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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 20-20477

RICHARD WINFREY, JR.,

Plaintiff—Appellee,

versus

SAN JACINTO COUNTY,

Defendant,

MEGAN WINFREY,

Plaintiff—Appellee,

versus

LENARD JOHNSON, FORMER SAN JACINTO COUNTY SHERIFF'S DEPARTMENT DEPUTY,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:10-CV-1896
USDC No. 4:14-CV-448

(Filed Feb. 17, 2022)

Before CLEMENT, SOUTHWICK, and WILLETT, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX B

REVISED 2/17/2022

United States Court of Appeals
for the Fifth Circuit

No. 20-20477

RICHARD WINFREY, JR.,

Plaintiff—Appellee,

versus

SAN JACINTO COUNTY,

Defendant,

MEGAN WINFREY,

Plaintiff—Appellee,

versus

LENARD JOHNSON, *Former San Jacinto County Sheriff's Department Deputy*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 4:10-CV-1896, 4:14-CV-448

(Filed Feb. 17, 2022)

Before CLEMENT, SOUTHWICK, and WILLETT, *Circuit Judges.*

PER CURIAM:*

This is the fourth appeal in this § 1983 case.[1] Having heard oral argument and reviewed the briefing, record, and applicable law, we find no reversible error and AFFIRM, thus upholding the jury verdict in favor of Plaintiffs.

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

[1] *See Winfrey v. San Jacinto Cnty. (Winfrey I)*, 481 F. App'x 969 (5th Cir. 2012); *Winfrey v. Rogers (Winfrey II)*, 901 F.3d 483 (5th Cir. 2018); *Winfrey v. Johnson (Winfrey III)*, 766 F. App'x 66 (5th Cir. 2019).

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

No. 20-20477

RICHARD WINFREY, JR.,

Plaintiff—Appellee,

versus

SAN JACINTO COUNTY,

Defendant,

MEGAN WINFREY,

Plaintiff—Appellee,

versus

LENARD JOHNSON, *Former San Jacinto County Sheriff's Department Deputy*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 4:10-CV-1896, 4:14-CV-448

(Filed Nov. 12, 2021)

Before CLEMENT, SOUTHWICK, and WILLETT, *Circuit Judges.*

PER CURIAM:*

This is the fourth appeal in this § 1983 malicious-prosecution case.[1] Having heard oral argument and reviewed the briefing, record, and applicable law, we find no reversible error and AFFIRM, thus upholding the jury verdict in favor of Plaintiffs.

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

[1] *See Winfrey v. San Jacinto Cnty. (Winfrey 1)*, 481 F. App'x 969 (5th Cir. 2012); *Winfrey v. Rogers (Winfrey II)*, 901 F.3d 483 (5th Cir. 2018); *Winfrey v. Johnson (Winfrey III)*, 766 F. App'x 66 (5th Cir. 2019).

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NOs. 4:10-CV-1896 and 4:14-CV-0448

FINAL JUDGMENT

(Filed Aug. 20, 2020)

This action came before the Court and a jury. Consistent with the jury verdict rendered on February 18, 2020, this Court enters judgment in favor of Plaintiffs Richard Winfrey, Jr. and Megan Winfrey on their Fourth Amendment claims and against Defendant Lenard Johnson, as follows:

(1) Verdict for Plaintiff Richard Winfrey, Jr. and against Defendant Lenard Johnson on the Fourth Amendment claim, and $750,000.00 in compensatory damages to Plaintiff Richard Winfrey, Jr.;

(2) Verdict for Plaintiff Megan Winfrey and against Defendant Lenard Johnson on the Fourth Amendment claim, and $250,000.00 in compensatory damages to Plaintiff Megan Winfrey.

This Judgment is entered pursuant to Federal Rule of Civil Procedure 58 and this action is terminated.

SIGNED at Houston, Texas, this 20th day of August, 2020.

/s/ George C. Hanks, Jr.
GEORGE C. HANKS, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NOs. 4:10-CV-1896 and 4:14-CV-0448

ORDER

(Filed Aug. 20, 2020)

Before the Court are the Winfreys' and Johnson's cross-motions for judgment: Johnson's Opposed Motion for Judgment on the Verdict (Dkt. 271) and Opposed Renewed Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50 (Dkt. 272), and the Winfreys' Motion for Judgment Under Rule 58. Dkt. 274.

Megan Winfrey and Richard Winfrey Jr. brought these two, now-consolidated actions against the Texas Rangers, San Jacinto County, Fort Bend County, and sheriffs and sheriff's deputies from those counties in 2010 and 2014, respectively. The basic facts and procedural history are set out more fully in the opinions of the United States Court of Appeals for the Fifth Circuit. *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018)

("*Winfrey II*"), *cert. denied sub nom. Johnson v. Winfrey*, 139 S. Ct. 1549 (2019); *Winfrey v. Johnson*, 766 F. App'x 66 (5th Cir. 2019) ("*Winfrey III*"), *cert denied*, 140 S. Ct. 377 (2019). In summary, the Winfreys alleged that San Jacinto County Deputy Sheriff Lenard Johnson violated their constitutional rights by presenting to a judge a warrant for their arrest for capital murder which contained material factual misstatements and omissions. After nearly ten years of litigation, including multiple appeals to the Court of Appeals, the Winfreys' remaining claims against Johnson were reassigned to this Court. Dkt. 169.

In its rulings on the Winfreys' appeals, the Court of Appeals issued a clear mandate to the district court. *Winfrey II*, 901 F.3d at 493; *Winfrey III*, 766 F. App'x at 71. In its order remanding Richard Winfrey, Jr.'s case, the Court of Appeals concluded that "[t]he primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements." *Winfrey II* at 498. The Fifth Circuit also emphasized that the case was remanded for "trial without delay in a manner not inconsistent with this opinion." *Id.* The Court of Appeals reiterated this ruling when it remanded Megan Winfrey's appeal. *Winfrey III* at 71 ("[T]he panel vacated the district court's judgment and remanded for trial 'on the factual issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior.").

In accordance with the Court of Appeals' rulings, this Court promptly consolidated the two Winfreys' cases, set them for trial, and presided over the parties' presentation of evidence to a jury on the issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavits when seeking arrest warrants for the Winfreys.

After nine days of trial, the jury found that Johnson "knowingly and intentionally, or with reckless disregard for the truth, . . . omit[ted] the following information in the arrest-warrant affidavit[s] for" both of the Winfreys' arrests: "omitting David Campbell's statement that Burr was both stabbed and shot, although he was only stabbed," "omitting David Campbell's statement that Richard Winfrey, Sr., had cut off Burr's body part, which was contradicted by the physical evidence," and "omitting that David Campbell identified a cousin as participating in the murder with Richard Winfrey, Sr., instead of Megan Winfrey and Richard Winfrey, Jr." Dkt. 266 at 1–2. The jury found that the "sum of money, if paid now in cash," that "would fairly and reasonably compensate Plaintiff Megan Winfrey for damages" which they "found Defendant Lenard Johnson's wrongful conduct caused" her was $250,000. Dkt. 266 at 3. They found that the sum that would fairly and reasonably compensate Richard Winfrey, Jr. was $750,000. Dkt. 266 at 3.

The Court finds that the evidence presented at trial supports this verdict, and that the law supports

entry of judgment for the Winfreys in accordance with the verdict.

Accordingly, the Winfreys' Motion for Judgment Under Rule 58 (Dkt. 274) is **GRANTED**. Johnson's Opposed Motion for Judgment on the Verdict (Dkt. 271) and Opposed Renewed Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50 (Dkt. 272) are **DENIED**.

The Court will separately enter final judgment.

SIGNED at Houston, Texas, this 20th day of August, 2020.

/s/ George C. Hanks, Jr.
GEORGE C. HANKS, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20022

MEGAN WINFREY,

Plaintiff - Appellant

v.

LENARD JOHNSON, Former San Jacinto County Sheriff's Deputy Chief,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-448

(Filed Mar. 26, 2019)

Before JONES, HAYNES, and OLDHAM, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

After her murder conviction was overturned, Megan Winfrey sought damages under § 1983 and has appealed the district court's grant of partial summary

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

judgment dismissing her Fourth and Fourteenth Amendment claims. Because a panel of this court has already addressed the same issues in her brother's case, this panel is bound by precedent to reverse and remand on Winfrey's Fourth Amendment claim. The district court's dismissal of Winfrey's Fourteenth Amendment claims was proper, however, and this court declines to address as untimely her arguments concerning her expert witness. Accordingly, the district court's partial summary judgment order is REVERSED in part and AFFIRMED in part, and the case is REMANDED.

I. BACKGROUND

Megan Winfrey ("Megan") was convicted of capital murder but her conviction was overturned on appeal after six years imprisonment. *Winfrey v. Texas*, 393 S.W.3d 763, 774 (Tex. Crim. App. 2013) ("*Winfrey I*"). Lenard Johnson, the Appellant, is a former deputy at the San Jacinto County Sheriff's Office who drafted and signed the arrest warrants for Megan, her father Richard Winfrey, Sr. ("Senior"), and her brother Richard Winfrey, Jr. ("Junior"). He also took witness testimony from David Campbell, a jailhouse informant who implicated the Winfreys in the murder of school janitor Murray Wayne Burr. The facts underlying this appeal need not be repeated as they have been set forth in Junior's case. *See Winfrey v. Rogers*, 901 F.3d 483, 488–90 (5th Cir. 2018) ("*Winfrey II*").

This appeal arises from the district court's opinion disposing of both siblings' cases. Megan's Fourth Amendment claim is nearly identical to that brought by Junior, with a few factual distinctions. First, while Junior was tried and acquitted after sitting in jail for two years, Megan was convicted by a jury and exonerated by the Texas Court of Criminal Appeals. Second, pertinent to her arrest warrant, deputies collected additional statements about Megan from teachers, including a statement by a teacher that Megan walked up to Burr in the school hallway, put her arm in his, and asked him when he was going to spend some money on her and take her out; a statement that after a fight with him Megan said she wished someone should "beat the shit" out of Burr; and another teacher's statement that Megan had "assaulted her in some way" and threatened her. Johnson contends these statements add support to his urging of probable cause to arrest her. Third, the arrest warrant mistakenly indicated that the bloodhound drop-trail scent used Junior's scent, when it in fact used the scent of Winfrey's boyfriend Chris Hammond. But there was no such error as to the dogs' alert on Megan's scent.

Winfrey was arrested on or about March 15, 2007 and detained pending trial. She was reindicted for capital murder and conspiracy to commit murder on December 13, 2007, tried in October 2008, convicted on October 9, 2008, and sentenced to life imprisonment. On February 27, 2013, the Texas Court of Criminal Appeals found the evidence legally insufficient to support

Winfrey's conviction and rendered a judgment of acquittal for each offense. *Winfrey I*, 393 S.W.3d at 774.

Winfrey filed a § 1983 lawsuit, originally alleging that Johnson, Rogers, San Jacinto County's then-Sheriff Clark, and Pikett violated her constitutional rights by using fabricated evidence in connection with the investigation, arrest and prosecution. She also pursued state law malicious prosecution claims against Johnson, Rogers, and Pikett. After a collection of dismissals, substitutions, settlements, and summary judgments, including dismissals under the Texas Tort Claims Act ("TTCA") or due to immunity, only Johnson remains as a defendant, and the district court granted summary judgment for Johnson on all claims. At a hearing about expert reports, the district court also *sua sponte* decided against allowing one of Winfrey's experts, Dr. Marshall, from testifying.

Winfrey presents four arguments on appeal. First, she argues that her Fourth Amendment claim that Johnson knowingly or recklessly made false statements in his arrest-warrant affidavit should go to trial. Second, she asserts a Fourteenth Amendment claim of malicious prosecution under procedural due process. Third, she presents a due process claim that Johnson fabricated Campbell's trial testimony, violating her right to a fair trial. Fourth, Winfrey argues that the district court abused its discretion in excluding her damages expert from testifying at trial.

II. STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment *de novo*. *Brewer v. Hayne*, 860 F.3d 819, 822 (5th Cir. 2017). Summary judgment is appropriate when the movant is entitled to judgment as a matter of law and there is no genuine dispute of material fact. *Id.* "To survive summary judgment, the nonmovant must supply evidence 'such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986)). The court must draw all reasonable inferences in the non-movant's favor and view the evidence in the light most favorable to the non-movant. *Id.*

"A qualified immunity defense alters the usual summary judgment burden of proof . . . Once 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. The plaintiff bears the burden of negating qualified immunity, but all inferences are drawn in his favor." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010) (quoting *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir.2005)). Finally, this court reviews the district court's probable-cause determination *de novo*. *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005).

III. DISCUSSION

1. Fourth Amendment

Megan argues that Johnson's conduct violated her Fourth Amendment right to be free from arrest without a good-faith showing of probable cause and his duty not to knowingly, intentionally, or recklessly make false statements in an arrest warrant affidavit. The substance of her claims is that Johnson's arrest-warrant affidavit contained material misstatements and, even if corrected, lacked probable cause. Megan relies on this court's decision in *Winfrey II*.[1] Johnson contends that he is entitled to qualified immunity, Megan never actually pled a Fourth Amendment violation arising from the arrest warrant, the statute of limitations has run on Megan's claim, and independent intermediaries blocked any causal chain running from the arrest warrant to Megan's incarceration.[2]

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[1] Because of the timing of their briefs, the parties cite *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018), but that decision was withdrawn and superseded on denial of rehearing by *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018). The opinions are identical in substance and outcome except for the analysis of qualified immunity.

[2] Megan's lawsuit is timely. Since the *Winfrey II* panel concluded that Megan's § 1983 claim more closely resembles the tort of malicious prosecution, focused as it is on the wrongful institution of legal process, *see Winfrey II*, 901 F.3d at 492–93, the statute of limitations on that claim did not begin to run until "the prosecution ends in the plaintiff's favor." *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc). In Megan's case, that would be February 27, 2013, the date her conviction was overturned.

In *Winfrey II*, the panel analyzed the affidavits for Megan and Senior in making its legal determinations. *Winfrey II*, 901 F.3d at 489 n.1. It held that the affidavits contained material misrepresentations and omissions,[3] and that a "corrected" affidavit would not have satisfied the probable-cause requirement. *Id.* at 496. Thus, the panel vacated the district court's judgment and remanded for trial "on the factual issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior." *Id.* at 488. Because the panel in *Winfrey II* rejected most of the same objections Johnson now raises, Johnson is precluded from relitigating these issues. Johnson offers only two new reasons why this panel is not bound by a panel decision interpreting the sufficiency of the same warrant, but those, too, are unavailing.

First, Johnson contends that additional facts here support probable cause as to Megan. He argues that the mistaken drop-trail scent – which identified the scent as Junior's when it was in fact that of Megan's boyfriend – was not a mistake as to Megan. But the

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[3] The court found that "Junior provides evidence that Johnson made false statements in his affidavit by (1) omitting Campbell's statements that were contradicted by the physical evidence; (2) misstating that Pikett's drop-trail from Burr's house to the Winfrey house used Junior's scent, when the drop-trail actually used Hammond's scent; and (3) omitting Campbell's inconsistencies between his statements, that is, between Campbell's first statement—which was related in the affidavit—that said that Megan and Junior helped Senior to murder Burr and Campbell s inconsistent later statement that Senior's cousin was the accomplice." *Winfrey II*, 901 F.3d at 494.

irrelevance of this misstatement does not add probable cause against Megan. Additionally, he argues that the warrant affidavit included statements from teachers about Megan, her relationship with Burr, and a possible propensity for violence. But, as the district court noted, these statements, eyebrow-raising though they might be, do not link Megan to murder. When weighed against the misstatements detailed in fn. 2 above, these factual distinctions do not detract from the *Winfrey II* panel's conclusion that "a reasonable magistrate would not have issued a warrant on the basis of this corrected affidavit, because the addition of the omitted material facts would have dissuaded the judge from issuing the warrant." *Id.* at 496.

Second, Johnson contends that the independent intermediary doctrine applies here because, unlike in *Winfrey II*, and indeed noted by that panel, there was an additional proceeding before a state judge which Johnson argues acted as an independent intermediary. Under the independent-intermediary doctrine, "'if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation' for the Fourth Amendment violation." *Jennings v. Patton*, 644 F.3d 297, 300–01 (5th Cir. 2011) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)). But this doctrine only applies "where all the facts are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the

independent intermediary." *Cuadra*, 626 F.3d at 813. The panel in *Winfrey II* rejected Johnson's independent-intermediary argument as to the grand jury because it was "unclear" whether Johnson presented all the facts to the grand jury. *Winfrey II*, 901 F.3d at 497.

