No. 17-1641

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

PETITIONERS' REPLY BRIEF

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APPENDIX[1]

[1] The Thomases respectfully attach two Orders from the district court which are relevant to contentions made in Williams' brief in opposition. See pp. 1-2, *infra.*

TABLE OF AUTHORITIES

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INTRODUCTION

In his Response, Williams failed to contest any perceived misstatement of:

(1) law cited by Judge Dennis;

(2) fact in the Thomases' Petition; or

(3) law in the Thomases' arguments that:

a. this Honorable Court has unequivocally held "protective sweeps" are searches under the Fourth Amendment;

b. out-of-court statements are inadmissible for the truths of the matters asserted therein; and

c. relief should be granted under Supreme Court Rule 10(a).

Each failure constitutes waiver.[2] Williams also argues he prevails via the Fifth Circuit's so-called "independent intermediary doctrine"[3] because he successfully convinced a magistrate that his lie was truth. Finally, Williams' brief in opposition repeatedly cites affidavits from his expert and a colleague;[4] both of these affidavits were stricken[5] and the district court overruled defendants' objections.[6]

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2 See generally Supreme Court Rule 15.2.

3 Williams' brief in opposition ["BIO"], at 22.

4 BIO, at 11. See also *id.*, at 16, 17, and 22.

5 App. at 95a, *infra.* Compare also *ibid.* with BIO, at 11 (citing struck ROA. 760).

6 App. at 108a-115a, *infra.*

Williams' representations that record evidence supports his contentions facially violate Federal Rule of Civil Procedure 11(b)(3).

I. Williams' Facts Highlight His Unreasonableness.

Williams has judicially admitted that he detained the Thomases in their home.[7] No known American jurisdiction has ever held that officers under comparable facts had *any* authority to detain law-abiding persons in their own homes so they could conduct a more thorough investigation therein. Houston's City Attorney effectively argues its officers are permitted to (1) lie to magistrates, (2) utilize discretion to resolve ambiguities they personally create, and (3) remain in the People's homes for up to 10 minutes asking them questions[8] *and detaining them* even after realizing they are in the wrong home (despite Petitioners' uncontroverted evidence that Ms. Thomas "instructed" Williams to leave her home "several times" and he refused).[9]

Williams also concedes that the original complaints about drug-dealing activity concerned "58**14 1/**" and "58**14** Hirsch Road".[10] First, these initial reports were facially suspect as (1) the first was incomplete and (2) the addresses appear to be different from one another. Second, the drug buy

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7 BIO, at 16 ("William's [sic]…conduct…resulted in…Petitioners'…temporary detainment.").

8 BIO, at 19.

9 Petition, at 27 (quoting App. 67a).

10 BIO, at 6 (emphasis added).

ostensibly occurred at an entirely different address ("58**18**"). Third, Williams admitted his research only "found there is…58**12** and 58**20** listed for the six buildings and twelve apartments."[11] These facts cannot permit anyone to believe they could search 58**16** Hirsch (and detain persons breaking no laws therein[12]), particularly when:

(1) 5816 Hirsch was not identified in the warrant;

(2) the address in the warrant varied from every other relevant address Williams had read or heard about;

(3) all of the homes were similar in appearance;[13]

(4) Williams did not have personal knowledge of the place to be searched;[14]

(5) Williams believed duplexes are "a little tricky";[15] and

(6) Texas appellate courts have expressly advised the City of Houston (and its officers)

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[11] BIO, at 7 (emphasis added).

[12] Compare Petition, at 11 with BIO (failing to dispute same).

[13] Compare Petition, 41 at n. 39 with BIO (failing to dispute same).

[14] Compare Petition, at 9 with BIO (failing to dispute same).

[15] Compare Petition, at 10 with BIO (failing to dispute same).

that nearly identical conduct clearly violates the United States Constitution.[16]

Finally, Williams admits he neither said nor implied the informant went inside any home.[17]

II. Out-Of-Court Statements Are Inadmissible For The Truths Of The Matters Asserted Therein Without An Exception Supported By A Reasonable Indicia Of Reliability.

Out-of-court statements made by an unidentified, unproduced, unavailable, and paid confidential informant[18] cannot simultaneously be both (1) used for the truths of the respective matters asserted therein (*e.g.,* that the informant went anywhere or spoke with anyone) and (2) not hearsay. The absence of any applicable exception is clear from Williams' repeated decisions to avoid the issue in its entirety. These refusals to brief waive any argument that said statements are admissible.

The magnitude of the courts' error in admitting the informant's statements is amplified by the facts

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16 Petition, 36-38 at n. 34 (quoting *State v. Chavarria,* 992 S.W.2d 22, 23-25 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd)).

