgment is granted.

Background

Plaintiffs, Barbara Ann Thomas and her son, John Thomas, reside at 5816 Hirsch Road, in Houston, Texas (Document No. 32 at 2-3). Defendant Williams is a peace officer employed by the Houston Police Department ("HPD"). *Id*. at 2.

According to Williams' affidavit, the relevant investigation began in April of 2014, because complaints had been submitted to HPD about marijuana and drug dealer activity on the 5800 Hirsch Road block (Document No. 52-3 at 3). One complaint stated the address as "5814 1/," without providing a final digit, and another complaint stated that activity was occurring at 5814 Hirsch Road. *Id*.

On May 7, 2014, Officers Williams and Caldwell took a confidential informant (the "C.I.") to the location to attempt to make a narcotics purchase. *Id*. at 4. During this attempted buy the officers "maintained distant and rolling surveillance, so not to be 'picked off' by any 'look-outs,'" which had happened before with other attempted narcotics purchases in the complex. *Id*. The C.I. was sent to look for the apartment numbered 5814 ½, and returned having successfully purchased .27 grams of crack cocaine from a "black male on the porch." *Id*. Williams explains in his affidavit that this is referred to as a "dirty buy," and "a search warrant cannot be generated under these circumstances because there is no proof the crack came out of the apartment." *Id*.

Therefore the officers continued investigating, and identified a suspect named "Nash" as the seller. *Id*. Williams continued to survey the area and the suspect, but never saw him enter or leave a specific

apartment; Williams "always noticed suspect Nash to be in the common areas of the complex or the parking lot of an adjacent corner store." *Id*. at 5. During this continued investigation Williams also used hcad.org attempt to "verify the addresses within the complex," but "found there is only 5812 and 5820 listed for the six buildings and twelve apartments." *Id*. at 4. Williams also used Google Earth to obtain a satellite photo of the complex. *Id*.

On May 20, 2014, Williams and Caldwell returned to the complex with the same C.I. *Id*. at 5. Williams stated in his affidavit that

> Keeping true to what proved to be successful tactics in the prior purchase, we maintained a distant and rolling surveillance, careful not to stay too long in one place and be "picked off". In doing so, we were not able to see every aspect of the purchase and had to verify what we had seen and what had transpired during the drug buy with what the C.I. told us when they reported back afterward.

Id. The C.I. returned with .19 grams of crack cocaine, and told the officers that he or she observed Nash come out of his apartment, numbered 5818. *Id*. at 5-6. To confirm which door Nash used, Williams verified with the C.I. that Nash used the right door, "as far in the corner of the complex as you can go." *Id*. at 6. Williams was hesitant to walk through the complex to identify the numbers himself, "[k]nowing the dealers in and around the complex were organized with look-outs," and could not see the numbers from the across

the street. *Id*. However Williams was confident in the information supplied by the C.I., and prepared a probable cause affidavit and search warrant for 5818 Hirsch Road. *Id*. at 6-7. Williams and other officers executed this search warrant on May 24, 2014. *Id*. at 8.

Williams stated that:

> As we approached the door of the far right apartment described by the C.I., I observed the last digit of the address of that apartment was a "6" instead of an "8", so it read "5816". I recognized the difference in the address in the probable cause affidavit and search warrant to that over the door of the subject apartment, […] But, based on past experiences, and the facts I have referenced above, I knew that address numbers can be misread for many reasons, and in fact it is not uncommon to encounter drug-related premises without an address.

Id. at 8-9. The officers then pried open the burglar bars and "[a]lmost simultaneously, Ms. Thomas opened her door and stepped back." *Id*. at 9. The team then conducted a security sweep of the apartment, "which took approximately 30 to 45 seconds," but "[a] search for narcotics was never started or attempted. During the safety sweep, it became apparent that the apartment did not give an indication as one being used to store or sell illegal drugs." *Id*. at 9-10.

Williams then apologized to Ms. Thomas, and asked her various questions to determine if another person was using her apartment to sell drugs. *Id*. at

10. Later, Williams returned to the complex with the C.I. who realized that he or she had made a mistake, because "the brick wall that runs partially between the two apartments blocked their view of Ms. Thomas' door." *Id*. at 11.

In their Second Amended Complaint, Plaintiffs describe the search as follows. The officers:

> r. forcibly entered Plaintiffs' locked front door at approximately 6:30 p.m.;
>
> s. found Plaintiffs therein huddled together in fear on the couch;
>
> t. seized Plaintiffs at gunpoint (at least three Defendants);
>
> u. admitted to Plaintiff Barbara Thomas that they were in the wrong house within approximately five minutes;
>
> v. detained Plaintiffs for approximately half an hour;
>
> w. accused Plaintiffs of having drugs in their home;
>
> x. performed an extensive search of Plaintiffs' home (at least two Defendants);
>
> y. caused damage to Plaintiffs' personal property in their home; and
>
> z. rendered the locking mechanism on Plaintiffs' front door completely inoperable (Document No. 32 at 5-6).

Therefore Plaintiffs allege that each officer[1] "violated

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[1] Plaintiffs' additional claims against the City of

their clearly established rights under the Fourth and Fourteenth Amendments to the United States Constitution to remain free from unreasonable searches of their home" and to "remain free from unreasonable seizures." *Id.* at 10, 15. Plaintiffs also allege that Williams "acquired a warrant to enter their home by swearing out an affidavit with materially false statements either knowingly or in reckless disregard for the truth." *Id.* at 16.

Legal Standards

A. Summary Judgment

Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The substantive law governing the claims determines the elements essential to the outcome of the case and thus determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over such a fact is genuine if the evidence presents an issue "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Id.* at 250. The moving party bears the burden of identifying evidence that no genuine issue of material fact exists, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and the court must view this evidence and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587

Houston are not at issue in these motions.

(1986).