Johnson attempts to distinguish *Winfrey II* because here, unlike there, a state judge *also* determined there was probable cause to arrest Megan. That is a fair point because the *Winfrey II* panel itself recognized the distinction and distinguished Junior's case – where "[n]one of these hearings addressed . . . whether there was probable cause to arrest Junior" – from Megan's case, where there was at least one hearing where the judge "determined that there was probable cause to arrest Megan." *Id.* But the exception to the independent-intermediary doctrine applies with equal force because, under *Winfrey II*, it is Johnson's burden to prove the omitted material information was presented to the judge. He has not done so. And again, since the panel in *Winfrey II* analyzed the very same affidavit, this court is bound by its rejection of the independent-intermediary doctrine. After *Winfrey II*, we have no leeway to conclude otherwise.

The only remaining question is the extent of Megan's potential damages. Based on *Winfrey II*, the misstatements in Johnson's arrest-warrant affidavit meant it lacked probable cause. The Supreme Court has made clear that pretrial seizures, even if they follow legal process, can violate the Fourth Amendment if the initial seizure occurred without probable cause and nothing later remedied the lack of probable cause. *See*

Manuel v. City of Joliet, 137 S. Ct. at 918–19 ("If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment."). That is the case here – the material misstatements and omissions in the arrest-warrant affidavit led to Winfrey's unlawful arrest and pretrial detainment.

But that is not the end of this story, because Megan was reindicted and tried on evidence obtained after further investigation of her case. Megan does not contradict the record evidence that Deputy Johnson's involvement in her investigation ceased following the issuance of the arrest warrant in February 2007, at which point the investigation was taken over by the Texas Rangers and the District Attorney's investigator, James Kirk. The further investigation included follow-up interviews with Campbell and other witnesses. At trial, new and potentially incriminating testimony about an alibi attempt and evidence tampering were offered by her ex-husband Hammond and her boyfriend at the time of the killing, Jason King. *See Winfrey I*, 393 S.W.3d at 766. Consequently, at the time of reindictment, the initial lack of probable cause ceased being the cause of Winfrey's detention and damages ceased accruing from Johnson's Fourth Amendment violation.

Additionally, although the Texas Court of Criminal Appeals ultimately reversed Winfrey's conviction, that court's painstaking review of the totality of the circumstantial evidence underlying her conviction

undermines Megan's argument that the initial lack of probable cause supporting her arrest persisted through reindictment, trial, and incarceration, and continued to taint the case against her. In concluding that the evidence was insufficient to prove Megan's guilt beyond a reasonable doubt, the court nowhere suggested that there was no probable cause to indict or try her for murder. In fact, the majority found that the evidence did indeed raise a suspicion of her guilt. The court's analysis further supports the conclusion that the initial lack of probable cause ceased with Megan's reindictment and so did the damages.

2. Fourteenth Amendment

In addition to her Fourth Amendment claims, Megan presses two claims under the Fourteenth Amendment: a malicious prosecution claim and a claim resulting from the Johnson's alleged use of fabricated evidence at trial. The malicious prosecution argument fails because Megan has failed to show that Johnson violated clearly established law. The fabrication of evidence argument fails because no reasonable jury could conclude on the facts before us that Johnson fabricated evidence.

a. Malicious Prosecution

Megan argues that because her liberty was constrained beyond her initial arrest, and because Texas law provides an insufficient state tort law remedy, she may press a § 1983 federal malicious prosecution claim

under procedural due process. She acknowledges, however, that the Supreme Court did not approve a substantive due process claim arising from malicious prosecution, *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 (1994), and no subsequent decision of that Court or this court has rendered such a claim cognizable, much less "clearly established." *See*, *e.g.*, *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc). Even if this court accepted Megan's invitation to break new legal ground, which we do not, Johnson would be entitled to qualified immunity. The district court's dismissal of the malicious prosecution claim was correct.

b. Fabrication of Evidence

Megan's second Fourteenth Amendment claim concerns Johnson's interaction with jailhouse informant David Campbell. Megan contends that a reasonable jury could decide Johnson fabricated Campbell's testimony because Campbell's pre-arrest interviews yielded conflicting facts at odds with the forensic evidence; Campbell himself believed that Johnson was trying to "stage" something against Megan; and Campbell testified to his suspicions at trial. These facts do not support a claim of fabricated evidence.

All of the Supreme Court and other cases on which Megan relies deal with manufactured evidence or perjured witnesses. In *Mooney*, for example, the court found a due process violation where there was a "deliberate deception of court and jury by the presentation of testimony known to be perjured" by *prosecutors*.

Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 342 (1935); *see also Pyle v. Kansas*, 317 U.S. 213, 63 S. Ct. 177 (1942). *Brown v. Mississippi*, 297 U.S. 278, 286, 56 S. Ct. 461, 465 (1936) involved the coercion of confessions by use of physical violence. *Napue v. People of State of Ill.*, 360 U.S. 264, 270, 79 S. Ct. 1173, 1177 (1959) involved the use of false testimony by a witness to curry favor with a prosecutor who might provide favors to the witness. In *Miller v. Pate*, 386 U.S. 1, 6, 87 S. Ct. 785, 788 (1967), "[t]he prosecution deliberately misrepresented the truth" by "consistent and repeated misrepresentation" that shorts stained with paint were actually stained with blood. The lone precedential Fifth Circuit case Megan cites, *Boyd v. Driver*, 579 F.3d 515 (5th Cir. 2009) (per curiam), involved the claim that prison employees gave perjured testimony at a criminal trial and destroyed and tampered with video evidence. These cases all involve a motivated person who undertook to create or destroy evidence presented at trial in support of convictions.

The facts of this case are quite different. Johnson took statements from Campbell on two occasions before he swore out the warrant affidavit. Megan has no basis for asserting that Johnson had any involvement in Campbell's testimony at trial; his connection to the case terminated with her arrest and Johnson did not even testify at her trial. The prosecutors alone were responsible for Campbell's trial testimony. Moreover, Campbell testified according to his own free will, never admitted any falsehoods in his trial testimony, and indeed truthfully related his own misgivings about any

improper influence Johnson may have been asserting. Thus, Megan offers no evidence that Johnson inappropriately influenced Campbell's testimony. According to Megan, the most damning piece of evidence is Campbell's suggestion that Johnson was "trying to make a story," but this opinion criticizes Johnson's conduct *prior* to the arrest, in Johnson's first interview with Campbell, and there is no indication that Johnson *influenced* Campbell's later testimony at trial. Additionally, the mere fact that Campbell presented one of the two versions that he had previously related regarding Senior's story – that Megan and Junior, not the cousins, were present with Senior in the house when Burr was murdered – would not allow a reasonable jury to conclude that Johnson fabricated Campbell's testimony. There is thus no genuine issue of material fact supporting Johnson's fabrication of evidence.

3. Exclusion of Damages Expert

Winfrey's final claim is that the district court abused its discretion by *sua sponte* excluding her damages expert in violation of the Federal Rules of Evidence. Johnson asserts that because none of the orders from which Megan has appealed involved the expert, and since this case did not go to trial, the district court's statements were merely an "interlocutory statement of opinion." This court is inclined to agree. Megan's arguments are largely a disagreement with the district court about how to apply federal evidentiary rules. Moreover, the district court has wide discretion in such cases: "with respect to expert testimony

offered in the summary judgment context, the trial court has broad discretion to rule on the admissibility of the expert's evidence and its ruling must be sustained unless manifestly erroneous." *Hathaway v. Bazany*, 507 F.3d 312, 317 (5th Cir. 2007) (citation and internal quotation marks omitted). In any event, there is no formal order to review, and based on this opinion, any prognostication by this court on expert evidence that Megan may offer in the future is premature.

CONCLUSION

The district court's judgment is **REVERSED** as to the Fourth Amendment claim, **AFFIRMED** as to the Fourteenth Amendment claims, and the case is **REMANDED** for further proceedings consistent herewith.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20702

D.C. Docket No. 4:10-CV-1896

RICHARD WINFREY, JR.,

Plaintiff - Appellant

v.

LACY ROGERS, Former San Jacinto County Sheriff; LENARD JOHNSON, Former San Jacinto County Sheriff's Department Deputy,

Defendants - Appellees

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

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.*

JUDGMENT ON REHEARING

(Filed Oct. 9, 2018)

This cause was considered on the record on appeal and was argued by counsel.

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* District Judge of the Western District of Texas, sitting by designation.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee, Lenard Johnson, pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-20702

RICHARD WINFREY, JR.,

Plaintiff - Appellant

v.

LACY ROGERS, Former San Jacinto County Sheriff; LENARD JOHNSON, Former San Jacinto County Sheriff's Department Deputy,

Defendants - Appellees

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

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ON PETITION FOR REHEARING

(Filed Oct. 9, 2018)

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.*

E. GRADY JOLLY, Circuit Judge:

Treating Defendant-Appellee Lenard Johnson's petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED.

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* District Judge of the Western District of Texas, sitting by designation.

The petition for rehearing en banc is also DENIED. The prior opinion, *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018), is withdrawn, and the following opinion is substituted. The modifications to the original opinion are minor and do not affect the substance or outcome of the earlier opinion, except in Part III.A, which now holds that Johnson's omission of the fact that the blood and hair found at the crime scene did not match Richard Winfrey Jr. ("Junior") or Megan Winfrey was not a "material" omission, and which reflects that it is Junior's burden to overcome qualified immunity, not Johnson's burden to show that qualified immunity applies.

Junior was arrested and charged with murder after a botched investigation and various alleged violations of Junior's Fourth Amendment rights. The State tried him on murder charges. The jury acquitted him in twenty-nine minutes, but only after he had served some 16 months in prison. He brought this 42 U.S.C. § 1983 action against various officers of San Jacinto County, Texas. After some seven years of litigation—including one appearance before this Court, *see Winfrey v. San Jacinto Cty.*, 481 F. App'x 969 (5th Cir. 2012) (*Winfrey I*)—defendants have come and gone, leaving only the defendant Deputy Sheriff Lenard Johnson to answer for Junior's charges of constitutional violations. Junior claims that Deputy Johnson violated his rights by signing an arrest-warrant affidavit that lacked probable cause by omitting and misstating key facts. This unconstitutional warrant, he alleged, resulted in his unlawful arrest and imprisonment. Johnson moved for summary judgment on the basis of

qualified immunity. The district court granted Johnson's motion, and Junior appeals.

We VACATE the district court's judgment and REMAND for trial essentially on the factual issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior. Because this litigation has continued for over seven years, including two appeals before this Court, we emphasize that this case must go to trial without further delay.

I.

Murray Wayne Burr was found murdered in his home in San Jacinto County, Texas, in August 2004. The San Jacinto County Sheriff's Office—including Sheriff Lacy Rogers and Deputy Johnson—and the Texas Rangers focused their investigation on three suspects: then-seventeen-year-old Junior; his then-sixteen-year-old sister, Megan Winfrey; and their father, Richard Winfrey, Sr. ("Senior").

Several weeks after the murder, the investigative blunders began. Texas Ranger Grover Huff requested that Keith Pikett, a deputy from a nearby law enforcement agency, assist the investigation by running "scent lineups." This dubious adventure required Pikett to call upon two of his pet bloodhounds and to acquire scents from four suspects—Megan; Junior; Megan's boyfriend, Chris Hammond; and Hammond's friend, Adam Szarf. Huff, then, following the procedure that

Pikett established, gathered scents from the suspects—by asking each person to rub a piece of gauze on his or her skin and put that gauze in a paper bag—and from the victim—by rubbing gauze against Burr's clothes. Pikett, rather "unscientifically," also carried around in a duffel bag filler scents which he had gathered from prisoners at the Fort Bend County Jail. He placed this bag in his SUV, in which his dogs rode daily.

Pikett proceeded to conduct a "drop-trail" exercise with his dogs. That exercise was conducted at the crime scene where Huff provided the hounds with a scent sample. Huff thought he had provided the scent for Junior, but he mistakenly scented the dogs for Hammond instead. Huff notified Pikett and the other investigators about the mistake after the test, and both Huff and Pikett mentioned it in their formal police reports.

Meanwhile, Junior and Megan allowed investigators to collect their DNA to compare with DNA found in blood discovered at Burr's home. The laboratory reported that the blood did not belong to either. The investigators also wanted to compare Megan's hair to hair found at the murder scene. Sheriff Rogers wrote a search-warrant affidavit to obtain Megan's hair, but he failed to mention the lab report showing her blood was not at the scene. He also misstated that the drop-trail was conducted using Junior's scent pad instead of Hammond's. Further, he did not acknowledge the incidental fact that all forensic evidence from the crime scene did not match the Winfreys. Perhaps recognizing

the fumbles in the process, the investigation was put on hold.

After stalling for a year, the investigation restarted when a jailhouse informant, Campbell, came forward with a story incriminating the Winfreys in Burr's murder. Campbell said that while he and Senior were in the same jail cell, Senior confessed to murdering Burr. Johnson visited and interviewed Campbell. There, Campbell told him: (1) Megan and Junior helped Senior get into Burr's house, (2) Senior severely beat up Burr and cut his neck, (3) Senior cut off Burr's genitals and stuck them in Burr's mouth, (4) Junior and Megan were in Burr's house the whole time, and (5) Senior had wanted to kill Burr because Burr's neighbor told Senior that Burr had touched one of Senior's kids. Johnson wrote a report of Campbell's story and noted that the details of the injuries were generally accurate in relation to the physical evidence, except that Burr's genitals were not cut off and put in his mouth.

Johnson visited Campbell a month later, taking Rogers with him. Campbell's story changed. First, Campbell added that Burr was killed in his living room, which Johnson said was not known to the public at that time. Second, he said that Senior stabbed and shot Burr, though there was no evidence that Burr was shot. Third, Campbell now claimed that one of Senior's cousins, not Junior or Megan, was the accomplice to the murder. Finally, Campbell said that Senior confessed to stealing a pistol and long gun from Burr's house and that he put these guns in a nearby "hollow."

Investigators found a hollow matching the description, but no weapons were there. Johnson said the public did not know about the stolen weapons.

Pikett, undeterred by earlier failures, conducted a second scent lineup using Senior's scent. The bloodhounds alerted each time on Senior's scent.

Deputy Sheriff Johnson signed two affidavits to obtain search warrants to obtain Junior's and Senior's hair from each of them to compare with the hair found in Burr's home. Each affidavit omitted any reference to: (1) the inconsistencies between Campbell's two interviews, (2) the inconsistencies between Campbell's statements and the other evidence, (3) Junior's and Megan's blood not being found at the scene, and (4) the hair found at the scene not matching Burr or Megan. The judge issued both warrants to Johnson, but the hair obtained from Burr's home did not match the hair of either Junior or Senior.

Nevertheless, Johnson signed affidavits for arrest warrants for Megan, Junior, and Senior.[1] The

[1] The record contains only the arrest-warrant affidavits for Senior and Megan. Johnson argues that the arrest-warrant affidavit for Senior cannot be used as a replacement for Junior's arrest affidavit, which is not in the record due to Junior's alleged intentional spoliation. But this issue was already resolved in *Winfrey I*, 481 F. App'x 969. There, we concluded that we would look to the affidavits for Megan and Senior because: (1) they "suggest that . . . the same affidavit language [was used] for all three Winfreys"; (2) "investigation reports indicate that warrants were obtained for [Junior] on the same day Johnson executed an arrest-warrant affidavit for Megan"; and (3) "Rogers indicated that the drop-trail evidence and Campbell's 'jailhouse snitching'

arrest-warrant affidavits also omitted the same inconsistencies as the search-warrant affidavits, and additionally omitted the fact that the hairs at the crime scene did not belong either to the Winfreys or Burr.

Junior was thus charged with capital murder and sat in jail for two years before his case was tried in June 2009. On June 12, he was found not guilty after twenty-nine minutes of jury deliberation.

On May 26, 2010, Junior filed this § 1983 lawsuit against every police investigator involved in his murder case. At this point in this lengthy litigation, only his claim against Deputy Sheriff Johnson remains. Junior says that Johnson violated his constitutional rights by using false information to secure arrest and search warrants and by failing to disclose exculpatory evidence.

This case has visited us before. *See generally Winfrey I*, 481 F. App'x 969. There, we vacated the district court's grant of summary judgment in favor of Johnson and remanded for additional discovery on whether Johnson violated the Fourth Amendment by acting with reckless disregard for the truth, as opposed to merely carelessness or negligence, when he included a

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established probable cause to obtain 'a search warrant for the hairs of my *suspects*.'" *Id.* at 978. Because of the law-of-the-case doctrine, we find that the prior panel's decision "should continue to govern" this case. *See Musacchio v. United States*, 136 S.Ct. 709, 716 (2016) (quoting *Pepper v. United States*, 562 U.S. 476, 506 (2011)).

material falsehood and omitted material information in his warrant affidavits. *Id.* at 979–81.