17 BIO, at 16.

18 See, *e.g.,* BIO at i; *id.,* at 7 ("[W]e…had to verify…with what the C.I. told us when they reported back afterward."); *id.,* at 7-8; *id.,* at 12; *id.,* at 13 (entire first paragraph); *ibid.* (the CI had provided honest and reliable information); *id.,* at 15; *ibid.*; *id.,* at 17; and *id.,* at 19.

that (1) there is no admissible indicia of the informant's reliability[19] and (2) Williams agrees his intent in presenting his affidavit is irrelevant[20] (thereby eliminating the sole grounds upon which the district court found the informant's statements were admissible).[21] Without the informant's statements (which include hearsay within hearsay), Williams has no admissible evidence capable of overcoming his presumptive unreasonableness.[22] Therefore, the lower courts erred when they denied the Thomases' motion for summary judgment and instead granted Williams'.

III. The Parties Appear To Agree The Fifth Circuit Erred.

The Thomases' Petition cited Judge Dennis' dissent for the proposition that the Fifth Circuit plainly erred when it held they exclusively relied upon facts Williams learned "during the course of executing the warrant."[23] Williams expressly agrees (1) he saw

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19 Compare Petition, at 11 (identifying what Williams did not know and would not disclose) with Williams' BIO (failing to dispute same). See also Petition, 22 at n. 17 (the Thomases' motion to compel was denied).

20 BIO, at 20 (admitting Williams' intent is irrelevant). But see *District of Columbia v. Wesby,* 138 S.Ct. 577, 594 (2018) (slip op., at 25) (GINSBURG, J., concurring).

21 See App. at 89a.

22 See *Arizona v. Hicks,* 480 U.S. 321, 326-27, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). See also *Steagald v. United States*, 451 U.S. 204, 211-12, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

23 Petition, at 24.

the address above the Thomases' door "as [he] approached" it[24] and (2) he "recognized the difference" between it and the address in the warrant.[25] This admission evidences the Fifth Circuit's plain error.[26]

IV. Counter-Arguments.

Williams contends, "Petitioners presented no evidence that Officer Williams violated a clearly established right."[27] Williams admits, however, (1) all of the facts in the Thomases' Petition,[28] (2) he "and other officers executed this search warrant on May 24, 2014";[29] (3) he conducted a "security sweep"[30], "safety sweep"[31], or "protective sweep"[32] inside the Thomases' home; (4) he made observations inside the Thomases'

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24 BIO, at 8.

25 *Ibid*. Compare App. 74a and Petition, at 30 (Williams admitted he had a suspicion something was wrong before entering the Thomases' home) (citing Dennis, J., dissenting) with BIO (failing to dispute same).

26 Compare also Petition, at 23 (the Fifth Circuit erred when it found Nash was "always" in the common areas of the complex) with BIO, at 7 (admitting Williams also saw Nash in "the parking lot of an adjacent corner store").

27 BIO, 20 at § I(B)(2).

28 See generally Supreme Court Rule 15.2.

29 BIO, at 8.

30 BIO, at 9.

31 *Ibid.*

32 Compare Petition, at 14 (Williams admitted to performing a protective sweep inside Petitioners' home) with BIO (failing to dispute same).

home;[33] (5) he moved things around therein;[34] (6) the Thomases were detained;[35] and (7) he "asked her [Ms. Thomas] various questions to determine if another person was using her apartment to sell drugs"[36] (even after she incontrovertibly "instructed" him to leave). The City Attorney's suggestion that these facts *cannot* constitute a constitutional violation shows the City of Houston (also a defendant below) harbors official disregard for the text of the Fourth Amendment and this Honorable Court's jurisprudence honoring the guaranteed protections therein.

Williams cites to *United States v. Ventresca.*[37] There, this Honorable Court observed:

> "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."[38]

Presumably, this Honorable Court did not mean to imply that doubtful or marginal cases should be resolved by warrants that contained imaginary

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[33] Compare BIO, at 9 ("[I]t became apparent that the apartment did not give an indication as one being used to store or sell illegal drugs.") with *Hicks,* 480 U.S., at 325 ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable.").

[34] Compare Petition, at 36 with BIO (failing to dispute same).

[35] BIO, at 16.

[36] BIO, at 9.

[37] 380 U.S. 102 (1985).

[38] *Id.,* at 109.

addresses based on intentional misrepresentations of material facts to otherwise impartial magistrates.