B. Qualified Immunity

The defense of "[q]ualified immunity shields government officials from liability when" they act within their discretionary authority and their actions do not violate "clearly established statutory or constitutional law of which a reasonable person would have known." *Gates v. Texas Dept. of Protective & Regulatory Servs.*, 537 F.3d 404, 418 (5th Cir. 2008). The purpose of this defense is to "balance[ ] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably," *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), and its effect is to "provide[ ] ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Because "qualified immunity is an immunity from suit rather than a mere defense to liability," *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (alterations omitted) (quoting *Pearson v. Callahan,* 555 U.S. 223, 237 (2009)), this "defense alters the usual summary judgment burden of proof" in that "[o]nce an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Although all inferences are still drawn in the plaintiff's favor, it is the plaintiff who

"bears the burden of negating qualified immunity." *Id*. The qualified immunity analysis consists of two prongs—one, whether an official's conduct violates a constitutional right; the other, whether that right was clearly established at the time of the alleged violation— and the court may rely on either prong in its analysis. *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011) *cert. denied*, 132 S. Ct. 2433, 182 L. Ed. 2d 1062 (U.S. 2012).

Under the second prong of the qualified immunity defense, the standard is whether the defendant's actions were "'objectively reasonable' in light of 'law which was clearly established at the time of the disputed action.'" *Brown,* 623 F.3d at 253 (quoting *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004)). The standard of "objective reasonableness" is unique to this context: "This inquiry focuses not on the general standard . . . but on the specific circumstances of the incident—could an officer have reasonably interpreted the law to conclude that" his or her actions were justified? *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 383 n.1 (5th Cir. 2009) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004)). "To be clearly established for purposes of qualified immunity, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Brown*, 623 F.3d at 253 (5th Cir. 2010).

Discussion

Plaintiffs argue that the undisputed facts

demonstrate that Williams "unreasonably violated the Fourth Amendment to the United States Constitution by (1) knowingly making materially false statements to a magistrate under oath, (2) entering Plaintiffs' home without a warrant therefor, and/or (3) staying in Plaintiffs' home for an unreasonable period of time after discovering he had no right to be therein" (Document No. 48 at 1). The Court will examine each of these claims below, in sections 1, 2, and 3.

1.

The affidavit given to the Magistrate Judge by Williams described the location as follows:

> The location may be particularly described as a duplex at 5818 Hirsch, Houston, Texas 77026. The duplexes located in the 5800 block of Hirsch all have a separate address for each front door. The duplex door marked "5818" sits on the east side of Hirsch and the front of the residence faces west. Duplex "5818" is located in the far southeast corner of the location. […] The numbers 5-8-1-8 are clearly posted by the front door of the duplex.

(Document No. 48-4 at 2). The affidavit then stated that "said suspected place is in the charge of and controlled by […] a black male known as 'Little Black

[Nash].'" *Id*. In the affidavit Williams stated that he had probable cause, because, within the past forty-eight hours, he observed a confidential informant "go to, and return directly from, the listed location." *Id*. at 3. The informant returned with an amount of crack cocaine, and stated that he or she purchased the cocaine from the listed suspect while at the residence. *Id*. The Magistrate Judge subsequently issued a warrant for the residence (Document No. 48-5).

Although "[t]he Fourth Amendment demands a 'truthful showing' of probable cause," it does not require "that every fact recited in a search or arrest warrant affidavit must be accurate, for probable cause may be founded upon hearsay, information received from informants, and information within the affiant's personal knowledge gathered hastily. A probable cause affidavit is 'truthful' if the information put forth therein is believed or appropriately accepted by the affiant as true." *Moreno v. Dretke*, 362 F. Supp. 2d 773, 800 (W.D. Tex. 2005) *aff'd*, 450 F.3d 158 (5th Cir. 2006) (citing *Franks*, 438 U.S. at 165).

One statement at issue in the affidavit is Williams' claims that he "observed the C.I. go to, and return directly from, the listed location" (Document No. 48-4 at 3). Plaintiffs argue that the evidence demonstrates that Williams intentionally misled the Magistrate Judge:

> Defendant Williams swore he "observed the [confidential informant] go to, and return directly from, the listed location [5818 Hirsch]." Defendant knew this was a lie; instead, he knew he

> only watched the informant "go to the building where Plaintiffs' duplex is located…". Defendant knew that Plaintiffs lived in a duplex, duplexes are "sometimes a little tricky", he never watched (and was physically incapable of watching) the informant enter any residence in the 5800 block of Hirsch, and the drugs in question were purchased outside of any apartment. Defendant knew he did not see a confidential informant enter 5818 Hirsch because (1) he concedes it did not exist, (2) his view of same was obstructed, and (3) he never saw a confidential informant go inside any home located on the 5800 block of Hirsch.

(Document No. 48 at 5-6) (citations and emphasis omitted). Because Williams knew that this information was false when he provided it to the Magistrate Judge, his conduct violated the Fourth Amendment. *Id*. at 5-6.

The Court does not agree that this is a misstatement. Williams explained what he meant by the "listed location" in his deposition: "In the way I worded it, what I recall was seeing them go to the building, not necessarily to the door. Otherwise, I would generally state to the door, knock on the door, go in the door, through the door, something like that. I couldn't say that in this instance. So, I had to use the verbiage of 'location' meaning in that area, in that

general immediate area" (Document No. 48, Exhibit A at 12). Williams explained that he last observed the C.I. "on the corner, pretty much in between the two complexes – the duplex where I thought 5818 was, which is – I learned was 5816 and 5816 ½." *Id.* at 12-13.