On remand, the district court held a hearing related to multiple *Daubert* motions. Junior contends that, at that hearing, the district court barred Junior's expert, David Kunkle, from testifying at trial.

After discovery concluded, Johnson again moved for summary judgment. First, Johnson argued that Junior's claim against Johnson was time-barred. But the district court ruled that it was not barred because the statute of limitations period began when Junior was acquitted, and he filed his lawsuit within a year of his acquittal. Second, the court examined whether Johnson violated Junior's Fourth Amendment rights by recklessly omitting and misstating certain facts in his search- and arrest-warrant affidavits. The court found that one omission was not reckless: omitting Campbell's statements that were inconsistent with each other. But it found that others were reckless: omitting Campbell's statements that were contradicted by the physical evidence and omitting the DNA and hair evidence that did not link the Winfreys to the scene, which could show that someone other than the Winfreys had to have been present in Burr's house. The court did not say whether Johnson's inclusion of the statement that "the drop-trail from the crime scene to the Winfrey house used [Junior]'s scent" was reckless. Third, the court decided that Johnson nevertheless was protected by qualified immunity, even though he violated Junior's rights, because a reasonable

magistrate, reviewing a corrected affidavit, would have found probable cause to search and arrest Junior.

Junior timely appealed. He contends: (1) his arrest-warrant claim is not time-barred; (2) Johnson is not entitled to qualified immunity; (3) the district court abused its discretion in excluding his expert; and (4) if the Court reverses and remands, it should remand this matter to a different judge.

II.

A.

The first issue we address is whether Junior has a valid Fourth Amendment claim. We conclude that he does.

Junior's complaint never alleges in magic words that Johnson violated his rights under the Fourth Amendment. Nevertheless, although the parties have argued this case in a confusing manner from the start, both sides have argued, at times, that the case involves a Fourth Amendment federal malicious-prosecution claim; at other times, they have argued whether the claim involves a Fourteenth Amendment due process claim. In any event, as the case is presented before us now, there is a proper Fourth Amendment claim because of the law-of-the-case doctrine. In *Winfrey I*, this Court decided that this case presented a Fourth Amendment claim, concluding that Johnson was not entitled to qualified immunity on summary judgment because Junior alleged that Johnson violated the

Fourth Amendment by signing objectively unreasonable arrest-warrant affidavits. 481 F. App'x at 979. Additionally, on remand, both sides argued the Fourth Amendment malicious-prosecution issue, and the district court decided the case as a Fourth Amendment case.

"The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio*, 136 S.Ct. at 716 (quoting *Pepper*, 562 U.S. at 506). The doctrine is meant to promote judicial efficiency so that appellate courts do not continually have to reexamine subsequent proceedings in the same case. *See Chapman v. Nat'l Aeronautics & Space Admin.*, 736 F.2d 238, 241 (5th Cir. 1984). It forecloses reexamination on a subsequent appeal. *Pegues v. Morehouse Par. Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). But the law-of-the-case doctrine does not apply when "(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such cases, or (3) the decision was clearly erroneous and would work manifest injustice." *Lyons v. Fisher*, 888 F.2d 1071, 1075 (5th Cir. 1989). Here, none of the exceptions apply, because the relevant precedent was decided before the suit was filed in 2011, the evidence has remained the same throughout, and the decision was not clearly erroneous and did not risk manifest injustice.

Furthermore, we agree that a Fourth Amendment claim is cognizable under the facts here. This Court

has held that although there is no "freestanding constitutional right to be free from malicious prosecution," "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example." *Castellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc). In *Albright v. Oliver*, 510 U.S. 266 (1994), a plurality of the Supreme Court said that malicious-prosecution claims must be based on the Fourth Amendment, rather than on "the more generalized notion of 'substantive due process,'" because the Fourth Amendment is the explicit textual source against this type of government behavior. *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). And recently, in *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017), the Supreme Court considered whether a plaintiff had stated a Fourth Amendment claim when he was arrested and charged with unlawful possession of a controlled substance based upon false reports written by a police officer and an evidence technician. *Id.* at 915. There, the Court said the plaintiff's "claim fits the Fourth Amendment, and the Fourth Amendment fits [the plaintiff's] claim, as hand in glove." *Id.* at 917. And it held "that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." *Id.* at 920.

These cases fully support a finding that the Fourth Amendment is the appropriate constitutional basis for Junior's claim that he was wrongfully arrested due to the knowing or reckless misstatements and omissions

in Johnson's affidavits. We, therefore, hold that a Fourth Amendment claim is presented, and we will decide the remainder of the issues based upon this legal conclusion.

B.

Johnson argues that Junior's claim is time-barred. Junior was arrested on February 8, 2007. His prosecution began in June 2009, and he was acquitted on June 12. He filed this suit on May 26, 2010.

Section 1983 provides a federal cause of action, but federal courts look to state's statute of limitations for personal-injury torts to decide when § 1983 claims toll. *See Wallace v. Kato*, 549 U.S. 384, 387 (2007); *see also Piotrowski v. City of Hou.*, 237 F.3d 567, 576 (5th Cir. 2001) ("The statute of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state."). "In Texas, the applicable limitations period is two years." *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993); *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) ("[A] person must bring suit . . . not later than two years after the day the cause of action accrues."). But "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388. "In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts." *Manuel*, 137 S.Ct. at 920.

The accrual date depends on whether Junior's claim more closely resembles one for false imprisonment or one for malicious prosecution. *See id.* at 921–22 (remanding the case to the Seventh Circuit to consider whether the claim was more like a false imprisonment or a malicious prosecution). A false-imprisonment claim is based upon "detention without legal process." *Wallace*, 549 U.S. at 389. It "begins to run at the time the claimant becomes detained pursuant to legal process." *Id.* at 397. A malicious-prosecution claim is based upon "detention accompanied . . . by *wrongful institution* of legal process." *Id.* at 390. It "does not accrue until the prosecution ends in the plaintiff's favor." *Castellano*, 352 F.3d at 953.

Johnson urges us to find that this case fits within *Wallace v. Kato*. There, the Supreme Court found that the plaintiff's unlawful warrantless-arrest Fourth Amendment claim resembled a false-imprisonment claim, because the constitutional violation occurred when the plaintiff was arrested without a warrant instead of when the conviction was later set aside. 549 U.S. at 397. Law enforcement officers transported the fifteen-year-old plaintiff to a police station—without a warrant or probable cause to arrest him—and interrogated him into the early morning. *Id.* at 386, 389. So, the Court found that the plaintiff's claim accrued when he was initially arrested. *Id.* at 397.

Here, we find that Junior's claim is more like the tort of malicious prosecution, because Junior was arrested through the wrongful institution of legal process: an arrest pursuant to a warrant, issued through

the normal legal process, that is alleged to contain numerous material omissions and misstatements. Junior thus alleges a wrongful institution of legal process—an unlawful arrest *pursuant to* a warrant—instead of a detention with no legal process. Because Junior's claim suggests malicious prosecution rather than false imprisonment, his claim accrued when his criminal proceedings ended in his favor on June 12, 2009. He filed his suit well within the two-year limitations period on May 26, 2010. So Junior's claim survives the time bar.

III.

A.

Even if the claim is not time-barred, Johnson argues, this case must not proceed further because he is entitled to qualified immunity.

This court reviews the district court's grant of summary judgment de novo. *Brewer v. Hayne*, 860 F.3d 819, 822 (5th Cir. 2017). Summary judgment is appropriate when the movant is entitled to judgment as a matter of law and there is no genuine dispute of material fact. *Id.* We must draw all reasonable inferences in the non-movant's favor and view the evidence in the light most favorable to the non-movant. *Id.* "To survive summary judgment, the non-movant must supply evidence 'such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

When resolving qualified immunity on summary judgment, courts determine (1) whether the facts, taken in the light most favorable to the party asserting the injury, show the officer violated a federal right and (2) whether the right was "clearly established" when the violation occurred. *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1865–66 (2014). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The Court does not need "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* The Court uses a standard of "objective reasonableness" to define "the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley v. Briggs*, 475 U.S. 335, 344 (1986). Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). And it "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (quoting *Malley*, 475 U.S. at 341).

Clearly established law is not determined "at a high level of generality." *Ashcroft*, 563 U.S. at 742. Instead "[t]he dispositive question is 'whether the

violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S.Ct. at 308 (quoting *Ashcroft*, 563 U.S. at 742). The inquiry must look at the specific context of the case. *Id.*

Here, the clearly established constitutional right asserted by Junior is to be free from police arrest without a good faith showing of probable cause. Since *Franks v. Delaware*, 438 U.S. 154 (1978), it has been clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes "a false statement knowingly and intentionally, or with reckless disregard for the truth" and (2) "the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155–56. In *Franks*, the Supreme Court observed that the warrant requirement is meant "to allow the magistrate to make an independent evaluation of the matter." *Id.* at 165. It requires affiants to "set forth particular facts and circumstances underlying the existence of probable cause," including those that concern the reliability of the information and the credibility of the source to avoid "deliberately or reckless false statement[s]." *Id.*

Still, "negligence alone will not defeat qualified immunity." *Brewer*, 860 F.3d at 825. "[A] proven misstatement can vitiate an affidavit only if it is established that the misstatement was the product 'of deliberate falsehood or of reckless disregard for the truth.'" *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (quoting *Franks*, 438 U.S. at 171). Recklessness requires proof that the defendant "'in fact entertained serious doubts as to the truth' of the statement."

Hart v. O'Brien, 127 F.3d 424, 449 (5th Cir. 1997) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)), *abrogation on other grounds recognized by Spivey v. Robertson*, 197 F.3d 772, 775 (5th Cir. 1999).

Here, we conclude that Junior alleges a clearly established constitutional violation. Under the first prong of *Franks*, Junior must present evidence that Johnson, through material omissions or otherwise, made "a false statement knowingly and intentionally, or with reckless disregard for the truth." 438 U.S. at 155. Junior provides evidence that Johnson made false statements in his affidavit by (1) omitting Campbell's statements that were contradicted by the physical evidence; (2) misstating that Pikett's drop-trail from Burr's house to the Winfrey house used Junior's scent, when the drop-trail actually used Hammond's scent; and (3) omitting Campbell's inconsistencies between his statements, that is, between Campbell's first statement—which was related in the affidavit—that said that Megan and Junior helped Senior to murder Burr and Campbell's inconsistent later statement that Senior's cousin was the accomplice. We find that this showing is also sufficient to demonstrate that there is an issue of material fact as to whether Johnson acted intentionally, knowingly, or recklessly, because Junior alleges that Johnson either knew or should have known that these material omissions and false statements could lead to an arrest of Junior without probable cause. In short, the evidence presented is sufficient to support a finding that his conduct was unreasonable

in the light of the well-established principle requiring probable cause for the issuance of an arrest warrant.

Yet, we must proceed further to the second prong of *Franks* in order to resolve whether "the allegedly false statement is necessary to the finding of probable cause," as required by the *Franks* analysis. 438 U.S. at 156. To determine whether the false statement was necessary for this finding, *Franks* requires us to consider the faulty affidavit as if those errors and omissions were removed. We then must examine the "corrected affidavit" and determine whether probable cause for the issuance of the warrant survives the deleted false statements and material omissions. *See Franks*, 438 U.S. at 156 (saying that courts must excise false statements); *United States v. Bankston*, 182 F.3d 296, 305–06 (5th Cir. 1999) (applying *Franks* to omissions and using a corrected affidavit that "contain[ed] the allegedly exculpatory conversation" to determine whether that affidavit would establish probable cause to authorize electronic surveillance), *overruled on other grounds by Cleveland v. United States*, 531 U.S. 12 (2000). The warrant will be valid only if the corrected affidavit establishes probable cause for Junior's arrest.

This Court reviews the district court's probable-cause determination de novo. *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). Probable cause requires only "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). Probable cause is a "practical and commonsensical standard." *Florida v. Harris*, 568 U.S. 237, 244

(2013). It looks to the "totality of the circumstances" to determine whether the magistrate with "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief'" to find that the suspect committed the crime for which he is being arrested. *See id.* at 243 (alterations in original) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion)).

So we turn to review the "corrected" affidavit to determine whether probable cause was established that Junior murdered Murray Wayne Burr. Examining the totality of the circumstances, we find that the corrected affidavit does not contain sufficient information to satisfy the probable-cause requirement.[2] A corrected affidavit would contain the following facts, which were omitted from Johnson's affidavit. First, a corrected affidavit would include reference to the material fact that Pikett used the scent of Christopher Hammond, Megan's boyfriend, instead of Junior's. This omitted information was necessary for the state-trial judge to consider, because it seriously affects whether Junior was present at the scene of Burr's murder. There was no other physical evidence that connected Junior to the murder scene besides the scent lineup. Second, a corrected affidavit would have referred to Campbell's statement that Senior's cousin—not Megan and Junior, like he had said earlier—let Senior into Burr's

[2] The district court thought there was enough information to support probable cause to arrest Junior because of: (1) a possibly romantic relationship between Burr and Megan; (2) Megan's desire for Burr's hidden money; (3) the presence of Junior's, Megan's, and Senior's scents on Burr; and (4) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

house to kill Burr. Although this fact would not have mattered as to an arrest warrant for Senior, it certainly was material for Junior, because in one scenario, he was connected to the murder, and in the other, he may not have been present at the scene. Third, a corrected affidavit would have apprised the state-trial judge that Campbell's statements contradicted aspects of the physical evidence.[3] Campbell said that Burr was both stabbed and shot—although he was only stabbed—and that Senior had cut off Burr's body part, which was not true. Although neither of these false statements, considered independently, would necessarily have been fatal to the affidavit—because Senior could have told Campbell anything—together with Campbell's other statements, these would have served to undermine Campbell's reliability. Weighing the totality of the circumstances, we conclude that a reasonable magistrate would not have issued a warrant on the basis of this corrected affidavit, because the addition of the omitted material facts would have dissuaded the judge from issuing the warrant.

In sum, assuming all factual disputes in favor of Junior, we hold (1) there is an issue of material fact as to whether Johnson recklessly, knowingly, or

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[3] Although Junior argues that the absence of a match between Junior's and Megan's blood with evidence from the scene "suggests that someone else was involved in the murder," we do not think the record supports that any blood but Burr's was found at the scene. The best inference from the blood DNA, then, is that whoever killed Burr wore gloves or simply avoided any injury by the victim. And Junior's claim that a single female hair found at the scene—that was not Megan's—is not a "material" fact.

intentionally made material misstatements and omitted material information and (2) a corrected affidavit would not show probable cause to arrest Junior. Thus, Junior has satisfied his burden of showing that there is an issue of material fact as to whether Johnson violated his clearly established rights, and he is entitled to present his case to the factfinder.

B.

Still, Johnson further contends that he is not liable to Junior because there were two independent intermediaries that intervened to break the causal chain between Johnson's alleged Fourth Amendment violation and Junior's incarceration: (1) the grand jury that indicted Junior and (2) the state judge who presided over the Winfreys' trial. We conclude that neither independent intermediary broke the causal chain between Johnson's faulty affidavit and Junior's incarceration.

Under the independent-intermediary doctrine, " 'if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation' for the Fourth Amendment violation." *Jennings v. Patton*, 644 F.3d 297, 300–01 (5th Cir. 2011) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).[4] "[E]ven an officer who acted

[4] Junior urges us to overrule our independent-intermediary doctrine based on *Manuel v. City of Joliet*, but we cannot do that and find it unnecessary. In *Manuel*, the Supreme Court held "that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." 137 S.Ct. at 920.

with malice . . . will not be liable if *the facts* supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's independent decision breaks the causal chain and insulates the initiating party." *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016) (quoting *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988)), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579 (2017). But the chain of causation between the officer's conduct and the unlawful arrest "is broken only where *all the facts* are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent

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The Court said that a grand jury indictment that "was entirely based on false testimony" could not expunge the plaintiff's Fourth Amendment claim. *Id.* at 920 n.8. But it did not hold that officers can never be insulated from liability based on later determinations by an intermediary when all the necessary information was placed before that intermediary. Instead, the Court affirmed a principle that we have consistently followed: when an intermediary's proceeding is tainted by an officer's unconstitutional conduct, the independent-intermediary doctrine does not apply. *Compare id.* ("[I]f the proceeding is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights. . . ."), *with Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579 (2017) (stating that under the "taint" exception, "an independent intermediary's probable cause finding does not protect law enforcement officials whose 'malicious motive . . . lead[s] them to withhold any relevant information.'" (alteration in original) (quoting *Cuadra*, 626 F.3d at 813)).

intermediary." *Id.* (emphasis added) (quoting *Cuadra*, 626 F.3d at 813).