Williams also cites to the Fifth Circuit's decision in *United States v. Blount.*[39] The warrant in *Blount* was based on an "ordinary citizen",[40] not a paid informant as here. Additionally, there was no reason to doubt the informant's truthfulness in *Blount*. Here, the undisputed facts clearly demonstrate the informant's unreliability, the unavailability of *any* evidence tending to show her reliability, and Williams' pre-entry recognition that he might be entering the wrong home.[41]

V. National importance and circuit splits.

Williams argues the Thomases' Petition should be denied because they failed to present evidence of a circuit split. Both parties remain unaware of any case from any other circuit that suggests § 1983 police officer defendants are entitled to qualified immunity based upon out-of-court statements from an unidentified, unproduced, unavailable, and paid confidential informant that are being introduced for the material and respective truths of the matters asserted therein. This elementary issue must be addressed to protect both the rules of evidence and the rule of law in the Fifth Circuit; otherwise, police officers will be incentivized to simply fabricate

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39 123 F.3d 831 (5th Cir. 1997).

40 *Blount,* 123 F.3d, at 835.

41 BIO, at 9.

informants so that they may reliably avoid civil liability.[42]

Williams also argues, "Petitioners have not shown an issue of national interest."[43] After the instant Petition was filed, a Mississippi police officer defendant filed for relief from this Honorable Court in *Barnes v. Gerhart* (No. 18-99). Barnes appeals the Fifth Circuit's *denial* of his motion for summary judgment and repeatedly references Respondent Williams' conduct (which he characterizes as "far less reasonable").[44] Therefore, a national interest has been created via (1) the Fifth Circuit's materially inconsistent jurisprudence concerning officers' entries into the People's homes despite the absence of warrants therefor, consent, or exigencies and (2) the immediate utilization of the Fifth Circuit's erroneous decision herein as an exemplar of relative reasonableness. This immeasurably dangerous precedent must be reversed.

VI. Williams Appears To Miscomprehend This Honorable Court's Supreme Nature.

Williams incomprehensibly argues that, "[t]he judge's determination precludes finding of

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[42] The Thomases do not concede the confidential informant at issue herein exists.

[43] BIO, at 23. But see Karen Blum, *Symposium: Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1918 n. 193 (2018) (quoting *Thomas v. Williams,* 719 F. App'x 346, 357 (5th Cir. 2018) (Dennis, J., dissenting)).

[44] *Barnes v. Gerhart,* No. 18-99 (Petition, at 9).

Constitutional [sic] violation as a matter of law."[45] Most importantly, the Fifth Circuit's wholly court-created "independent intermediary doctrine" is intrinsically incapable of restricting this Honorable Supreme Court from doing anything. Additionally, Williams' attempt to invoke a doctrine which purports to insulate officers from § 1983 liability (even when officers admit they materially[46] lied to an intermediary) evidences a dire need to eradicate this particularly egregious form of judicial activism from American jurisprudence. This doctrine finds no basis in the text of the Constitution, the Bill of Rights, the Magna Carta, the common law, or this Honorable Court's jurisprudence; instead, it purports to place government officials beyond the reach of federal law and provides them with a perverse incentive to convincingly lie under oath to those who act as venerated intermediaries between the People and those who seek to seize them under color of law. The lower courts did not address this issue and Williams did not cross-appeal. Finally, the Fifth Circuit's doctrine would not protect Williams for his decision to detain the Thomases.

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45 BIO, at 22.

46 Compare Petition, 13 at n. 7 (Williams believed his sworn representation that he observed the informant "go to the listed location" was important to the judge) with BIO (failing to dispute same).

VII. The Fifth Circuit Refuses To Apply Correct Summary Judgment Standards.

The Thomases respectfully (1) aver Judge Dennis continues to raise alarms concerning the Fifth Circuit's ongoing refusal to view facts in § 1983 cases in the light most favorable to summary judgment non-movants,[47] (2) agree with Judge Dennis' repeated

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[47] *Melton v. Phillips,* 875 F.3d 256, 268-69 (5th Cir. 2017) (en banc) (Dennis, J., dissenting, joined by Graves, J.), *cert. denied,* No. 17-1095, 2018 WL 707021 (Apr. 16, 2018); *Dawson v. Anderson County*, 769 F.3d 326, 327 (5th Cir. 2014) (Haynes, J., dissenting from denial of rehearing en banc, joined by Graves and Dennis, JJ.), *cert. denied,* 135 S. Ct. 1453 (2015); *Rayborn v. Bossier Parish Sch. Bd.,* 881 F.3d 409, 420-21 (5th Cir. 2018) (Dennis, J., concurring in part and dissenting in part); *Arthur v. BNSF Ry. Co.,* No. 16-10270, 2017 U.S. App. LEXIS 12108 (5th Cir. 2017) (unpub., slip op., at 11-12) (Dennis, J., dissenting in part); *Valderaz v. Lubbock Cnty. Hosp. Dist.,* 611 Fed. Appx. 816, 823 (5th Cir. 2015) (unpub.) (Dennis, J., dissenting) (slip op., at 14, 18, 21-22 {citing *Tolan* and observing the court's opinion reflected "a clear misapprehension of summary judgment standards}, & 23); *Dawson v. Anderson County*, 566 F. App'x 369, 371-74, 376-79 (5th Cir. 2014) (Dennis, J., dissenting); *Tolan v. Cotton,* 538 F. App'x 374 (5th Cir. 2013) (Dennis, J., dissenting from denial of rehearing en banc, joined by Graves, J.); and App. 18a-29a (Dennis, J. dissenting). See also *Davenport v. Edward D. Jones & Co.,* 891 F.3d 162, 173 (5th Cir. 2018) (Higgason, J., concurring in part and dissenting in part); *Pratt v. Harris Cnty,* 822 F.3d 174, 186, 190-91, and n. 3 (5th Cir. 2016) (Haynes, J., concurring and dissenting); and *Mason v. Lafayette City-Paris Consol. Gov't,* 806 F.3d 268, 283, 289 (5th Cir. 2015)