Plaintiffs also argue that Williams could not have seen the C.I. "enter 5818 Hirsch" and that he "never saw a confidential informant go inside any home located on the 5800 block of Hirsch (Document No. 48 at 5-6; Document No. 65 at 2). However, Williams' affidavit does not state that he saw the C.I. enter any apartment (Document No. 48-4). The affidavit does refer to the C.I.'s statement that he or she was "at the residence." *Id.* However, it does not say that the C.I. went inside; "at the residence" refers to the C.I.'s purchase of drugs outside of the apartment (Document No. 48, Exhibit A at 13). Therefore neither of these assertions were misstatements. Furthermore, Plaintiffs' focus on the fact that the purchase happened outside of the apartment is misplaced, because Williams explains in his statement that the C.I. watched the suspect retrieve the drugs from the apartment:

> The C.I. […] reported that as they were looking for suspect Nash in the common areas, they saw him as he came out of his apartment and locked the door behind him. He had come out of a different apartment than 5814 ½ Hirsh 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. The C.I. offered to buy crack cocaine from suspect Nash who then went back inside the same apartment[2] and brought the 0.19 grams of crack cocaine out to them.

(Document No. 52-3 at 5).

Plaintiffs also object that Williams could not have seen the C.I. go to a location that does not exist (i.e. the unit numbered 5818), and that his view of the location was obstructed (Document No. 48 at 5-6). However, Williams' statement refers to the "listed location," which is also described as the duplex in the "far southeast" corner of the building (Document No. 48-4 at 2). Therefore this statement can be interpreted as Williams' seeing the C.I. go to, and return from, the far southeast duplex in the building. Although Williams' view of Plaintiffs' apartment door was obstructed, Williams does not specifically say that he

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[2] Plaintiffs also argue that "this particular informant's mere conclusion is even further denigrated because the affidavit provides no evidence she had personal knowledge that drugs were inside any residence; instead, her conclusion was based on her subjective interpretation of the drug dealer's 'body language'" (Document No. 65 at 5) (citation omitted). However, this section of Williams' statement explains that the C.I. did not rely only on body language.

saw the C.I. approach the door; the phrase "listed location" refers to the corner of the building, where Williams did see the C.I. (Document No. 48, Exhibit A at 12-14).

Even assuming that the affidavit contained material misstatements or omissions, Plaintiffs have not demonstrated that these were committed intentionally or recklessly. *Michalik*, 422 F.3d at 258 n.5. Where a party argues that "affidavits were knowingly or recklessly false," the qualified immunity inquiry includes consideration of "what the officers knew and did in evaluating whether it was objectively reasonable for them to believe that their conduct was lawful." *Winfrey*, 481 F. App'x at 981 n.9 (citations omitted).

Williams' statements in the affidavits were not intentionally false, but were based on his knowledge at the time. Williams testified that he watched the informant go to the corner of the duplex, where he thought unit 5818 was located, and that he used the word "location" to mean the "general area" of 5818 Hirsch (Document No. 48, Exhibit A at 12-13). Williams was also told by the C.I. that the suspect Nash went inside apartment 5818 to retrieve drugs, which the C.I. then purchased (Document No. 52-3 at 5). These facts, which are examined in detail above, demonstrate that Williams genuinely believed that the location was numbered 5818, and that the C.I. had purchased drugs from that apartment.

Williams also did not make his statements in the affidavit recklessly. In order to prove reckless disregard for the truth, Plaintiffs would need to present evidence that Williams "in fact entertained serious doubts as to the truth" of the statements. *Hart*,

127 F.3d at 449 (citations omitted). As described above, Williams' statements were based on his knowledge at the time, and his genuine belief that the C.I. had purchased drugs from 4818 Hirsch. There is no evidence that Williams had any doubts about the information in the affidavit. Furthermore, Williams attempted "to identify and confirm the correct physical location and address number of the subject drug dealer," by running two separate drug buys, researching the apartment building online, confirming the location with the C.I., and surveilling the area (Document No. 52 at 6-7). These actions demonstrate that Williams was not acting with a reckless disregard for the truth.

Plaintiffs also argue that Williams' affidavit relies on hearsay without presenting a "substantial basis" for crediting it (Document No. 65 at 4) (citing *Illinois v. Gates*, 462 U.S. 213, 241 (1983)). In *Gates*, the Supreme Court held that:

> A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States,* 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement

that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). As in *Nathanson,* this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits present in cases such as *Nathanson* and *Aguilar,* this area simply does not lend itself to a prescribed set of rules, like that which had developed from *Spinelli.* Instead, the flexible, common-sense standard articulated in *Jones, Ventresca,* and *Brinegar* better serves the purposes of the Fourth Amendment's probable cause requirement.

Id. at 239. The statements in Williams' affidavit go beyond the "wholly conclusory" statements in *Nathanson* and *Aguilar*, which are referenced above. The C.I. in this case did not merely state a belief that drugs were in the listed location; the C.I. himself or herself purchased drugs from the suspect at the listed location (Document No. 48-4 at 3). Furthermore, Williams was nearby during the drug purchase, checked the C.I. for contraband/drugs before and after the purchase, and verified that the "purchased crack" was cocaine. *Id*. Williams' corroborative efforts constitute a substantial basis for crediting the hearsay, and concluding that probable cause to search the residence existed. *Gates*, 462 U.S. at 241 ("Our decisions applying the totality-of-the- circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work.").

Furthermore, under the "totality of the circumstances" the magistrate judge was entitled to rely on the information from the C.I., because the C.I. had previously proven to be reliable.[3] *United States v. McKnight*, 953 F.2d 898, 905 (5th Cir. 1992) ("The Constable's assertion that the confidential informant was 'reliable' and had 'furnished him with information in the past that has proved to be reliable and true' provided the magistrate with sufficient indicia of the reliability and veracity of the informant's tip.").

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[3] Plaintiffs are correct, though, that *U.S. v. Blount*, cited by Defendant, actually refers to information from an ordinary citizen, not a paid informant (Document No. 65 at 8) (citing 123 F.3d 831, 835 (5th Cir.1997)).