Here, the record does not indicate that the material information, which we have noted was omitted from Johnson's affidavit, was presented either to the grand jury or the state judge. Stated differently, as far as this record is concerned, the only information before a grand jury was the information in Johnson's affidavit. Neither the plaintiff nor defendant has shown otherwise.

First, because, at best, it is not clear whether "all the facts [were] presented to the grand jury," *Cuadra*, 626 F.3d at 813, we hold that the independent-intermediary doctrine does not apply.

Second, Johnson contends that the state-trial judge found probable cause to authorize Junior's continued detention, thereby insulating Johnson from liability. But the record does not show that the judge ever ruled that there was probable cause to detain Junior. At one hearing, the judge determined that there was probable cause to arrest Megan, but nothing about Junior. And in other hearings, the judge decided whether certain evidence should be allowed at trial and whether Senior should be granted a directed verdict. None of these hearings addressed the central question today: whether there was probable cause to arrest Junior. So we have no basis to find that the subject material omitted information was presented to the state-trial judge.

IV.

We now turn from the state proceedings to the procedural errors that Junior asserts in the federal proceeding below. Junior contends that the district court excluded the testimony of David Kunkle, a former police chief and Junior's expert witness. He contends this exclusion was an abuse of discretion. But after our examination of the record, we conclude that the district court never decided whether Kunkle could testify at trial. We are a court of appeals and errors. Inasmuch as the district court made no decision and issued no ruling, it could not have made an error or otherwise created an issue for appeal. We therefore decline to address the exclusion of David Kunkle's testimony until the district judge has expressly ruled on the issue.

Junior contends that the district judge orally ruled from the bench to exclude Kunkle from trial on October 20, 2014. But at that hearing, the judge never explicitly ruled that Kunkle could not testify. He said,

> And there is no salvageable part of the police chief's, [Kunkle,] as I recall. . . . It's simply, it's what we tried very hard to get away from back in the early 80s. And I don't remember when Daubert was, somewhere in there; but I have always believed that expert testimony had to mean something. And we got anybody with a decent resume could say anything was pretty much the rule for a long time.
>
> And the Supreme Court finally said they have to know something in particular about

> what is going on and it has to be cogent. There is no peer review for police chiefs. The city council, but they're not really peers there, something else entirely different.

Although strongly suggestive, this statement did not expressly grant or deny Johnson's motion to exclude the testimony of Kunkle. Further, the district judge indicated in his minute entry that "an order on the motion" would be entered following the hearing, but no such order was ever entered.

Furthermore, the Supreme Court has made clear that trial judges must play a "gatekeeping" role when examining the reliability of experts, and the court's inquiry must be "tied to the facts" of the particular case. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993)). The district court is required to make a ruling and provide articulable reasoning before we can review whether its decision was proper. Here, if the question arises on remand, the district court will need to make clear its basis for its ruling on Kunkle's testimony.

V.

Finally, Junior requests that this Court remand the matter to a different district judge. We find no basis for that request.

VI.

In this opinion, we have held that (1) Junior has alleged a valid Fourth Amendment claim against Johnson; (2) Junior's claim is not time-barred; (3) Johnson has not shown that his alleged conduct is protected by qualified immunity; (4) a corrected affidavit did not establish probable cause; (5) Johnson is not protected by the independent-intermediary doctrine; (6) because the district court did not expressly rule whether to exclude Kunkle, we do not address whether the court abused its discretion; and (7) we find no basis for remanding the matter to a different district judge. The primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements. This case should go to trial without delay in a manner not inconsistent with this opinion.

Accordingly, the judgment of the district court is

VACATED and REMANDED.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-20702

RICHARD WINFREY, JR.,

Plaintiff-Appellant,

v.

LACY ROGERS, Former San Jacinto County Sheriff; LENARD JOHNSON, Former San Jacinto County Sheriff's Department Deputy,

Defendants-Appellees.

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

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(Filed Feb. 5, 2018)

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.*

192*192 E. GRADY JOLLY, Circuit Judge.

Richard Winfrey Jr. ("Junior") was arrested and charged with murder after a botched investigation and various alleged violations of Junior's Fourth

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* District Judge of the Western District of Texas, sitting by designation.

Amendment rights. The State tried him on murder charges. The jury acquitted him in fifteen minutes, but only after he had served some 16 months in prison. He brought this 42 U.S.C. § 1983 action against various officers of San Jacinto County, Texas. After some seven years of litigation—including one appearance before this Court, *see Winfrey v. San Jacinto Cty.*, 481 Fed. Appx. 969 (5th Cir. 2012) (*Winfrey I*)—defendants have come and gone, leaving only the defendant Deputy Sheriff Lenard Johnson to answer for Junior's charges of constitutional violations. Junior claims that Deputy Johnson violated his rights by signing an arrest-warrant affidavit that lacked probable cause by omitting and misstating key facts. This unconstitutional warrant, he alleged, resulted in his unlawful arrest and imprisonment. Johnson moved for summary judgment on the basis of qualified immunity. The district court granted Johnson's motion, and Junior appeals.

We VACATE the district court's judgment and REMAND for trial essentially on the factual issue of whether Johnson acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior. Because this litigation has continued for over seven years, including two appeals before this Court, we emphasize that this case must go to trial without further delay.

I.

Murray Wayne Burr was found murdered in his home in San Jacinto County, Texas, in August 2004. The San Jacinto County Sheriff's Office—including Sheriff Lacy Rogers and Deputy Johnson—and the Texas Rangers focused their investigation on three suspects: then-seventeen-year-old Junior; his then-sixteen-year-old sister, Megan Winfrey; and their father, Richard Winfrey, Sr. ("Senior").

Several weeks after the murder, the investigative blunders began. Texas Ranger Grover Huff requested that Keith Pikett, a deputy from a nearby law enforcement agency, assist the investigation by running "scent lineups." This dubious adventure required Pikett to call upon two of his pet bloodhounds and to acquire scents from four suspects—Megan; Junior; Megan's boyfriend, Chris Hammond; and Hammond's friend, Adam Szarf. Huff, then, following the procedure that Pikett established, gathered scents from the suspects—by asking each person to rub a piece of gauze on his or her skin and put that gauze in a paper bag—and from the victim—by rubbing gauze against Burr's clothes. Pikett, rather "unscientifically," also carried around in a duffel bag filler scents which he gathered from prisoners at the Fort Bend County Jail. He placed this bag in his SUV, in which his dogs rode daily.

Pikett proceeded to conduct a "drop-trail" exercise with his dogs. That exercise was conducted at the crime scene where Huff provided the hounds with a scent sample. Huff thought he had provided the scent

for Junior, but he mistakenly scented the dogs for Hammond instead. Huff notified Pikett and the other investigators about the mistake after the test, and both Huff and Pikett mentioned it in their formal police reports.

Meanwhile, Junior and Megan allowed investigators to collect their DNA to compare with DNA found in blood discovered at Burr's home. The laboratory reported that the blood did not belong to either. The investigators also wanted to compare Megan's hair to hair found at the murder scene. Sheriff Rogers wrote a search-warrant affidavit to obtain Megan's hair, but he failed to mention the lab report showing her blood was not at the scene. He also misstated that the drop-trail was conducted using Junior's scent pad instead of Hammond's. Further, he did not acknowledge the incidental fact that all forensic evidence from the crime scene excluded the Winfreys. Perhaps recognizing the fumbles in the process, the investigation was put on hold.

After stalling for a year, the investigation restarted when a jailhouse informant, Campbell, came forward with a story incriminating the Winfreys in Burr's murder. Campbell said that while he and Senior were in the same jail cell, Senior confessed to murdering Burr. Johnson visited and interviewed Campbell. There, Campbell told him: (1) Megan and Junior helped Senior get into Burr's house, (2) Senior severely beat up Burr and cut his neck, (3) Senior cut off Burr's genitals and stuck them in Burr's mouth, (4) Junior and Megan were in Burr's house the whole time, and

(5) Senior had wanted to kill Burr because Burr's neighbor told Senior that Burr touched one of Senior's kids. Johnson wrote a report of Campbell's story and noted that the details of the injuries were generally accurate in relation to the physical evidence, except that Burr's genitals were not cut off and put in his mouth.

Johnson visited Campbell a month later, taking Rogers with him. Campbell's story changed. First, Campbell added that Burr was killed in his living room, which Johnson said was not known to the public at that time. Second, he said that Senior stabbed and shot Burr, though there was no evidence that Burr was shot. Third, Campbell now claimed that one of Senior's cousins, not Junior or Megan, was the accomplice to the murder. Finally, Campbell said that Senior confessed to stealing a pistol and long gun from Burr's house, and he put these guns in a nearby "hollow." Investigators found a hollow matching the description, but no weapons were there. Johnson said the public did not know about the stolen weapons.

Pikett, undeterred by earlier failures, conducted a second scent lineup using Senior's scent. The bloodhounds alerted each time on Senior's scent.

Deputy Sheriff Johnson signed two affidavits to obtain search warrants to obtain Junior's and Senior's hair from each of them to compare with the hair found in Burr's home. Each affidavit excluded any reference to: (1) the inconsistencies between Campbell's two interviews, (2) the inconsistencies between Campbell's statements and the other evidence, (3) Junior's and

Megan's blood not being found at the scene, and (4) the hair found at the scene not matching Burr or Megan. The judge issued both warrants to Johnson, but the hair obtained from Burr's home did not match the hair of either Junior or Senior.

Nevertheless, Johnson signed affidavits for arrest warrants for Megan, Junior, and Senior.[1] The arrest-warrant affidavits also excluded the same inconsistencies as the search-warrant affidavits, and additionally omitted the fact that the hairs at the crime scene did not belong either to the Winfreys or Burr.

Junior was thus charged with capital murder and sat in jail for two years before his case was tried in June 2009. On June 12, he was found not guilty after thirteen minutes of jury deliberation.

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[1] The record contains only the arrest-warrant affidavits for Senior and Megan. Johnson argues that the arrest-warrant affidavit for Senior cannot be used as a replacement for Junior's arrest affidavit, which is not in the record due to Junior's intentional spoliation. But this issue was already resolved in *Winfrey I*, 481 Fed.Appx. 969. There, we concluded that we would look to the affidavits for Megan and Senior because: (1) they "suggest that . . . the same affidavit language [was used] for all three Winfreys"; (2) "investigation reports indicate that warrants were obtained for [Junior] on the same day Johnson executed an arrest-warrant affidavit for Megan"; and (3) "Rogers indicated that the drop-trail evidence and Campbell's 'jailhouse snitching' established probable cause to obtain 'a search warrant for the hairs of my *suspects.*'" *Id.* at 978. Because of the law-of-the-case doctrine, we find that the prior panel's decision "should continue to govern" this case. *See Musacchio v. United States*, 136 S.Ct. 709, 716 (2016) (quoting *Pepper v. United States*, 562 U.S. 476, 506 (2011)).

On May 26, 2010, Junior filed this § 1983 lawsuit against every police investigator involved in his murder case. At this point in this lengthy litigation, only his claim against Deputy Sheriff Johnson remains. Junior says that Johnson violated his constitutional rights by using false information to secure arrest and search warrants and by failing to disclose exculpatory evidence.

This case has visited us before. *See generally Winfrey I*, 481 Fed.Appx. 969. There, we vacated the district court's grant of summary judgment in favor of Johnson and remanded for additional discovery on whether Johnson violated the Fourth Amendment by acting with reckless disregard for the truth, as opposed to merely carelessness or negligence, when he included a material falsehood and omitted material information in his warrant affidavits. *Id.* at 979-81.

On remand, the district court held a hearing relating to multiple *Daubert* motions. Junior contends that, at that hearing, the district court barred Junior's expert, David Kunkle, from testifying at trial.

After discovery concluded, Johnson again moved for summary judgment. First, Johnson argued that Junior's claim against Johnson was time-barred. But the district court ruled that it was not barred because the statute of limitations period began when Junior was acquitted, and he filed his lawsuit within a year of his acquittal. Second, the court examined whether Johnson violated Junior's Fourth Amendment rights by recklessly omitting and misstating certain facts in

his search- and arrest-warrant affidavits. The court found that one omission was not reckless: excluding Campbell's statements that were inconsistent with each other. But it found that others were reckless: excluding Campbell's statements that were contradicted by the physical evidence and omitting the DNA and hair evidence that did not link the Winfreys to the scene, which could show that someone other than the Winfreys had to have been present in Burr's house. The court did not say whether Johnson's inclusion of the statement that "the drop-trail from the crime scene to the Winfrey house used [Junior]'s scent" was reckless. Third, the court decided that Johnson nevertheless was protected by qualified immunity, even though he violated Junior's rights, because a reasonable magistrate, reviewing a corrected affidavit, would have found probable cause to search and arrest Junior.

Junior timely appealed. He contends: (1) his arrest-warrant claim is not time-barred; (2) Johnson is not entitled to qualified immunity; (3) the district court abused its discretion in excluding his expert; and (4) if the Court reverses and remands, it should remand this matter to a different judge.

II.

A.

The first issue we address is whether Junior has a valid Fourth Amendment claim. We conclude that he does.

Junior's complaint never alleges in magic words that Johnson violated his rights under the Fourth Amendment. Nevertheless, although the parties have argued this case in a confusing manner from the start, both sides have argued, at times, that the case involves a Fourth Amendment federal malicious-prosecution claim; at other times, they have argued whether the claim involves a Fourteenth Amendment due process claim. In any event, as the case is presented before us now, there is a proper Fourth Amendment claim because of the law-of-the-case doctrine. In *Winfrey I*, this Court decided that this case presented a Fourth Amendment claim, concluding that Johnson was not entitled to qualified immunity on summary judgment because Junior alleged that Johnson violated the Fourth Amendment by signing objectively unreasonable arrest-warrant affidavits. 481 Fed.Appx. at 979. Additionally, on remand, both sides argued the Fourth Amendment malicious-prosecution issue, and the district court decided the case as a Fourth Amendment case.

"The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio*, 136 S.Ct. at 716 (quoting *Pepper*, 562 U.S. at 506). The doctrine is meant to promote judicial efficiency so that appellate courts do not continually have to reexamine subsequent proceedings in the same case. *See Chapman v. Nat'l Aeronautics & Space Admin.*, 736 F.2d 238, 241 (5th Cir. 1984). It forecloses reexamination on

a subsequent appeal. *Pegues v. Morehouse Par. Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). But the law-of-the-case doctrine does not apply when "(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such cases, or (3) the decision was clearly erroneous and would work manifest injustice." *Lyons v. Fisher*, 888 F.2d 1071, 1075 (5th Cir. 1989). Here, none of the exceptions apply, because the relevant precedent was decided before the suit was filed in 2011, the evidence has remained the same throughout, and the decision was not clearly erroneous and did not risk manifest injustice.

Furthermore, we agree that a Fourth Amendment claim is cognizable under the facts here. This Court has held that although there is no "freestanding constitutional right to be free from malicious prosecution," "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example." *Castellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc). In *Albright v. Oliver*, 510 U.S. 266 (1994), a plurality of the Supreme Court said that malicious-prosecution claims must be based on the Fourth Amendment, rather than on "the more generalized notion of 'substantive due process,' " because the Fourth Amendment is the explicit textual source against this type of government behavior. *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). And recently, in *Manuel v. City of Joliet*, '(2017), the Supreme Court

considered whether a plaintiff had stated a Fourth Amendment claim when he was arrested and charged with unlawful possession of a controlled substance based upon false reports written by a police officer and an evidence technician. *Id.* at 915. There, the Court said the plaintiff's "claim fits the Fourth Amendment, and the Fourth Amendment fits [the plaintiff's] claim, as hand in glove." *Id.* at 917. And it held "that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." *Id.* at 920.

These cases fully support a finding that the Fourth Amendment is the appropriate constitutional basis for Junior's claim that he was wrongfully arrested due to the knowing or reckless misstatements and omissions in Johnson's affidavits. We, therefore, hold that a Fourth Amendment claim is presented, and we will decide the remainder of the issues based upon this legal conclusion.

B.

Johnson argues that Junior's claim is time-barred. Junior was arrested on February 8, 2007. His prosecution began in June 2009, and he was acquitted on June 12. He filed this suit on May 26, 2010.