analyses, and (3) aver the denial of relief in this case will have a devastating impact on the Fourth Amendment, summary judgment standards, properly preserved evidentiary issues, the ability to settle egregious constitutional violations, and the increasingly absurd results rendered via qualified immunity and refusals to honor fundamental principles of law.[48]

VIII. Errata.

The Thomases' Petition contains an error. Page 4 at note 2 cites "pp. 53-54 at n. 38"; this should read "pp. 41-42 at n. 39".

IX. Conclusion.

The instant case presents a truly remarkable opportunity for this Honorable Court to re-establish its apparently disputed supremacy over inferior courts which refuse to honor fundamental principles

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(Higginbotham, J., concurring in part and dissenting in part) (citing *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014)).

[48] See, *e.g., Zadeh v. Robinson,* 17-50518 (5th Cir. Aug. 31, 2018) (unpub.) (affirming Texas Medical Board personnel were entitled to qualified immunity because they could have believed they were entitled to execute subpoenas *instanter* and seize doctors' medical records without affording them the opportunity to seek pre-compliance review), *pet. for reh'g en banc submitted* (Oct. 22, 2018). See also *id.* (slip op., at 21) (Willett, J., concurring *dubitante*). Cf. *Barry v. Freshour*, 17-2026 (5th Cir. Oct. 4, 2018) (slip op., 5 at n. 3), *pet. for reh'g en banc filed, response requested* (due Nov. 13, 2018).

of law. The dangers presented herein are magnified by the City of Houston's enormous size and apparent official belief (as expressed through its City Attorney) that Williams "acted reasonably"[49] when he:

(a) lied to the magistrate;

(b) permissibly used the phrase "the listed location" to refer to a non-particularized place in a search warrant affidavit;[50]

(c) utilized discretion to alter the physical address in the warrant without personal knowledge of the place to be searched;

(d) forcibly entered the Thomases' home;

(e) performed a protective sweep therein (that the City Attorney contends was not a search);[51]

(f) detained the Thomases in their home; and

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[49] BIO, at 22.

[50] Compare Petition, at 9 (Williams "watched the informant go to the non-particularized 'building where [Petitioners'] duplex is located[.]'") with BIO (failing to dispute same). Compare also *ibid.* with Petition at 9-10. C.f. BIO, at 17 (averring Williams' descriptions and observations are "customary and accepted") (citing stricken evidence).

[51] BIO, at 19 ("Williams testified that there was no search of Petitioners' apartment.").

(g) provided the magistrate with "probable cause"[52] despite:

(i) swearing it was associated with an address he admits does not exist;[53] and

(ii) admitting "he did not have probable cause to believe criminal activity was occurring in Petitioners' home."[54]

These dangers are of particular concern because Texas appellate courts have already provided notice to Houston Police Department officers that they definitively violated the Constitution under nearly identical facts.[55]

Williams concedes he did not see where his informant went, that he could not find 5816 or 5818 in any database, and that he refused to independently verify the physical address to which his informant allegedly went because "the complex occupancy [was] all black[.]"[56] When confronted with an address he admits did not exist, Williams simply guessed. The Thomases respectfully aver (1) further briefing herein is unnecessary given the vast expanse of Williams' waiver via a largely copied brief from below (which does not even attempt to address, *inter alia*, the dispositive, well-known, and necessary evidentiary

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52 See BIO, at 14-16. See also *id.,* at 23.

53 Compare Petition, at 8 with BIO (failing to dispute same).

54 *Ibid*. Williams's representation that he provided the magistrate with probable cause he did not have violates Federal Rules of Civil Procedure 11(b)(2) and 11(b)(3).

55 *Chavarria,* 992 S.W.2d, at 23-25.

56 App. 81a.

issue plainly presented herein) and (2) summary judgment should be granted in their favor due to (a) the presumptive unreasonableness of Williams' conduct and (b) the absence of any admissible evidence capable of overcoming said presumption.

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

Respectfully submitted,

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