Similarly, Williams' affidavit stated that "[t]his informant has on numerous occasions provided officers with information which has been proven to be true and correct. This informant has in the past provided officers with honest and reliable information" (Document No. 48-4 at 3). This statement of reliability further demonstrates that there was a substantial basis for crediting the hearsay of the C.I.

Plaintiffs are unable to demonstrate that Williams violated the Fourth Amendment via his statements in the affidavit; therefore Williams is entitled to qualified immunity on this claim.

2.

Plaintiffs have alleged a violation of a constitutional right under the first prong in determining qualified immunity, as they argue that Defendants "did not have a warrant or any other constitutionally sufficient justification for entering the Plaintiffs' home." *Rogers v. Hooper*, 271 F. App'x 431, 433 (5th Cir. 2008). "The law of this Circuit clearly establishes that searches of the wrong residence are presumptive constitutional violations." *Hunt v. Tomplait*, 301 F. App'x 355, 361 (5th Cir. 2008) (not selected for publication).

However, under the second prong, the Court must determine "whether the defendant's actions were 'objectively reasonable' in light of 'law which was clearly established at the time of the disputed action.'" *Brown,* 623 F.3d at 253 (quoting *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004*)). See also Cannady v. State*, 582 S.W.2d 467, 469 (Tex. Crim. App. 1979)

("The test to be applied to searches outside the scope of a search warrant is whether the search was unreasonable, since only unreasonable searches are prohibited by the Fourth Amendment of the United States Constitution."). Although warrantless searches of a person's home are "presumptively unreasonable," "law enforcement officers are generally granted qualified immunity if the evidence is undisputed that they merely made an honest mistake when entering the incorrect home." *Hunt*, 301 F. App'x at 359 (citations omitted). In a situation where officers entered the wrong residence, the facts must be "consistent with a reasonable effort to ascertain and identify the place intended to be searched." *Rogers*, 271 F. App'x at 435.

The Court finds that Williams made an "honest mistake" when entering the Plaintiffs' home. *Id*. Williams stated that he did not intentionally enter the incorrect residence, but that he "believed the information provided to him by the C.I.," who stated that the drug dealer was exiting from "the farthest apartment to the right in that same building that was described in Williams' affidavit and deposition testimony" (Document No. 52 at 10-11). Williams relied in good faith on this description of the physical location, and therefore entered apartment 5816, rather than 5818.[4] *Id*. *See Williams v. State*, No. A14-

[4] Plaintiffs state in their response that "Defendant argues (without citation to any fact or precedent) that 'the physical location is as important or more important than an address number.' This conclusion is clearly contrary to Texas precedent" (Document No. 74 at 2-3) (citing *Balch v. State*, 134 Tex. Crim. 327, 329, 115 S.W.2d 676, 677 (1938, no pet.); *Ervin v. State*, 165 Tex. Crim. 391, 392, 307 S.W.2d 955, 955-

87-01015-CR, 1989 WL 34433, at *1 (Tex. App. Apr. 13, 1989) (not designated for publication) ("[T]he executing officers are entitled to rely upon the entire description given in the warrant, including the physical description and the allegations of control and occupancy.") (citations omitted); *Fifty-Six Thousand, Seven Hundred Dollars in U.S. Currency v. State*, 710 S.W.2d 65, 71 (Tex. App. 1986), *rev'd on other grounds*, 730 S.W.2d 659 (Tex. 1987) ("Even if the numerical address is wrong, the warrant may still be valid if the description is adequate to direct the officer to the correct place.") (citing *Olivas v. State*, 631 S.W.2d 553, 556-557 (Tex. App. – El Paso 1982, no pet.)); *Guzman v. State*, 508 S.W.2d 375, 375 (Tex. Crim. App. 1974) ("[W]here search warrant directed search of house numbered '7307,' but warrant gave description of house conforming to house numbered '7309,' and house at '7307' did not match any of the physical characteristics of house to be searched, officers were entitled to rely upon the entire description given in the warrant and search of house numbered '7309' was lawful."). The reasonableness of this decision is furthered by the similarity in the end digits, 6 and 8, and the fact that the apartment numbers could only be seen when standing underneath the top of the door, and the numbers are "folded a little at the top".

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56 (1957, no pet.); *Childress v. State*, 163 Tex. Crim. 467, 469, 294 S.W.2d 110, 111 (1956, no pet.)). However, in discussing the three cases cited by Plaintiff, Judge Davidson wrote that "[b]efore the writing of the opinion of the majority of this court in this case, I had deemed it axiomatic that the premises searched must correspond with those described in the search warrant. Such, however, is no longer true." *McCormick v. State*, 169 Tex. Crim. 53, 56, 331 S.W.2d 307, 309 (1960) (Davidson, J., dissenting).

(Document No. 48, Exhibit A at 18).

The Court also finds that Williams made a "reasonable effort to ascertain and identify the place intended to be searched." *Rogers*, 271 F. App'x at 435. Throughout the investigation, Williams "ran two drug buys […] from a suspect known as 'Nash' operating out of the complex;" "used HCAD.ORG to attempt to identify the addresses or physical locations for the various apartments in the subject complex in the 5000 block of Hirsch Rd;" and "used Google Earth's satellite webpage to further attempt to identify the physical locations or address of each of the apartments and buildings in the complex" (Document No. 52 at 6). Williams also "conducted surveillance of the complex between May 7, 2014 and May 20, 2014, and repeatedly saw suspect Nash in the common area of the complex." *Id*. Although hindsight now demonstrates that Williams' actions were insufficient, they were reasonable under the law in this circuit. *See Rogers*, 271 F. App'x at 435. *Hunt v. Tomplait* did not grant qualified immunity to police officers who searched the wrong residence, because the officers did not read the warrant, which is "the most basic step an officer can take in ascertaining the place to be searched." 301 F. App'x at 361. The circumstances here demonstrate far more diligence than that taken in *Hunt*. As Plaintiffs have not demonstrated that the mistaken search of their residence was unreasonable, Williams is entitled to qualified immunity on this issue.