Section 1983 provides a federal cause of action, but federal courts look to state's statute of limitations for personal-injury torts to decide when § 1983 claims toll. *See Wallace v. Kato*, 549 U.S. 384, 387 (2007); *see also Piotrowski v. City of Hou.*, 237 F.3d 567, 576 (5th Cir.

2001) ("The statute of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state."). "In Texas, the applicable limitations period is two years." *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993); *see* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) ("[A] person must bring suit . . . not later than two years after the day the cause of action accrues."). But "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388. "In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts." *Manuel*, 137 S.Ct. at 920.

The accrual date depends on whether Junior's claim more closely resembles one for false imprisonment or one for malicious prosecution. *See id.* at 921-22 (remanding the case to the Seventh Circuit to consider whether the claim was more like a false imprisonment or a malicious prosecution). A false-imprisonment claim is based upon "detention without legal process." *Wallace*, 549 U.S. at 389. It "begins to run at the time the claimant becomes detained pursuant to legal process." *Id.* at 397. A malicious-prosecution claim is based upon "detention accompanied . . . by *wrongful institution* of legal process." *Id.* at 390. It "does not accrue until the prosecution ends in the plaintiff's favor." *Castellano*, 352 F.3d at 953.

Johnson urges us to find that this case fits within *Wallace v. Kato.* There, the Supreme Court found that the plaintiff's unlawful warrantless-arrest Fourth

Amendment claim resembled a false-imprisonment claim, because the constitutional violation occurred when the plaintiff was arrested without a warrant instead of when the conviction was later set aside. 549 U.S. at 397. Law enforcement officers transported the fifteen-year-old plaintiff to a police station—without a warrant or probable cause to arrest him—and interrogated him into the early morning. *Id.* at 386, 389. So, the Court found that the plaintiff's claim accrued when he was initially arrested. *Id.* at 397.

Here, we find that Junior's claim is more like the tort of malicious prosecution, because Junior was arrested through the wrongful institution of legal process: an arrest pursuant to a warrant, issued through the normal legal process, that is alleged to contain numerous material omissions and misstatements. Junior thus alleges a wrongful institution of legal process—an unlawful arrest *pursuant to* a warrant—instead of a detention with no legal process. Because Junior's claim suggests malicious prosecution rather than false imprisonment, his claim accrued when his criminal proceedings ended in his favor on June 12, 2009. He filed his suit well within the two-year limitations period on May 26, 2010. So Junior's claim survives the time bar.

III.

A.

Even if the claim is not time-barred, Johnson argues, this case must not proceed further because he is entitled to qualified immunity.

This court reviews the district court's grant of summary judgment de novo. *Brewer v. Hayne*, 860 F.3d 819, 822 (5th Cir. 2017). Summary judgment is appropriate when the movant is entitled to judgment as a matter of law and there is no genuine dispute of material fact. *Id.* We must draw all reasonable inferences in the non-movant's favor and view the evidence in the light most favorable to the non-movant. *Id.* "To survive summary judgment, the non-movant must supply evidence 'such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

When resolving qualified immunity on summary judgment, courts determine (1) whether the facts, taken in the light most favorable to the party asserting the injury, show the officer violated a federal right and (2) whether the right was "clearly established" when the violation occurred. *Tolan v. Cotton*, 134 S.Ct. 1861, 1865-66 (2014). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (quoting *Anderson v. Creighton*,

483 U.S. 635, 640 (1987)). The Court does not need "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* The Court uses a standard of "objective reasonableness" to define "the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley v. Briggs*, 475 U.S. 335, 344 (1986). Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). And it "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (quoting *Malley*, 475 U.S. at 341).

Clearly established law is not determined "at a high level of generality." *Ashcroft*, 563 U.S. at 742. Instead "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S.Ct. at 308 (quoting *Ashcroft*, 563 U.S. at 742). The inquiry must look at the specific context of the case. *Id.*

Here, the clearly established constitutional right asserted by Junior is to be free from police arrest without a good faith showing of probable cause. Since *Franks v. Delaware*, 438 U.S. 154 (1978), it has been clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes "a false statement knowingly and intentionally, or with reckless disregard for the truth" and (2) "the allegedly false statement is

necessary to the finding of probable cause." *Id.* at 155-56. In *Franks*, the Supreme Court observed that the warrant requirement is meant "to allow the magistrate to make an independent evaluation of the matter." *Id.* at 165. It requires affiants to "set forth particular facts and circumstances underlying the existence of probable cause," including those that concern the reliability of the information and the credibility of the source to avoid "deliberately or reckless false statement[s]." *Id.*

Still, "negligence alone will not defeat qualified immunity." *Brewer*, 860 F.3d at 825. "[A] proven misstatement can vitiate an affidavit only if it is established that the misstatement was the product 'of deliberate falsehood or of reckless disregard for the truth.'" *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (quoting *Franks*, 438 U.S. at 171). Recklessness requires proof that the defendant "'in fact entertained serious doubts as to the truth' of the statement." *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)), *abrogation on other grounds recognized by Spivey v. Robertson*, 197 F.3d 772, 775 (5th Cir. 1999).

Here, we conclude that Junior alleges a clearly established constitutional violation. Under the first prong of *Franks*, Junior must present evidence that Johnson, through material omissions or otherwise, made "a false statement knowingly and intentionally, or with reckless disregard for the truth." 438 U.S. at 155. Junior provides evidence that Johnson made false statements in his affidavit by (1) excluding Campbell's statements that were contradicted by the physical

evidence; (2) excluding the fact that the DNA and hair evidence did not link the Winfreys to the scene; (3) misstating that Pikett's drop-trail from Burr's house to the Winfrey house used Junior's scent, when the drop-trail actually used Hammond's scent; and (4) excluding Campbell's inconsistencies between his statements, that is, between Campbell's first statement—which was related in the affidavit—that said that Megan and Junior helped Senior to murder Burr and Campbell's inconsistent later statement that Senior's cousin was the accomplice. We find that this showing is also sufficient to demonstrate that there is an issue of material fact as to whether Johnson acted intentionally, knowingly, or recklessly, because Junior alleges that Johnson either knew or should have known that these material omissions and false statements could lead to an arrest of Junior without probable cause. In short, the evidence presented is sufficient to support a finding that his conduct was unreasonable in the light of the well-established principle requiring probable cause for the issuance of an arrest warrant.

Yet, we must proceed further to the second prong of *Franks* in order to resolve whether "the allegedly false statement is necessary to the finding of probable cause," as required by the *Franks* analysis. 438 U.S. at 156. To determine whether the false statement was necessary for this finding, *Franks* requires us to consider the faulty affidavit as if those errors and omissions were removed. We then must examine the "corrected affidavit" and determine whether probable cause for the issuance of the warrant survives the

deleted false statements and material omissions. *See Franks*, 438 U.S. at 156 (saying that courts must excise false statements); *United States v. Bankston*, 182 F.3d 296, 305-06 (5th Cir. 1999) (applying *Franks* to omissions and using a corrected affidavit that "contain[ed] the allegedly exculpatory conversation" to determine whether that affidavit would establish probable cause to authorize electronic surveillance), *overruled on other grounds by Cleveland v. United States*, 531 U.S. 12 (2000). The warrant will be valid only if the corrected affidavit establishes probable cause for Junior's arrest.

This Court reviews the district court's probable-cause determination de novo. *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). Probable cause requires only "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). Probable cause is a "practical and common-sensical standard." *Florida v. Harris*, 568 U.S. 237, 244 (2013). It looks to the "totality of the circumstances" to determine whether the magistrate with "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief'" to find that the suspect committed the crime for which he is being arrested. *See id.* at 243 (alterations in original) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion)).

So we turn to review the "corrected" affidavit to determine whether probable cause was established that Junior murdered Murray Wayne Burr. Examining the totality of the circumstances, we find that the

corrected affidavit does not contain sufficient information to satisfy the probable-cause requirement.[2] A corrected affidavit would contain the following facts, which were omitted from Johnson's affidavit. First, a corrected affidavit would include reference to the material fact that Pikett used the scent of Christopher Hammond, Megan's boyfriend, instead of Junior's. This omitted information was necessary for the state trial judge to consider, because it seriously affects whether Junior was present at the scene of Burr's murder. There was no other physical evidence that connected Junior to the murder scene besides the scent lineup. Second, a corrected affidavit would inform the state trial judge that Megan and Junior's DNA did not match the blood at the scene and that Megan's hair did not match hair found at the scene. It is material because this physical evidence suggests that someone else was involved in the murder. Third, a corrected affidavit would have referred to Campbell's statement that Senior's cousin—not Megan and Junior, like he had said earlier—let Senior into Burr's house to kill Burr. Although this fact would not have mattered as to an arrest warrant for Senior, it certainly was material for Junior, because in one scenario, he was connected to the murder, and in the other, he may not have been present at the scene. Fourth, a corrected affidavit

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[2] The district court thought there was enough information to support probable cause to arrest Junior because of: (1) a possibly romantic relationship between Burr and Megan; (2) Megan's desire for Burr's hidden money; (3) the presence of Junior's, Megan's, and Senior's scents on Burr; and (4) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

would have apprised the state trial judge that Campbell's statements contradicted aspects of the physical evidence. Campbell said that Burr was both stabbed and shot—although he was only stabbed—and that Senior had cut off Burr's body part, which was not true. Although neither of these false statements, considered independently, would necessarily have been fatal to the affidavit—because Senior could have told Campbell anything—together with Campbell's other statements, these would have served to undermine Campbell's reliability. Weighing the totality of the circumstances, we conclude that a reasonable magistrate would not have issued a warrant on the basis of this corrected affidavit, because the addition of the omitted material facts would have dissuaded the judge from issuing the warrant.

In sum, we hold that Johnson has not established that a corrected affidavit would show probable cause to arrest Junior. Junior is, therefore, entitled to present his case to the jury.[3]

B.

Still, Johnson further contends that he is not liable to Junior because there were two independent intermediaries that intervened to break the causal chain between Johnson's alleged Fourth Amendment violation and Junior's incarceration: (1) the grand jury that indicted Junior and (2) the state judge who presided

[3] We note that this appeal is not an interlocutory appeal on the sole question of qualified immunity. Instead, it comes to us from a final decision of summary judgment for the defendant.

over the Winfreys' trial. We conclude that neither independent intermediary broke the causal chain between Johnson's faulty affidavit and Junior's incarceration.

Under the independent-intermediary doctrine, " 'if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation' for the Fourth Amendment violation." *Jennings v. Patton*, 644 F.3d 297, 300-01 (5th Cir. 2011) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).[4] "[E]ven an officer who acted

[4] Junior urges us to overrule our independent-intermediary doctrine based on *Manuel v. City of Joliet*, but we cannot do that and find it unnecessary. In *Manuel*, the Supreme Court held "that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." 137 S.Ct. at 920. The Court said that a grand jury indictment that "was entirely based on false testimony" could not expunge the plaintiff's Fourth Amendment claim. *Id.* at 920 n.8. But it did not hold that officers can never be insulated from liability based on later determinations by an intermediary when all the necessary information was placed before that intermediary. Instead, the Court affirmed a principle that we have consistently followed: when an intermediary's proceeding is tainted by an officer's unconstitutional conduct, the independent-intermediary doctrine does not apply. *Compare id.* ("[I]f the proceeding is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights. . . ."), *with Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579 (2017) (stating that under the "taint" exception, "an independent intermediary's probable cause finding does not protect law enforcement officials whose 'malicious motive . . . lead[s] them to withhold any relevant information.' " (alteration in original) (quoting *Cuadra*, 626 F.3d at 813)).

with malice . . . will not be liable if *the facts* supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's independent decision breaks the causal chain and insulates the initiating party." *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016) (quoting *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988)), *cert. denied sub nom. Buehler v. Austin Police Dep't*, 137 S.Ct. 1579 (2017). But the chain of causation between the officer's conduct and the unlawful arrest "is broken only where *all the facts* are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary." *Id.* (emphasis added) (quoting *Cuadra*, 626 F.3d at 813).

Here, the record does not indicate that the material information, which we have noted was omitted from Johnson's affidavit, was presented either to the grand jury or the state judge. Stated differently, as far as this record is concerned, the only information before a grand jury was the information in Johnson's affidavit. Neither the plaintiff nor defendant has shown otherwise.

First, because, at best, it is not clear whether "all the facts [were] presented to the grand jury," *Cuadra*, 626 F.3d at 813, we hold that the independent-intermediary doctrine does not apply.

Second, Johnson contends that the state trial judge found probable cause to authorize Junior's continued detention, thereby insulating Johnson from liability. But the record does not show that the judge ever ruled that there was probable cause to detain Junior. At one hearing, the judge determined that there was probable cause to arrest Megan, but nothing about Junior. And in other hearings, the judge decided whether certain evidence should be allowed at trial and whether Senior should be granted a directed verdict. None of these hearings addressed the central question today: whether there was probable cause to arrest Junior. So we have no basis to find that the subject material omitted information was presented to the state trial judge.

IV.

We now turn from the state proceedings to the procedural errors that Junior asserts in the federal proceeding below. Junior contends that the district court excluded the testimony of David Kunkle, a former police chief and Junior's expert witness. He contends this exclusion was an abuse of discretion. But after our examination of the record, we conclude that the district court never decided whether Kunkle could testify at trial. We are a court of appeals and errors. Inasmuch as the district court made no decision and issued no ruling, it could not have made an error or otherwise created an issue for appeal. We therefore decline to address the exclusion of David Kunkle's testimony until the district judge has expressly ruled on the issue.

Junior contends that the district judge orally ruled from the bench to exclude Kunkle from trial on October 20, 2014. But at that hearing, the judge never explicitly ruled that Kunkle could not testify. He said,

> And there is no salvageable part of the police chief's, [Kunkle,] as I recall. . . . It's simply, it's what we tried very hard to get away from back in the early 80s. And I don't remember when Daubert was, somewhere in there; but I have always believed that expert testimony had to mean something. And we got anybody with a decent resume could say anything was pretty much the rule for a long time.
>
> And the Supreme Court finally said they have to know something in particular about what is going on and it has to be cogent. There is no peer review for police chiefs. The city council, but they're not really peers there, something else entirely different.

Although strongly suggestive, this statement did not expressly grant or deny Johnson's motion to exclude the testimony of Kunkle. Further, the district judge indicated in his minute entry that "an order on the motion" would be entered following the hearing, but no such order was ever entered.

Furthermore, the Supreme Court has made clear that trial judges must play a "gatekeeping" role when examining the reliability of experts, and the court's inquiry must be "tied to the facts" of the particular case. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150

(1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993)). The district court is required to make a ruling and provide articulable reasoning before we can review whether its decision was proper. Here, if the question arises on remand, the district court will need to make clear its basis for its ruling on Kunkle's testimony.

V.

Finally, Junior requests that this Court remand the matter to a different district judge. We find no basis for that request.

VI.

In this opinion, we have held that (1) Junior has alleged a valid Fourth Amendment claim against Johnson; (2) Junior's claim is not time-barred; (3) Johnson has not shown that his alleged conduct is protected by qualified immunity; (4) a corrected affidavit did not establish probable cause; (5) Johnson is not protected by the independent-intermediary doctrine; (6) because the district court did not expressly rule whether to exclude Kunkle, we do not address whether the court abused its discretion; and (7) we find no basis for remanding the matter to a different district judge. The primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and

misstatements. This case should go to trial without delay in a manner not inconsistent with this opinion.

Accordingly, the judgment of the district court is VACATED and the case is REMANDED.

VACATED and REMANDED.

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Richard Winfrey, Junior, *et al.*, Plaintiffs, *versus* Keith Pikett, *et al.*, Defendants.	§ § § § § § § § §	Civil Action H-10-1896 H-14-448

Opinion on Partial Summary Judgment

(Filed Oct. 4, 2016)

1. *Introduction.*

A father, his son, and his daughter were searched, arrested, and tried for murder. All three were, eventually, acquitted. The son and daughter sue the investigators and the counties that employ them for violating their constitutional rights. The son will take nothing. The daughter will take nothing on all but one of her claims.

2. *Background.*

In August of 2004, Murray Wayne Burr was found dead in his home in Texas's San Jacinto County. Blood spatter showed that the murder started in his living room, and the body was dragged to the bedroom. The

County Sheriff Lacy Rogers and Deputy Sheriff Lenard Johnson led the investigation. Texas Rangers Grover Huff and Ronald Duff assisted.

Ultimately, the investigators concluded that Richard Winfrey, Senior, and his children Richard Winfrey, Junior, and Megan Winfrey killed Burr.

A. *The Investigation Begins.*

Burr had worked as a janitor at Coldspring High School where Megan and Junior were students. Some of the initial evidence indicated that they had socialized.

Burr's neighbors said that Megan and Junior asked Burr to let them move in with him, but he said no. One teacher at the school saw Megan put her arm in Burr's and ask if he was going to take her out and spend some of the money he had hidden in his house on her.

A second teacher said she saw a verbal fight between Megan and Burr after which Megan muttered, "Someone should beat the shit out of him." A third teacher told of a time Megan acted violently towards her.

B. *Scent Evidence Gathered.*

Keith Pikett – a deputy from a nearby agency – assisted the investigation by running scent-pad line-ups. The line-up uses bloodhounds to compare a

suspect's scent to the scents found on a victim's clothes. On August 24, 2004, Pikett ran the line-up using bloodhounds and scents from four suspects – Megan, Junior, Chris Hammond, and Adam Szarf. The bloodhounds alerted only on Megan's and Junior's scents.

The bloodhounds also traced a scent by following a scent trail, a method often used to find lost people or fleeing criminals. The investigators gave the hounds the scent at Burr's house. The hounds located the scent and followed it to the Winfrey house. The officers thought the scent used was Junior's; the scent actually came from Chris Hammond, Megan's boyfriend.

C. *Blood not a match.*

In September of 2004, the investigators received a report from the Houston Crime Laboratory. A lot of blood was found at Burr's house. The report compared the DNA of the blood found in Burr's house with the suspects' DNA. The report concluded that neither Megan's nor Junior's blood was at the scene. The report also concluded that all of the blood may have come from Burr but it could not conclude his blood was the only blood at the scene.

D. *Megan's hair not a match.*

The investigators found hairs on and near Burr's body that did not belong to Burr. In January of 2005, Rogers signed an affidavit and received a search warrant for Megan's hair.

In the affidavit, he included (a) the neighbor's statement that Megan socialized with Burr; (b) the teacher's statements; (c) the results of the line-up; (d) the partially erroneous results of the scent trail. He did not include that the blood at the scene may have come from someone other than Burr, Megan, or Junior. Megan's hair was not a match.

E. *An Informant Comes Forward.*

The investigation stalled for over a year. Until then, Senior had not been a suspect. David Campbell changed that.

Some time after Burr's murder, Senior was imprisoned on an unrelated matter, he was housed with Campbell. Campbell told a warden that he confessed his involvement in a murder in San Jacinto County. The warden contacted Johnson.

Johnson met with Campbell and wrote a summary of his statement. According to the report, Senior told Campbell that he committed a murder in San Jacinto County in 2005. Senior also told Campbell that: (a) Megan and Junior played across the street from Burr's house; (b) one of Burr's neighbors told Senior that Burr had touched one of Senior's children; (c) Megan and Junior helped Senior get into Burr's house; (d) Senior severely beat Burr and cut his neck; (e) Senior cut off Burr's genitals and placed them in Burr's mouth; and (f) Megan and Junior were present the whole time. Johnson told Campbell that he would return with Rogers for more information.

Rogers and Johnson returned to question him. They videotaped the interview. Campbell elaborated on what he originally told Johnson. This time, Campbell added that (a) a cousin entered with Senior; (b) Burr was in the living room; (c) Burr was shot as well as stabbed; (d) Senior stole two guns (a pistol and a .3030 rifle) from Burr; and (e) Senior hid the guns and a knife in a hollow on Winfrey property. Those facts are missing from Johnson's report about the first interview.

After the interview, Johnson learned from one of Burr's relatives that two guns were missing from Burr's house after the murder. The relative said the missing guns were a shotgun and a .22 rifle, not a pistol and a .3030 rifle.

The investigators also found a hollow matching Campbell's description of where Senior hid the guns and knife but did not find any weapons in the hollow.

Finally, Pikett ran a line-up using Senior's scent. Senior's scent matched the scent on Burr's clothes.

F. *Junior's and Senior's hair not a match.*

On August 23, 2006, Johnson signed two affidavits to obtain search warrants for Junior's and Senior's hair. He wanted to compare their hairs against the hair found at the scene.

Both affidavits omitted some of the evidence favorable to Junior and Senior. Johnson excluded: (a) the inconsistencies between Campbell's two interviews;

(b) the inconsistencies between Campbell's statements and the other evidence; (c) that Junior's blood and Megan's blood was not found at the scene; and (d) that the hair found at the scene did not match Burr or Megan.

Junior's and Senior's hairs did not match the hair found at the crime scene.

G. *Winfreys Arrested and Eventually Acquitted.*

On February 2, 2007, Johnson signed affidavits for arrest warrants for Megan, Junior, and Senior. The substance of Johnson's affidavits for the arrest warrants is identical to Johnson's affidavits for Junior's and Senior's search warrants.

Johnson's arrest affidavits contained the same errors as the search affidavits. There was an additional omission: the hairs recovered at the crime scene did not belong to Junior, Megan, Senior, or Burr.

In October of 2008, Megan was convicted. On June 12, 2009, Junior was acquitted. On February 27, 2013, Megan's conviction was overturned.

H. *Allegations that Campbell's Interview was Staged.*

Campbell testified at Megan's trial. He was asked about letters he sent Senior's sister, Vicki Haynes. While in prison, Campbell received a letter from Haynes. She had learned that he was going to be a witness. Campbell was worried because Haynes knew

where his family lived; he feared retribution. Campbell wrote back saying that the first interview, by Johnson, was "staged." At trial, Campbell reaffirmed this and said that Johnson tried to make something up. As a result, Campbell asked to speak to someone with more authority – Rogers.

Campbell never explains what Johnson tried to add or in what way the interview was "staged." Johnson's summary of the interview is consistent with the content of both the second interview and Campbell's testimony at trial. The video shows that Campbell was not under duress or coached during the second interview.

3. *Case History.*

Senior, Megan, and Junior sued every investigator; most of the claims have been resolved.

In Junior's case, the court granted summary judgment to the defendants. The United States Court of Appeals reversed the judgments for Johnson, Rogers, and Pikett. Pikett was dismissed by agreement of the parties.

Junior's claims against Rogers and Johnson pend. Megan's claims against Rogers, Johnson, Pikett, and San Jacinto County pend.

Junior will take nothing. Megan will take nothing from Rogers, Johnson, and the County. Megan's claims against Pikett survive.

4. *Mandate.*

The court of appeals held that on the facts then discovered, (a) Junior's claims against Pikett for fabrication of evidence could not be denied as a matter of law; and (b) Junior had made a *threshold* showing of objective unreasonableness in the preparation of the search and arrest warrant.

Megan and Junior attempt to use the court of appeals's decision. The court conducted further discover; the record has changed. The determination of whether Megan's and Junior's claims can be decided as a matter of law will be based on the facts now in evidence.

5. *Limitations.*

Megan and Junior sue Johnson and Rogers for searching and imprisoning them without due process and fabricating Campbell's testimony. Megan also sues Pikett for manufacturing the scent-pad line-ups. These are claims for damages for violations of constitutional rights.

Federal law authorizes some actions that stem from violations of constitutional rights. State law determines how long a person may wait before suing.[1] Under Texas law, a person must sue within two years of a violation. Accrual is determined by federal law.[2]

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[1] *Owens v. Okure*, 488 U.S. 235, 239 (1989).

[2] *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

The limitations period begins when the injury is complete, the plaintiff knows it, and knows it's cause.

A. *Illegal Searches.*

Megan and Junior seek damages for unreasonable searches – the subpoenas for their hair. The limitations period began when the search was complete because the Winfreys knew who searched them.

They say that the limitations period did not begin until they were acquitted because challenging the searches meant challenging their convictions. A claim for damages based on an illegal search does not imply unlawful imprisonment.[3] Here, for example, the searches did not produce evidence against Megan or Junior. Therefore the searches did not produce evidence that supported their imprisonment.

Megan was searched in 2005; her claim expired in 2007. She did not sue until May 26, 2014. Her claims for unreasonable search are untimely.

Junior was searched in 2006; his claim expired in 2008. He did not sue until May 26, 2010. His claims for unreasonable search are untimely.

B. *Illegal Arrests and Manufacture of Evidence.*

Civil claims that challenge imprisonment can be brought only once the accused has been acquitted.[4]

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[3] *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994).

[4] *Id.* at 486-87.

Concerns for finality and consistency cannot abide the use of civil suits to attack convictions collaterally.

Megan and Junior say that their arrests were not supported by probable cause and that the evidence used against them was manufactured. The defendants say that the limitations period began once Megan and Junior were held pursuant to legal process.

The Winfrey's claims are not for detention without legal process;[5] rather, they are for wrongful institution of legal process. Claims about probable cause and guilt cannot be brought until the accused is acquitted.[6]

On June 12, 2009, a jury acquitted Junior. Less than a year later, he sued. He brought his claims for arrest without probable cause and the manufacture of evidence within the limitations period.

On February 27, 2013, the Texas Court of Criminal Appeals reversed Megan's conviction. Less than a year later, she sued. She brought her claims for arrest without probable cause and the manufacture of evidence within the limitations period.

7. *Megan and Rogers.*

Megan seeks damages from Rogers because he (a) wrote a misleading affidavit for a search warrant and (b) coerced Campbell's testimony. Though her claim for

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[5] *Wallace* 549 U.S. at 389.

[6] *Id*. at 484.

the search must be dismissed as brought after the limitations period, the court still considers its merits.

A. *Misleading Affidavit to Search.*

To recover, Megan must show that Rogers (a) violated her rights and (b) was not protected by qualified immunity.

The law requires that Rogers's affidavit include enough facts to enable the magistrate to make an independent evaluation that there was probable cause to search Megan.[7] Rogers violated Megan's Fourth Amendment rights if he recklessly included false information or excluded important information from his affidavit.

Even if Rogers violated Megan's rights, he is protected by qualified immunity if the search was objectively reasonable.[8] Rogers's search was objectively reasonable if supported by probable cause.[9] Thus, Megan must show (a) Rogers's recklessness in writing a misleading affidavit and (b) that a reasonable magistrate, reviewing a corrected affidavit, would not have found probable cause.

A reasonable magistrate would find probable cause in a corrected affidavit if it contained enough facts to justify a belief that Megan murdered Burr. The

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[7] *Franks v. Delaware*, 438 U.S. 154, 165 (1978).

[8] *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

[9] *See U.S. v. Leon*, 468 U.S. 897, 922-23 (1984); *U.S. v. Perez*, 484 F.3d 735, 743 (5th Cir. 2007).

belief must be more than a suspicion but far less than a preponderance of the evidence. Though a corrected affidavit must include favorable evidence, once a reasonably credible source comes forward, the investigators do not have an obligation to investigate further.[10]

The court now examines Megan's evidence that her rights were violated and compares Rogers's affidavit with a corrected affidavit to determine whether a reasonable magistrate could have found probable cause.

(I) *Claimed Rights Violations.*

Megan says that Rogers violated her Fourth Amendment rights by recklessly (a) including the evidence from the scent-pad line-up, (b) including the partially erroneous scent trail, and (c) excluding the favorable DNA evidence.

(a). *Inclusion of Line-Up.*

Megan says that Rogers recklessly included the results of Pikett's line-up in his affidavit.

Even if Pikett's line-up is junk science that has no place in criminal investigations, Rogers did not know that when he signed the affidavit. Pikett was a police officer with a nearby agency. He worked with the Federal Bureau of Investigations. At least one Texas court had found testimony by Pikett about the results of a

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[10] *Woods v. City of Chi.*, 234 F.3d 979, 997 (7th Cir. 2000).

line-up admissible.[11] No fact suggests that Rogers erred in including Pikett's results.

(b). *Misidentification of the Scent Used on the Scent Trail.*

Huff intended to run the scent trail from Burr's house with Junior's scent; he accidentally used Chris Hammond's. Assuming that Huff told Rogers when he discovered the error, Rogers's false statement that Junior's scent was used was reckless but not important. Both Hammond and Junior are affiliated with Megan. Junior is her brother; Hammond was her boyfriend. Had the error been remedied, the value of the evidence would not have changed.

Rogers's error about whose scent was used was reckless but not important.

(c). *Exclusion of Favorable DNA Evidence.*

Rogers recklessly excluded that Megan did not contribute to the blood in Burr's house. Rogers knew this information; the Lab sent him the report.

That Megan's blood did not match the blood at the scene was of some importance. Burr's murder was violent. The killer could have been cut and bled during the struggle. If Megan killed Burr and the killer bled during the murder, Megan's blood would have matched the

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[11] *Winston v. State*, 78 S.W. 3d 522, 529 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd).

blood at the scene. The DNA evidence decreases the likelihood that Megan killed Burr. Rogers recklessly excluded this evidence, violating Megan's Fourth Amendment rights.

(2). *Rogers not Protected by Qualified Immunity.*

Rogers was not protected by qualified immunity because there was not probable cause to search Megan. The investigators had evidence that (a) Megan and Junior wanted to move in with Burr, but he said no; (b) Megan was flirtatious but also fought with Burr; (c) she thought he had money in his house; (d) she was violent towards other school employees;[12] (e) her scent was on his clothes;[13] and (f) her boyfriend traveled from Burr's house to her house.

This evidence supported a reasonable belief that there was a relationship between Megan and Burr and that she was at his house sometime before the murder. There was no evidence linking her to the murder. A trier of fact could conclude that a reasonable magistrate reviewing a corrected affidavit could not have found probable cause to search Megan.

Megan raises a fact issue about whether Rogers was protected by qualified immunity, but her claim is

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[12] Propensity evidence may be used in probable cause determinations. Federal Rules of Evidence 1001(d)(3).

[13] The court evaluates probable cause at the time of the search and does not consider later evidence questioning the validity of Pikett's methods.

barred by limitations. Megan will take nothing from Rogers on this claim.

B. *Coercion of Campbell.*

Megan says that Rogers and Johnson coerced Campbell to give false information. There are no facts to support a claim that Rogers forced Campbell to incriminate Megan. The data in Johnson's report of the first interview, the video of the second interview, and Campbell's testimony at trial is consistent. Campbell was not under duress at trial.

Megan will take nothing from Rogers on her claim that he manufactured evidence against her.

8. *Megan and San Jacinto County.*

Megan could recover damages from San Jacinto County for the unconstitutional acts of its final policy maker, Rogers.

Megan's claim against Rogers for writing a flawed affidavit to search her is barred by limitations. Her claim against Rogers for coercing Campbell to give a false statement is not supported by the facts.

Because Megan takes nothing from Rogers, she will take nothing from the county.

9. *Junior and Rogers.*

Junior seeks damages from Rogers for (a) writing a misleading affidavit and (b) coercing Campbell's testimony.

Rogers did not write the affidavits used to secure warrants for Junior's search and arrest. Junior will take nothing from Rogers on this claim.

There are no facts to support Junior's claim that Campbell's testimony was coerced. Junior will take nothing from Rogers on this claim.

10. *Junior and Johnson.*

Junior seeks damages from Johnson because he (a) wrote misleading affidavits to secure warrants and (b) coerced Campbell's testimony. Though his claim for the search must be dismissed as brought after the limitations period, the court still considers its merits.

A. *Misleading Affidavit to Search.*

To recover, Junior must show that Johnson (a) violated his rights and (b) was not protected by qualified immunity.

Johnson violated Junior's Fourth Amendment rights if he recklessly included false information or excluded important information from his affidavit. Even if Johnson violated Junior's rights, he is protected by qualified immunity if the search was supported by probable cause. Thus, Junior must show (a) Johnson's

recklessness in writing a misleading affidavit and (b) that a reasonable magistrate, reviewing a corrected affidavit could not have found probable cause. A reasonable magistrate could find probable cause in a corrected affidavit if it contained enough facts to justify a belief that Junior murdered Burr.

The court now examines Junior's evidence that his rights were violated and compares Johnson's affidavit with a corrected affidavit.[14]

(I). *Claimed Rights Violations.*

Junior says that Johnson violated his Fourth Amendment rights by recklessly excluding (a) the fact that Campbell made two inconsistent statements; (b) the parts of Campbell's statement contradicted by other evidence; and (c) the DNA and hair evidence.

(a). *Exclusion of Inconsistent Statements Not Reckless.*

Junior says that: (a) Campbell's two statements were inconsistent, and (b) Johnson's omission of the inconsistencies from the affidavit was reckless.

The evidence does not show that the statements were inconsistent. Assuming the inconsistencies, Johnson's exclusion of them was not reckless because they

[14] An appendix compares the actual affidavit with a corrected affidavit.

are not grave enough to discount Campbell's statements.