Plaintiffs also argue that the warrant was invalid[5] on its face, as it was "subject to more than one

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[5] The Fifth Circuit has held that "[t]he principles of *Franks* have never been applied to facially invalid warrants,

interpretation" (Document No. 48 at 8). However, the warrant describes the unit as the "far southeast corner of the location," as well as giving the number 5818 (Document No. 48-5 at 2). The physical description of the location clearly designates only one apartment and the address also designates only one apartment; therefore the warrant was not subject to more than one interpretation on its face. *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). *See also United States v. Cotham*, 363 F. Supp. 851, 855 (W.D. Tex. 1973) ("It is well established that an error in the description of the premises to be searched is not automatically a fatal defect."). With the benefit of hindsight, we now know that the C.I. actually purchased drugs from the unit next door to Plaintiffs' (i.e. one unit over from the far southeast corner of the location), and that a unit numbered 5818 does not exist. To the extent that this creates an ambiguity, we must "judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted." *Id.* At the time the warrant was issued, Williams reasonably believed that the C.I. had purchased drugs from the apartment in the far southeast corner, and reasonably believed the C.I.'s statement that the apartment was numbered 5818 (Document No. 52-3 at 5). As discussed above, Williams took several measures to verify this

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and we decline to so extend *Franks* today." *Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006) (dismissing *Franks* claim against officer where "there was insufficient evidence to establish probable cause on the face of [officer's] warrant affidavit"). Therefore, Plaintiffs' allegation of a *Franks* violation, discussed in Section 1, appears to conflict with their allegation that the warrant was invalid.

information. *United States v. Perez*, 484 F.3d 735, 742 (5th Cir. 2007) (investigation found sufficient where "officers performed a public records check, a utilities company check, and an internet white pages check, all indicating" that the residence was occupied by the plaintiff alone). Therefore the warrant was valid when issued.

3.

Finally, Plaintiffs state that Williams "stayed in Plaintiffs' home for an unreasonable period of time after discovering he had no right to be therein," because Williams remained in the residence for "approximately 10 extra minutes" while investigating, without immediately discontinuing the search (Document No. 48 at 9). Plaintiffs claim that Williams is not entitled to qualified immunity, as his behavior "crosses the line between a reasonable mistake and affirmative misconduct that traditionally sets the boundaries of qualified immunity." *Id*. (citing *Simmons v. City of Paris, Texas*, 378 F.3d 476, 479-80 (5th Cir. 2004)). Plaintiffs also argue that the safety sweep done by the officers constitutes a search (Document No. 65 at 21) (citing *Maryland v. Buie*, 494 U.S. 325, 327 (1990)).

In response, Williams states that the officers only conducted a safety sweep of the apartment, taking less than one minute, and spent the remaining ten minutes inside the apartment "sitting with Ms. Thomas on her couch asking her questions to determine if others might be using her apartment unbeknownst to her while she was away" (Document

No. 52 at 12). Therefore, Williams states that the "total time searching was zero." *Id.*

Remaining in the residence

The Supreme Court has stated that, when officers "mistakenly execute a search warrant on the wrong address," they are "required to discontinue the search of respondent's apartment 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." *Simmons*, 378 F.3d at 479 (citing *Maryland v. Garrison,* 480 U.S. 79, 88 (1987)). In *Simmons*, officers mistakenly searched the wrong house. *Id.* The officers stated that they left the house immediately upon realizing their mistake, but the plaintiffs testified that the officers remained inside the house for "five to six minutes" and searched some of the bedrooms. *Id.* at 480. Due to the inconsistencies in testimony, the district court found "a genuine dispute of material fact as to how long the officers remained in the house after discovering that they had entered the wrong house and detained the wrong individuals," which the Fifth Circuit affirmed. *Id.* The Fifth Circuit also stated that:

> Qualified immunity does not provide a safe harbor for police to 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.

Id. at 481. *Simmons* cited with approval the Sixth Circuit case of *Pray v. City of Sandusky*, 49 F.3d 1154 (6th Cir. 1995). *Id.* The facts in *Pray* were similar to *Simmons* and the facts in this case, as the police mistakenly entered the wrong residence. *Id.* (*citing* Pray, 49 F.3d at 1160). In *Pray*, the plaintiffs contended that the defendant officers "secured the Pray residence for an additional four to five minutes" and proceeded to look for "something or someone" after realizing they were in the wrong house. 49 F.3d at 1160. Therefore a genuine issue of material fact remained "to determine which, if any, of the illegal searches and seizures took place *after* the officers discovered or reasonably should have discovered that they were in fact in the wrong residence." *Id.* In the case at hand, both parties are in agreement that Williams remained inside the Plaintiffs' residence after discovering that he was in the wrong location (Document No. 48, Exhibit A at 52; Document No. 52 at 12; Document No. 65 at 21-22). Therefore a genuine issue of material fact does not exist here; the question is solely whether it was unreasonable as a matter of law for Williams to remain in the apartment.

The statements of each officer demonstrate that the execution of the search warrant was aborted, and state that Williams realized soon after the entry and initial sweep that something was not right. Williams himself testified that it took him "maybe five minutes"

to realize that he was in the wrong location (Document No. 48, Exhibit A at 52). Officer Elkin says in his statement that, after the initial entry and sweep of the apartment, he "was informed we were not going to search the residence because Officer Williams felt this was not the correct apartment that was selling narcotics" (Document No. 53-5 at 1). Similarly, Officer Nguyen stated that he assisted with the sweep of the apartment "to clear it for any potential threats," and heard shortly after that "there was a problem with the location" and the search "was going to be aborted." *Id*. at 9. Officer McClelland also stated that "once we were inside the residence and completed our initial sweep, Officer Williams informed us that something wasn't right about the location and we were not going to conduct an evidentiary search." *Id*. at 16.