Campbell's statements are not clearly inconsistent. The first interview was not formal. Johnson's notes were not meant to be a complete record of Campbell's statement. The notes were part of a live report that was supplemented later. Johnson told Campbell at the end of their first meeting that he would return with Rogers to take a full statement. It is likely that Campbell either told a more complete story the second time or Johnson's notes from the first time were incomplete.

Even if Campbell intended to tell a full story both times and added information the second time, Johnson's exclusion of that fact in the affidavit was not reckless. It merely evinces that Johnson either did not (a) see any inconsistencies between Campbell's two statements or (b) attach any importance to them. A jury cannot reasonably find that he should have. Johnson did not violate Junior's rights by excluding the inconsistencies.

(b). *Reckless Exclusion of Parts of Campbell's Statement.*

Junior says that (a) other evidence gathered by the investigators contradicted parts of Campbell's statement, and (b) Johnson recklessly omitted the inconsistent parts.

Johnson excluded portions of Campbell's statement that were contradicted by other evidence. Campbell said that Burr was beaten, cut, and shot. The autopsy report showed that Burr was beaten and cut but not shot. Campbell said Senior cut off Burr's genitals and put them in Burr's mouth. There was no evidence of genital mutilation.

Campbell also said that Senior stole a pistol and a .3030 rifle. While Burr's relatives confirmed that two guns were missing, they said the guns were a shotgun and a .22 rifle. Campbell said that Senior hid the guns and a knife in a hollow on Winfrey property. The investigators found a place matching Campbell's description but did not find guns or a knife.

Johnson had either direct knowledge of these inconsistencies or chose not to read the information in the file he used to write the affidavit.

These omissions were reckless. Inconsistencies between Campbell's statement and other evidence are a reason to doubt Campbell's credibility. While the court will conclude that these inconsistencies were not grave enough to discount Campbell's credibility, that decision was not for Johnson to make. He should have presented all of the important facts. Johnson violated Junior's Fourth Amendment rights.

(c). *Reckless Exclusion of DNA and Hair Evidence.*

Johnson also omitted that the blood at the scene did not match Megan and Junior and that the hair did not match Megan.

Johnson had either direct knowledge of this evidence or chose not to read the information in the file he used to write the affidavit.

Omission of this evidence was reckless. The lack of blood from Megan and Junior at the crime scene decreased the likelihood that they killed Burr. While the court will conclude that the inclusion of this favorable evidence would not have been enough to overcome a reasonable belief that Junior and Megan were involved in the murder, that decision was not for Johnson to make. He should have presented all of the important facts. In not doing so, Johnson violated Junior's Fourth Amendment rights.

(2). *Johnson Protected by Qualified Immunity.*

Johnson was protected by qualified immunity because a reasonable magistrate, reviewing a corrected affidavit, would have found probable cause to search Junior. Johnson had evidence of: (a) the relationship, possibly romantic, between Megan and Burr; (b) her desire for his hidden money, (c) the presence of Megan's, Junior's, and Senior's scents on Burr after his death, and (d) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

Campbell was a credible source. Though he included some details that did not match other evidence, the majority of the facts he gave matched the investigators' theory of the case. He also gave one fact – about the missing guns – that was unknown at the time.

Though the lack of DNA evidence decreases the likelihood that Megan, Junior, and Senior killed Burr, it is not enough to cast doubt on the investigators' reasonable belief of the Winfreys' guilt. The investigators believed that three or four people worked together to kill Burr and that he was murdered while in his living room with people he considered to be friends. They reasonably believed that the Winfreys killed him without suffering an injury in the process.

On the facts before it, the court can decide as a matter of law that a reasonable magistrate, reviewing a corrected affidavit, could have found probable cause to search Junior. Junior will take nothing from Johnson on this claim.

B. *Misleading Affidavit to Arrest Junior.*

Junior says that Johnson recklessly wrote a misleading affidavit for his arrest and that the arrest was not supported by probable cause.

Johnson says that the court cannot consider this claim because the affidavit for Junior's arrest was destroyed at Junior's request. The four affidavits before the court are substantively identical. The content of

Junior's arrest affidavit was the same as Megan's and Senior's.

Because the search affidavit violated Junior's rights, the arrest affidavit did as well. The affidavit supporting Junior's arrest contained the same errors as the search affidavit plus one additional error. The Lab reported that the hairs gathered from Junior and Senior did not match the hair found at Burr's house. That omission is unique because it shows that someone was present in Burr's house other than Burr, Junior, Megan, and Senior.

The additional fact that someone else left hair at Burr's house does not cast enough doubt on the incriminating evidence to overcome a reasonable belief that Junior participated in Burr's murder.

One the facts before it, the court can decide as a matter of law that a reasonable magistrate, reviewing a corrected affidavit, could have found probable cause to search Junior. Junior will take nothing from Johnson on this claim.

C. *Coercion of Campbell.*

There are no facts to support Junior's claim that Campbell's testimony was coerced. Junior will take nothing from Johnson on this claim.

11. *Megan and Johnson.*

Megan seeks damages from Johnson because he (a) wrote a misleading affidavit to secure a warrant for Megan's arrest, and (b) coerced Campbell's testimony.

A. *Misleading Affidavit to Arrest Megan.*

Johnson's affidavit to arrest Megan contained the same errors as his affidavits to search and arrest Junior. Johnson violated Megan's Fourth Amendment rights by recklessly omitting that (a) parts of Campbell's statement were inconsistent with other evidence; and (b) DNA and hair evidence did not match any of the Winfreys.

Even if Johnson had corrected those errors, a reasonable magistrate would have found probable cause to arrest Megan. The evidence still indicated: (a) a relationship, possibly romantic, between Megan and Burr; (b) her desire for his hidden money; (c) the presence of Megan's, Junior's, and Senior's scents on Burr after his death; and (d) Campbell's statement that Senior murdered Burr with the help of Megan and Junior.

On the facts before it, the court can conclude as a matter of law that a reasonable magistrate reviewing a corrected affidavit could have found probable cause to arrest Megan. Megan will take nothing from Johnson on this claim.

B. *Coercion of Campbell.*

There are no facts to support Megan's claim that Campbell's testimony was coerced. Megan will take nothing from Johnson on this claim.

12. *Megan and Pikett.*

Pikett invented and ran the scent-pad line-up that identified Megan, Junior, and Senior as contributors to the scents on Burr's clothes. The investigators used the line-up to support probable cause to search and seize Megan. Pikett testified about the line-up at Megan's trial. Megan says that Pikett manufactured the results of the line-up.

A. *Pikett's Background.*

Pikett bought a bloodhound as a pet and decided to train it. He attended seminars about how to use bloodhounds to track people. Based on what he learned, Pikett developed scent'pad line-ups as a tool to help police officers.

Pikett has a bachelor's degree in chemistry and a master's in sports coaching. He came up with scent-pad line-ups on his own. He did not receive training, read scientific literature, or publish peer-reviewed articles.

B. *Performing the Line-Up.*

Before meeting the lead investigators, Pikett asked them to gather (a) scents from suspects and (b)

scents from the victim. Texas Ranger Grover Huff gave a piece of gauze to each suspect, asked them to rub it on their skin, and had them place the gauze in a plastic bag. Huff also rubbed a piece of gauze on Burr's clothes and put the gauze in another plastic bag.

Pikett met the investigators in a field. Pikett brought his dogs, unused paint cans, and filler scents that he took from prisoners at the Fort Bend County Jail. Pikett stores the filler scents in a duffle bag that he keeps in the back of his SUV – the same place where his dogs ride daily.

Huff put either a suspect's scent or a filler scent in each paint can. Huff then put the paint cans in the field while Pikett prepared one of his dogs. Pikett then gave the dog the victim's scent.

Pikett walked the dog next to each can to see if the dog "alerted" on any of the cans. Each dog's alert varies. Pikett has been unable to train his dogs to alert in a specific manner. Instead, he learns each dog's individual alert as he works with it. If the dog alerts on a can, Pikett concludes that the scent in the can matches the scent from the victim's clothes.

After the first dog did the line-up, Pikett did the same line-up one or two additional dogs to confirm the initial result. The position of the cans was not altered for each dog.

Both of the dogs used alerted on Megan's scent and Junior's scent as a match to the scent on Burr's clothes.

All three of the dogs used alerted on Senior's scent as a match.

C. *Megan's Claims against Pikett.*

Megan sues Pikett for violating her constitutional rights by fabricating the results of the scent-pad line-up. Megan must show that Pikett (a) violated her rights and (b) was not protected by qualified immunity from damages.

If Pikett fabricated scientific evidence to help justify Megan's imprisonment, he violated her Fourteenth Amendment due process rights. His qualified immunity does not protect him from deliberately or recklessly creating a scientifically inaccurate report.[15] Pikett's behavior is measured against what a reasonable police officer with his training and experience should have known about the reliability of his report.

D. *Nicely Report.*

In evaluating Megan's claim, the court considers the technician's report submitted by Megan. Pikett objects because Steven Nicely has no experience with scent-pad line-ups or training bloodhounds. Nicely has extensive experience with scent detecting dogs. No technician has experience with scent-pad line-ups other than Pikett and the people he trained. Nicely's

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[15] *Brown v. Miller*, 519 F.3d at 237 (5th Cir. 2008).

report will be admitted and considered commensurate with his experience.

Nicely watched the video of Pikett's line-up and reviewed Pikett's deposition. Nicely found that: (a) newer scents stand out as fresher amongst older scents; (b) scents from people who live in the same place smell similarly; (c) dogs can become accustomed to scents if they are exposed to them regularly; (d) Pikett's claim that his dogs are accurate ninety-nine percent of the time is unreliable; (e) Pikett may have influenced his dogs because he kept them on a short leash and could see in the cans; and (f) the dogs may have responded to deliberate cues from Pikett.

E. *Insufficient Distractors.*

Pikett's filler scents were not useful distractors. Most of the scents were old, came from people who lived in the same place, and were stored in a location near the dogs.

Pikett kept the filler scents for as long as three years. The scents from the suspects were new. According to Nicely, newer scents stand out amongst older scents. The dogs may have alerted to Megan's scent because it was fresher than the others.

Most of the filler scents came from the Fort Bend County Jail. According to Nicely, the filler scents that came from the Jail had a common institutional scent. The dogs may have alerted on Megan's scent because it stood out amongst the scents from the same place.

Pikett also stored the filler scents in a duffle bag in the back of his SUV. The dogs rode daily in the car next to the bag. According to Nicely, the dogs may have become accustomed to the filler scents because of prolonged exposure. The dogs may have alerted on Megan's scent because it was the only one they did not recognize.

Pikett testified at Megan's trial that his dogs have an accuracy rate between ninety-nine and one hundred percent. According to Pikett, he believes his dogs are wrong only when they "identif[y] the wrong person in the line-up."

Pikett cannot check his dogs' accuracy because no other test compares scents. It is more accurate to say that his dogs have only chosen a filler scent instead of a target scent twice out of a nearly a thousand line-ups. Nicely reports that a success rate of over ninety-nine percent is highly unlikely for scent identifying dogs.

Such a high success rate is an indication not that the dogs are accurate but that the filler scents are defective as distractors.

F. *Pikett's Influence.*

Pikett's method may allow him to intentionally or subconsciously influence the outcome of the line-up. Pikett kept his dogs on a short leash and looked down while walking by each can. He used paint cans that did

not have lids on them. He may have consciously or unconsciously influenced the result.

Pikett looked down while walking the line-up and did not ensure that the bags and gauze used for the suspects matched those used for his filler scents. Pikett may have been able to tell which can contained a suspect's scent by looking into the can. Also, when Pikett ran the second or third dogs, he knew which can the first dog had alerted on.

By keeping the dogs on a short leash, Pikett may have been able to cue the dogs to alert. According to Nicely, a dog may be cued intentionally or subconsciously. He also says that the dogs should have been trained to run the line-ups by themselves, with a different handler who did not train them, or at least given a longer leash with more slack to prevent cuing.

G. *Dog's Alert.*

Pikett admits that he did not successfully train his dogs to alert in a specific way. Instead, he claims that he knows each dog's alert and can describe the alert before running the line-up. At Megan's trial, he said that anyone watching the line-up should be able to tell when the dog alerts but recently admitted that, as the handler, he is uniquely able to feel it.

According to Nicely, the video does not clearly show the dogs alerting on Megan's scent. It is also unclear whether Pikett cues the dogs or whether their reactions are caused by smelling the scents.

H. *Pikett's Culpability.*

Megan has shown that the line-ups were likely to confirm the investigators' suspicions by linking the suspects' scents to the victim's scent. This could have happened due to ineffective filler scents, Pikett's subconscious acts, or Pikett's intentional acts. Though he may not have had a motive to harm Megan individually, his methods may have been designed to help officers confirm their suspicions.

Dogs help humans in a variety of difficult jobs. Dogs reliably guide the blind, flush game, comfort the ill, locate the lost, subdue the violent, interdict contraband, intimidate intruder, herd livestock, and track the fugitive.

While using a dog to alert among scents to connect a suspect to an artifact of the crime follows the pattern of these uses, Megan has introduced enough evidence to create a question about whether Pikett recklessly or intentionally designed a flawed test. Her claims against Pikett for fabricating evidence that was used to support her seizure, prosecution, and imprisonment survive.

13. *Conclusion.*

Megan and Junior take nothing on their claims for illegal search against Johnson and Rogers because they sued after the limitations period.

The court can conclude as a matter of law that Rogers and Johnson are protected by qualified immunity for their arrests of Megan and Junior.

The county is not liable because Rogers is not liable.

No facts support the claims that Johnson and Rogers fabricated Campbell's testimony.

The court cannot decide as a matter of law whether Pikett's use of scent-pad line-ups to produce evidence against Megan was reckless. Megan's claim against Pikett survives.

Signed on October 4, 2016, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Appendix

Johnson Affidavit	Corrected Affidavit
Junior and Megan visited Burr and asked to move in with him, but he said no.	Same.
A teacher saw an intimate exchange between Megan and Burr in which Megan asked Burr to spend some of the money he had hidden at his house on her.	Same.

A second teacher saw an angry exchange between Megan and Burr after which she muttered that someone should beat the shit out of him.	Same.
A third teacher said she was assaulted by Megan over a year before the murder.	Same.
The line-up established that Megan's and Junior's scents were on Burr's clothes.	Same.
A scent trail connected Burr's house to the Winfreys' house.	A scent trail connected Burr's house to the Winfreys house, though the scent used to trace the trail belonged to Chris Hammond, Megan's boyfriend.
Omitted.	Megan and Junior did not contribute to the blood at the scene and Megan's hair did not match hair found at the scene.
Campbell shared a prison cell with Senior who admitted to killing Burr.	Same.
Senior told Campbell that Megan and Junior let him in the back of the house.	In an initial interview, Campbell said that Megan and Junior let Senior in the back of the house.

	Campbell later said that Senior was accompanied by a cousin.
Campbell knew that Burr was in the living room when Burr was killed.	Campbell only revealed that he knew Burr was in the living room when he was killed in the second interview.
Campbell knew that Burr was badly beaten and that his neck was cut.	Though Campbell knew in both interviews that Burr was beaten and cut, in the second interview he said that Burr was also shot – a fact contradicted by the autopsy report.
Omitted.	Campbell thought that Senior cut off Burr's genitals and put them in Burr's mouth.
Senior told Campbell that he stole two guns from Burr's house. Burr's relative confirmed that two guns were missing from Burr's house after the murder a shotgun and a .22 rifle. The investigators were not aware of the missing guns before Campbell's statements.	Senior told Campbell that he stole two guns from Burr – a pistol and a 3030 rifle. Burr's relative confirmed that two guns were missing from Burr's house after the murder – a shotgun and a .22 rifle. The investigators were not aware of the missing guns before Campbell's statement. Campbell did not mention the guns until the second interview.

Senior told Campbell that he hid the guns and a buck knife in a hollow on Winfrey property.	Senior told Campbell that he hid the guns and a knife in a hollow on Winfrey property. The investigators located an area that matched that description but did not find the guns or knife.