Plaintiffs argue that Williams was required to leave immediately, regardless of whether a search was performed (Document No. 65 at 21). Plaintiffs cite *Simmons* for the proposition that "[a] decision by law enforcement 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." *Id*. (citing 378 F.3d at 479-80) (emphasis added by Plaintiffs). However, in *Simmons*, the plaintiffs had testified that the officers searched some of the bedrooms after realizing they were in the wrong house. 378 F.3d at 480. Similarly in *Pray*, the officers continued looking through the residence, after realizing they were in the wrong house. 49 F.3d at 1160.

There is a substantial difference between continuing to execute a search of the apartment, and

the actions taken by Williams. Williams testified that he continued talking with Ms. Thomas, to find out if anyone else had access to the apartment (Document No. 48, Exhibit A at 54). Williams also testified that he believed it was "reasonable to stay after the raid to talk to Ms. Thomas" as he "owed her an explanation." *Id*. at 138. Plaintiffs offer no evidence that either Ms. Thomas or her son asked Williams to leave. The cases cited by Plaintiffs do not definitively demonstrate that the actions taken by Williams, after realizing he was in the wrong apartment, were unreasonable as a matter of law. Upon reading *Simmons* and *Pray*, it would be unreasonable for Williams to continue the search; however, Williams could have reasonably interpreted those cases as allowing him to remain in the apartment in order to explain his actions to Ms. Thomas. Therefore Williams could have "reasonably interpreted the law to conclude that" his actions were justified, and qualified immunity as to his remaining in the apartment is appropriate. *Ontiveros*, 564 F.3d at 383 n.1 (citation omitted).

The safety sweep

The case cited by Plaintiffs, *Maryland v. Buie*, describes a protective sweep as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." 494 U.S. at 327. "However, the Fifth Circuit has held that 'arrest is not always, or *per se,* an indispensable element of an in-home protective sweep....'" *Cooksey v. State*, 350 S.W.3d 177, 185 (Tex. App. 2011) (citing *United States v. Gould,* 364 F.3d 578, 584 (5th Cir. 2004)).

According to Williams, immediately on entering the Plaintiffs' home he "went directly to the rear and I believe to the far back bedroom" executing "a sweep of the bedroom for bodies, persons hiding" (Document No. 48, Exhibit A at 49). Williams stated that "other people" finished the sweep, "looking anywhere a body could hide." *Id*. This included looking in the closet and moving things around, and looking under the bed. *Id*. at 49-50. Williams' initial protective sweep took "less than a minute," and then he began talking to Ms. Thomas. *Id*. at 52. The other officers all corroborate that the protective sweep of the apartment took place first, and then Williams made the decision to abort the search (as discussed above). In his statement, Williams stated that his execution of the protective sweep took place within the first minute of his time inside the apartment, during which "it became apparent that the apartment did not give an indication as one being used to store or sell illegal drugs" (Document No. 52-3 at 9-10). Considering the brevity of the protective sweep, which took 30 to 45 seconds, it is unlikely that Williams could have come to a realization that he was in the wrong apartment, and aborted the sweep, before its completion.[6] *Id*. Therefore, as the protective sweep took place before Williams' realization that the officers were in the

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[6] In his deposition, Williams stated that it took him "maybe five minutes" to realize he was in the wrong apartment (Document No. 48, Exhibit A at 52). Regardless, though, he stated that the protective sweep occurred in "less than a minute," so the sweep took place *before* his realization that he was in the wrong place. *Id.*

wrong place, Williams is entitled to qualified immunity on this issue.

Furthermore, there are no cases cited by Plaintiffs which would require Williams to abort a safety sweep upon realization that the officers were in the wrong apartment. Plaintiffs make a lot of the statement in *Buie* that a protective sweep constitutes a search; however, a protective sweep, done for the safety of the officers, is very different from a search for contraband. Under *Pray* and *Simmons*, Williams was on notice that he was required to abort the search upon realizing the officers were in the wrong apartment. However he was not specifically on notice that he was required to abort a protective sweep, further demonstrating that qualified immunity is appropriate.

Conclusion

As described above, Williams is entitled to qualified immunity on Plaintiffs' claims.

Therefore the Court hereby

ORDERS that Plaintiffs' claims against Defendant Williams are DISMISSED.

MELINDA HARMON
UNITED STATES

DISTRICT JUDGE

SIGNED at Houston,
Texas, this 31st day of
March, 2016.

APPENDIX D

Filed 3/6/2018
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20783

BARBARA THOMAS; JOHN THOMAS;
Plaintiffs - Appellants
v.
J.J. WILLIAMS;
Defendant - Appellee

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 2/1/18, 5 Cir., _____, _____ F.3d _____)
Before BARKSDALE, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX E

Deposition of J.J. Williams

May 20, 2015

Q. And each had its own address?

A. Yes.

Q. Each door in the complex of 5800 block of Hirsch each had its own address?

MR. GARDNER: Objection, calls for speculation.

Q. (By Mr. Demond) Do you know whether or not each door inside the 5800 block of Hirsch has its own address?

A. I believe that's correct.

Q. In the description in the warrant, does it describe a duplex of light orange colored brick and light orange trim?

A. Yes.

Q. Does that describe every duplex in the 5800 block of Hirsch?

A. I think so. They're all pretty similar.

***

Q. Do you believe the Thomases were entitled to privacy inside their home before you entered it?

A. Yes.

***

Q. Could you see the inside of plaintiffs' home from outside the premises?

A. I could not.

Q. Did you make any observations of illegal activity occurring inside of the plaintiffs' home?

A. Inside, no.

***

Q. So, when you say the "listed location," you believe that the reader would interpret it to mean the area surrounding that building as opposed to 5818 itself?

A. That's what it means to me.

***

Q. Was the warrant subject to more than one interpretation when you realized the address above the plaintiffs' home was 5816, not 5818?

MR. GARDNER: Objection, vague, speculation.

Q. (By Mr. Demond) Do you understand the question?

A. I think so.

MR. GARDNER: Same objection.

A. Yes, I mean, obviously the numbers were different [...]

***

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.

***

Q. (By Mr. Demond) Is it important to you, that representation to the magistrate that you

watched them go to the listed location?

MR. GARDNER: Object --

A. I don't think --

MR. GARDNER: Objection, calls for speculation, improper predicate.

A. I don't think it's required. Would the judge like to hear it? I'm sure they would.

***

Q. Why did you believe you wouldn't fit in that area?

A. From the -- from the surveillance that I did, everybody that I observed inside that complex were black and I felt that me walking through there would be an instant standout.

***

Q. And, in fact, that apartment was obstructed by other apartments at that same block of Hirsch, was it not?

A. Ms. Thomas' apartment is obstructed, yes.

APPENDIX F

"Request for Admission to Defendant J.J. Williams, No. 11, Answered on February 21, 2015"

Admit or deny that before attempting to execute a search on a home in the 5800 block of Hirsch on or about May 21, 2014, Defendant Williams did not have probable cause to believe criminal activity was occurring within Plaintiffs' residence.

ANSWER:
Defendant admits as to Plaintiff's numbered address.

APPENDIX G

THE STATE OF TEXAS	§	AFFIDAVIT FOR
	§	
COUNTY OF HARRIS	§	SEARCH WARRANT

Issued May 21, 2014

I, Officer J. Williams, am a Certified Peace Office employed by the Houston Police Department and am currently assigned to the Narcotics Division of the Houston Police Department. I do solemnly swear that I have reason to believe and do believe that within a residence located at 5818 Hirsch, Houston, Harris County, Texas 77026, are illegal drugs. contraband including, but not limited to Crack Cocaine, as well as scales, equipment for the manufacture of such drugs, any documents or other evidence such as a surveillance system and/or digital cameras showing care, custody, or control over said premises that may be found within said residence.

The location may be particularly described as a duplex at 5818 Hirsch, Houston, Texas 77026. The duplexes located in the 5800 block of Hirsch all have a separate address for each front door. The duplex door marked " 5818" sits on the east side of Hirsch and the front of the residence faces west. Duplex "5818" is located in the far southeast corner of the location. The duplex is constructed of light orange colored brick, and light orange trim. The numbers 5-8-1-8 are clearly posted by the front door of the duplex. Sajd suspected place, in addition to the foregoing description, also include

all other building, structure, places, and vehicles on said premises and within the curtilage, if said premises is a residence that are found to be under the control of the suspected party named below and in, on, or around which said suspected party may reasonably deposit or secrete property that is the object of the search requested here in.

A picture of the duplexes in the 5800 block of Hirsch pictured below, is attached to the Affidavit of this warrant and incorporated herein for all purposes of this warrant.

Said suspected place is in the charge of and controlled by each of the following named and /or described suspected parties (hereafter called "suspected party," whether one or more), to wit: A Black male known as Little Black", 5'08", I 50-1 60 lbs. 18-25 years old medium skin, and short black hair.

MY BELIEF IS BASED UPON THE FOLLOWING FACTS:

Your Affiant, Officer J. J. Williams, is a Certified Peace Officer employed by the Houston Police

Department and is currently assigned to the Narcotics Division of the Houston Police Department. Affiant has been an officer for 14 year and has conducted many investigations regarding narcotics resulting in successful arrests and prosecutions in the past. Affiant has over two thousand hours of training as a certified peace officer, many of those hours involving narcotics and surveillance training.

Affiant has probable cause for said belief by reason of the following facts and circumstances: Within the past forty-eight hours, your Affiant utilized the assistance of a confidential informant (C. l.), who will remain anonymous for safety reasons. This informant has on numerous occasions provided officers with information which has been proven to be true and correct: This informant has in the past provided officers with honest and reliable information. Your Affiant met with the CJ. at an undisclosed location to brief this information.

After developing a tactical plan the officers with the C.I. proceeded to 5818 Hirsch. Prior to doing so, your affiant checked the C.I. for any contraband, after none were found, supplied the C.I. with an amount of city buy money. The C.I. was then directed to the listed location to purchase an amount of Crack Cocaine. Your affiant observed the C.I. go to, and return directly from, the listed location. The C.I. upon returning, handed your affiant an amount of Crack Cocaine. The C.I. is a past user of Crack Cocaine and can readily identify it by sight. The C.I. advised your affiant that while the C.I. was at the

residence, the C.I. purchased the Cocaine from the listed suspect. The C.I. was advised to come back anytime to purchase more Cocaine. Your affiant checked the C.I. for any contraband, after none were found, dismissed the C.I. and returned to the office. Your affiant later determined the purchased crack to test positive for cocaine content.

WHEREFORE, PREMISES CONSIDERED, your Affiant respectfully requests that a warrant issue authorizing your Affiant, or any other peace officer of Harris County Texas to enter the aforementioned premises located at 5818 Hirsch, Houston, Harris County, Texas 77026, with authority to search for and to seize the property and items set out earlier in this affidavit.

_____

AFFIANT

SWORN TO AND SUBSCRIBED before me on this 21 day of May, 2014.

Judge Denise Collins
208th District Court
Harris County, Texas

APPENDIX H

"Statement of Ofc. L.C. Bronikowski, August 13, 2014:"

[…]

I asked Officer Williams why he didn't verify the numbers on the unit. He 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.

[…]

APPENDIX I

"Statement of Ofc. J.J. Williams, July 21, 2014"

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.

APPENDIX J

"Deposition of Lt. Michael Waterwall
May 20, 2015"

Q. No problem. The third sentence says, "The CI was then directed to the listed location to purchase an amount of crack cocaine"; is that correct?

A. Correct.

Q. Did -- the term "listed location," is that a -- 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 affidavit I would.

APPENDIX K

"Plaintiffs' Reply to Defendant Williams' Response (Dkt. 52) to Plaintiffs' Motion for Summary Judgment (Dkt. 48), Filed August 13, 2015"

2. DEFENDANT'S GROUNDS FOR REFUSING TO CORROBORATE HIS INFORMANT'S INFORMATION CONSTITUTES AN INDEPENDENT VIOLATION OF THE CONSTITUTION

Defendant's refusal to go inside Plaintiffs' complex because it was a black community is insufficient as a matter of constitutional law. 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.

3. THE INFORMANT'S VERACITY WAS CLEARLY QUESTIONABLE

Third, "An informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report." *Mack,* 461 F.3d, at 551 (citing *Gates,* 462 U.S., at 230). Here, the informant's veracity was plainly in question because she told Defendant she bought drugs from outside of a physical address which Defendant concedes does not exist.[4] *Bonds v. State*, 355 S.W.3d 902, 910 (Tex.App.—Corpus Christi 2011) ("[P]robable cause cannot be associated with an address that does not actually exist; that is, when 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)), rev'd on other grounds, 403 S.W.3d 867 (Tex.Crim.App.2013) (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*, 498 U.S. 981, 111 S.Ct. 510, 112 L.Ed.2d 522 (1990)). Therefore, the "value" of the informant's report was inherently suspect, particularly given Defendant's known inability to confirm the existence of 5818 Hirsch before he presented his sworn misrepresentations to the magistrate. Because an informant is wrong about some things, he is more probably wrong about other facts. 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*, 393 U.S., at 427 (WHITE, J., concurring)). Therefore, Defendant's knowledge that his informant's veracity was suspect both before and after he provided his affidavit to the magistrate demonstrates his deliberate indifference to Plaintiffs' well-established constitutional rights and no reasonable juror could ever make a contrary finding given the undisputed facts herein.

4. THE BASIS OF THE INFORMANT'S KNOWLEDGE WAS FACIALLY SUSPECT

Fourth, the informant had no personal knowledge of illegal activity inside any address. Where an "Informant's report was based on a direct, personal observation…that Appellant possesses marijuana in his apartment within the prior forty-eight hours", personal knowledge is clearly established as a matter of law. *Mack*, 461 F.3d, at 551. However, Defendant Williams' affidavit fails to demonstrate that his informant had direct or personal observation of any illegal activity occurring in any home. Specifically, the affidavit never says the informant went inside any home, saw drugs inside any home, or saw the dealer retrieve drugs from any home. In fact, Defendant admits he did not see the informant go in any house in the 5800 block of Hirsch and that the informant allegedly purchased drugs outside.

This violates the Fourth Amendment's reasonableness requirement insofar as the mere

conclusion at issue herein "was not even that of the affiant himself; it was that of an unidentified informant." *Aguilar*, 378 U.S., at 113-14 (abrogated by *Gates*, 462 U.S. 213). The manifest unreasonableness of this result is exponentially exacerbated by the fact that the conclusion was based on the informant's interpretation of the alleged dealer's "body language". Further, to the extent Williams' sworn statement that the informant was "at the residence" implies that the informant went inside same, said representation was yet another material lie under oath.

5. DEFENDANT DID NOT HAVE PROBABLE CAUSE

Fifth, there was no probable cause because the informant's tip had no indicia of reliability and was not corroborated. *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). important." Id., at 204 (citing *Gates*, 462 U.S., at 225); see also *U.S. v. Hirschhorn*, 649 F.2d 360, 363 (5th Cir.1981) (tip from confidential informant sufficient to satisfy Fourth Amendment where it was corroborated by police investigation). "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." *Parish*, 939 S.W.2d, at 204 (emphasis added) (citing (inter alia) *Gates*, 462 U.S., at 245). Here, the informant provided no prediction of future actions and no

information that was independently corroborated. Therefore, there was no probable cause and the warrant was invalid. See *U.S. v. Sanchez*, 689 F.2d 508, 512 (5th Cir.1982) ("'Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.'") (quoting *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327, 332 (1959) (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543, 555 (1925))).

(internal footnotes omitted throughout)

APPENDIX L

"Order (from Magistrate re: Plaintiffs' motions to strike reports and affidavits submitted with Defendant Williams' MSJ and in response to their MSJ), November 9, 2015"

[…]

In particular, the information complained of by Plaintiff as hearsay was not offered for the truth of the matter asserted, but to establish a basis for Defendant Williams' actions and show his state of mind.

[…]

APPENDIX M

"Affidavit of Barbara Thomas, April 26, 2016"

[…]

5. 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.

[…]

APPENDIX N

"Plaintiffs' Response to Defendant Williams' Motion for Summary Judgement (Dkt. 52), September 9, 2015."

[…]

Specifically, Defendant repeatedly states (without evidence) that the informant was reliable and credible. See, *e.g., Id.,* at pp. 5, 6, 7, 10. 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).

[…]

APPENDIX O

"Affidavit of Ofc. J.J. Williams, August 6, 2015"

[…]

Over the next several days, I conducted surveillance on the complex for short amounts of time and always noticed suspect Nash to be in the common areas of the complex or the parking lot of an adjacent corner store.

[…]

APPENDIX P

"Plaintiffs' Motion for Summary Judgment, filed July 15, 2015

[…]

Defendant Williams concedes…he did not have probable cause to believe criminal activity was occurring within Plaintiffs' numbered address at 5816 Hirsch. [citing Plaintiffs' Request for Admission No. 11]

[…]