APPENDIX J

United States Court of Appeals
for the Fifth Circuit

No. 20-20477

RICHARD WINFREY, JR.,

Plaintiff—Appellee,

versus

SAN JACINTO COUNTY,

Defendant,

MEGAN WINFREY,

Plaintiff—Appellee,

versus

LENARD JOHNSON, *Former San Jacinto County Sheriff's Department Deputy*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 4:10-CV-1896, 4:14-CV-448

ON PETITION FOR REHEARING EN BANC

(Filed Feb. 17, 2022)

Before CLEMENT, SOUTHWICK, and WILLETT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, 5TH CIR. R. 35 I.O.P., the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc, FED. R. APP. P. 35 and 5TH CIR. R. 35, the petition for rehearing en banc is DENIED.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

RICHARD WINFREY, JR., Plaintiff, v. SAN JACINTO COUNTY, San Jacinto County Sheriff JAMES WALTERS, Former San Jacinto County Sheriff LACY ROGERS, Former San Jacinto County Sheriff's Department Deputy LENARD JOHNSON, Texas Ranger GROVER HUFF, Texas Ranger RONALD DUFF, FORT BEND COUNTY, Fort Bend County Sheriff MILTON WRIGHT, Former Fort Bend County Sheriff's Department Deputy KEITH PIKETT, and as-of-yet unknown employees of San Jacinto County, as-of-yet unknown Texas Rangers, and as-of-yet unknown employees of Fort Bend County, Defendants.	Case No. 10-cv-1896 JURY TRIAL DEMANDED

COMPLAINT

(Filed May 26, 2010)

Plaintiff, RICHARD WINFREY, JR., by his attorney, LOEVY & LOEVY, complains of Defendants, SAN JACINTO COUNTY, JAMES WALTERS, LACY ROGERS, LENARD JOHNSON, GROVER HUFF, RONALD DUFF, FORT BEND COUNTY, MILTON WRIGHT, KEITH PIKETT AND other as-ofyet UNKNOWN EMPLOYEES (collectively "Defendants"), and states as follows:

Introduction

1. Plaintiff, Richard Winfrey, Jr. was wrongfully charged with capital murder on the basis of knowingly contrived dog scent lineups.

2. These dog scent lineups, which were developed by Defendant Pikett, epitomize the worst of "junk science" – and the Defendants knew it. Defendant Pikett developed the dog scent lineups without any training, without any mechanism for testing their scientific reliability or even for ensuring that the "scents" were not contaminated. In fact, the "dog scent lineups" conducted by Pikett were so preposterous that one expert who has viewed them asserted that "[i]f it was not for the fact that this is a serious matter, I could have been watching a comedy."

3. Well before Plaintiff was arrested, the Defendants knew that dog scent lineups and their mastermind, Defendant Pikett, were a fraud. Nonetheless, the

Defendants continued to use them in their criminal investigations, including to inculpate Plaintiff in a murder that he did not commit.

4. In an attempt to ensure that Plaintiff was convicted despite his innocence, the Defendants fabricated evidence – including coached false testimony that incriminated the Plaintiff – to corroborate the sham findings of the dog scent lineups.

5. Ultimately, the criminal case against Plaintiff fell apart, just as the dog scent lineups have been exposed a fraud. On June 12, 2009, after spending more than two years wrongfully imprisoned on capital charges and branded a "murderer," Mr. Winfrey was acquitted of all charges and released from custody.

Jurisdiction and Venue

6. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation under color of law of Plaintiff's rights as secured by the United States Constitution.

7. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

8. Venue is proper under 28 U.S.C. § 1391(b). All parties reside in this judicial district, and the events giving rise to the claims asserted herein occurred in this judicial district.

The Parties

9. Plaintiff Richard Winfrey, Jr. is a 23 year-old resident of San Jacinto County. By all accounts, a mild-mannered and well-liked young man, Mr. Winfrey was working at Bubba's Store and Restaurant before he was arrested. Since his release, he has been working as an interviewer for a research firm.

10. At all relevant times, Defendants Lenard Johnson and the as-of-yet unknown employees of San Jacinto County were officers employed by the San Jacinto County Sheriff and the San Jacinto County Sheriff's Department. At all relevant times, Defendant Lacy Rogers was the San Jacinto County Sheriff. Defendants Johnson, Rogers and the as-of-yet unknown employees of San Jacinto County were acting within the scope of their employment at all relevant times.

11. Defendants Grover Huff, Ron Duff, and the as-of-yet unidentified Texas Rangers were at all relevant times Texas Rangers employed by the Texas Department of Public Safety, and acting within the scope of their employment.

12. Defendant Milton Wright is and was at all relevant times the Sheriff of Fort Bend County. At all relevant times, Defendant Keith Pikett was a Deputy with the Fort Bend County Sheriff's Department. At all relevant times, Defendant Keith Pikett and the as-of-yet unidentified employees of the Fort Bend County Sheriff's Office were employed by the Fort Bend County Sheriff's Department. Likewise, at all relevant times, Defendants Wright, Pikett and the as-of-yet

unidentified employees were acting within the scope of their employment.

Factual Background

Defendant Pikett's Fraudulent Dog Scent Lineups

13. In the early 1990s, Defendant Pikett developed a fraudulent investigative technique he coined "dog scent lineups."

14. In this technique, the dog is introduced to a scent sample that has been collected from a crime scene or piece of evidence. After "getting" that scent, the dog is then presented with a series of containers with scents in them. These scents have been taken directly from a suspect and, allegedly, from others purportedly matching the general description of the suspect. According to Defendant Pikett, the dog will then communicate to its handler/observer if the scent that it "got" the first time matches a scent in one of the containers.

15. Without a doubt, these lineups epitomize the worst of junk science. Defendant Pikett developed the dog scent lineups without any training – he simply purchased bloodhound dogs and "trained" them to indicate when two human scents matched. Defendant Pikett never tested the dog scent lineups' accuracy, nor did he establish a set of standards under which to conduct the lineups. Instead, Defendant Pikett has repeatedly lied under oath about his qualifications, his

training, and the supposed infallibility of his dog identifications.

16. Despite the unreliability of the dog scent lineup results, Defendant Pikett has used them in thousands of criminal case investigations.

17. The fraudulent nature of Defendant Pikett's dog scent lineups was exposed well before Plaintiff was charged with and prosecuted for capital murder. For example, in 2006, Defendant Pikett's dog scent lineup wrongly implicated an innocent man in a murder case in which the true perpetrator later confessed. Similarly, in 2007, the dog scent lineup falsely implicated a man in a string of robberies for which he was absolutely innocent. Finally, in 2007 and 2008, Pikett's dogs falsely identified two men who were then charged with capital murder on the basis of dog scent lineups; both were exonerated when the real killer confessed.

18. Indeed, before Plaintiff's wrongful arrest, the "dog scent lineups" were so patently false that a senior prosecutor in the Harris County District Attorney's Office alerted the Houston Police Department to the fact that Defendant Pikett and his dogs were a fraud.

19. Given the exposure of Defendant Pikett's dog scent lineups as a fraud within the law enforcement community, the Defendants were aware that Defendant Pikett and his dog scent lineups were a sham. Nonetheless, the Defendants continued to use Defendant Pikett to help them "solve" crimes and close cases.

The Murder

20. Murray Burr was a custodian at the high school that Richard Winfrey, Jr. attended.

21. On or about August 7, 2004, the body of Mr. Burr was discovered inside his home. Mr. Burr had been beaten and stabbed to death.

Defendants Fabricate Evidence to Inculpate Plaintiff

22. In the days following Mr. Burr's murder, the Defendants canvassed the neighborhood looking for potential witnesses. During this canvas, the Defendants learned that Plaintiff and his sister, Megan Winfrey, would visit Mr. Burr on occasion on their way to church on Sundays.

23. At the time of Mr. Burr's murder, Richard Winfrey, Jr. was only 17 years old; his sister Megan was only 16 years old.

24. The Defendants spoke with Mr. Winfrey about the murder. Mr. Winfrey explained that he had absolutely nothing to do with – and, furthermore, no knowledge of – the murder of Murray Burr.

25. Instead of initiating a search for the perpetrator of this heinous crime, the Defendants simply determined that Plaintiff and his family were the offenders. The Defendants actively ignored all evidence to the contrary, including DNA tests performed on

evidence collected at the crime scene that excluded Mr. Winfrey as an offender.

26. Approximately one week after they approached Mr. Winfrey, and having found no legitimate evidence that would inculpate him, the Defendants turned to Defendant Pikett and his dogs. The Defendants knew that Defendant Pikett's practice of conducting dog scent lineups to identify criminals was a fraud. Despite this knowledge, the Defendants subjected Mr. Winfrey to a dog scent lineup.

27. Mr. Winfrey was innocent, and felt no hesitation about providing the Defendants with everything they were asking of him. To conduct the dog scent lineup, the Defendants took a "scent sample" from the victim's clothing and compared this to six other scent samples, including one from Mr. Winfrey, who had readily complied with their request that he wipe his hands with a piece of gauze.

28. The dog scent lineup purportedly "confirmed" that Mr. Winfrey was involved in the murder.

29. To provide additional "confirmation" of the dog scent lineup's result, Defendant Pikett conducted what he described as a dog "scent drop." That is, two dogs were allegedly provided with Mr. Winfrey's scent outside the victim's home. After several stops and restarts, the two dogs – accompanied by Pikett – arrived at Plaintiff's home.

30. Unfortunately for the Defendants, it was later discovered that the "scent drop" was conducted

using the scent of another man – not Plaintiff – who was not related to Plaintiff and did not live in Plaintiff's home. There is no question that this "scent drop" was a sham on its face.

31. Once the Defendants learned that the "scent drop" had been performed using another individual's scent, the Defendants called the "scent drop" an "accident."

32. Despite this discovery, the Defendants continued to use this evidence in furtherance of the prosecution of the case.

33. To corroborate Defendant Pikett's fabricated scent identifications of Mr. Winfrey, the Defendants coached a jailhouse snitch into identifying Plaintiff, his sister and his father as the perpetrators of the murder of Mr. Burr. The Defendants never disclosed their improper coaching of the jailhouse snitch to Mr. Winfrey. That jailhouse snitch has fully recanted his false statements.

The Defendants Ignore Obvious Alternative Offenders

34. In addition to fabricating evidence to inculpate Plaintiff, the Defendants also ignored substantial evidence pointing at other possible offenders.

35. For example, the Defendants ignored all evidence pointing at Tracy Brown as an alternative offender.

36. Ms. Brown was Mr. Burr's niece. Ms. Brown handled Mr. Burr's financial affairs.

37. Just prior to Mr. Burr's murder, Ms. Brown and her husband were having severe financial problems. Indeed, before Mr. Burr was killed, Ms. Brown had been fired from at least one job as a bank teller because of money coming up short.

38. Since she handled her uncle's affairs, Ms. Brown knew that she would inherit a large sum of money upon Mr. Burr's death.

39. After Mr. Burr's death, Ms. Brown collected this money – an amount totaling approximately $500,000. Ms. Brown also collected proceeds from the sale of Mr. Burr's home. She and her husband went on a two-week cruise just a couple of weeks after her uncle was murdered.

40. Although the Defendants were aware of the Browns' motive for killing Mr. Burr and their suspicious behavior in the aftermath of his death, the Defendants never investigated Ms. Brown as a possible perpetrator of the murder of Murray Burr.

Plaintiff is Wrongfully Arrested and Prosecuted for Mr. Burr's Murder

41. Despite the fact that Plaintiff had done absolutely nothing wrong, and the fact that the Defendants had absolutely no legitimate evidence against him, on or about February 8, 2007, more than two-and-a-half

years after Mr. Burr's death, Plaintiff was arrested for the murder of Murray Burr.

42. At only 20 years old, Plaintiff had never received so much as a speeding ticket, let alone been arrested for a crime. Nonetheless, for the next nearly two-and-a-half years, Plaintiff was confined inside a jail cell, branded a murderer, and charged with a capital crime.

Plaintiff is Acquitted in 13 Minutes

43. On June 12, 2009, after a 5-day trial, Plaintiff was acquitted of the murder of Murray Burr. The jury reached its determination in only 13 minutes.

44. Although Plaintiff has regained his freedom, it has come at a tremendous cost. Mr. Winfrey spent nearly two-and-ahalf years incarcerated for a capital crime that he did not commit. During his wrongful incarceration, Mr. Winfrey was deprived of the various pleasures of basic human experience, which all free people enjoy as a matter of right. As a result of his wrongful incarceration, Mr. Winfrey has suffered tremendous damage, including extreme emotional distress, physical suffering and financial loss.

Count I – 42 U.S.C. § 1983
Violation of Due Process

45. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

46. As described more fully above, all of the Defendants, while acting individually, jointly and in conspiracy, as well as under color of law and within the scope of their employment, deprived Plaintiff of his constitutional rights.

47. In the manner described more fully above, the Defendants conducted a reckless criminal investigation, knowingly using fabricated junk science, which they bolstered with false reports and coerced evidence, to mislead and misdirect Plaintiff's criminal prosecution. Absent this misconduct, the prosecution of Plaintiff could not and would not have been pursued. Moreover, the Defendants failed to release Plaintiff even after they knew, or should have known, that Plaintiff had been misidentified.

48. The Defendants' misconduct directly resulted in the unjust criminal prosecution of Plaintiff, in violation of his rights under the United States Constitution.

49. As a result of the Defendants' violation of his constitutional rights, Plaintiff suffered injuries, including but not limited to financial harm and emotional distress.

50. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

51. The misconduct described in this Count was undertaken by employees and agents of the San

Jacinto County Sheriff's Department, including but not limited to the Defendants, pursuant to the policy and practices of the San Jacinto County Sheriff to pursue wrongful arrests and convictions through profoundly flawed investigations and fabricated evidence, including junk science evidence. In this way, the San Jacinto County Sheriff's Office violated Plaintiff's rights by maintaining policies and practices that were the moving force driving the foregoing constitutional violations.

52. These widespread practices, so well-settled as to constitute *de facto* policy in the San Jacinto County Sheriff's Office, were able to exist and thrive because municipal policymakers with authority over the same exhibited deliberate indifference to the problem, thereby effectively ratifying it.

53. The widespread practices described in the preceding paragraphs were allowed to flourish because the San Jacinto County Sheriff declined to implement sufficient training and/or any legitimate mechanism for oversight or punishment.

54. The misconduct described in this Count was also undertaken by employees and agents of the Fort Bend County Sheriff's Office, including but not limited to the Defendants, pursuant to the policy and practice of the Fort Bend County Sheriff to pursue wrongful arrests and convictions through profoundly flawed investigations and fabricated evidence, including junk science evidence. In this way, the Fort Bend County Sheriff's Office violated Plaintiff's rights by

maintaining policies and practices that were the moving force driving the foregoing constitutional violations.

55. These widespread practices, so well-settled as to constitute *de facto* policy in the Fort Bend County Sheriff's Office, were able to exist and thrive because municipal policymakers with authority over the same exhibited deliberate indifference to the problem, thereby effectively ratifying it.

56. The widespread practices described in the preceding paragraphs were allowed to flourish because the Fort Bend County Sheriff declined to implement sufficient training and/or any legitimate mechanism for oversight or punishment.

57. As a result of the Defendants' unconstitutional conduct, Plaintiff sustained, and continues to sustain, injuries including emotional pain and suffering.

Count II – 42 U.S.C. § 1983
Supervisory Liability

58. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

59. The constitutional injuries complained-of herein were proximately caused by a pattern and practice of misconduct which occurred with the knowledge and consent of those of the Defendants who acted in a supervisory capacity, such that these officers personally knew about, facilitated, approved, and condoned

this pattern and practice of misconduct, or else affirmatively turned a blind eye thereto without taking any steps to stop it.

60. In this way, these Defendants are personally responsible for the complained-of injuries because they knowingly, willfully, or at least recklessly caused the alleged deprivation by their actions or by their deliberately indifferent failure to act.

61. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

62. The misconduct described in this Count was undertaken pursuant to the San Jacinto County's and the Fort Bend County's policies and practices in the manner more fully described above.

63. As a result of this misconduct, Plaintiff sustained, and continues to sustain, injuries including emotional pain and suffering.

Count III – 42 U.S.C. § 1983
Failure to Intervene

64. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

65. One or more of the Defendants had a reasonable opportunity, had they been so inclined, to prevent another Defendant from violating Plaintiff's rights in the manner described above, but they failed to do so.

66. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

67. The misconduct described in this Count was undertaken pursuant to the San Jacinto County's and the Fort Bend County's policies and practices in the manner more fully described above.

68. As a result of this misconduct, Plaintiff sustained, and continues to sustain, injuries including emotional pain and suffering.

Count IV – 42 U.S.C. § 1983
Conspiracy to Deprive Constitutional Rights

69. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

70. After the crime at issue, the Defendants reached an agreement amongst themselves to frame Plaintiff for the murder, and to thereby deprive Plaintiff of his constitutional rights, all as described in the various paragraphs of this Complaint.

71. In this manner, the Defendants, acting in concert with other unknown co-conspirators, have conspired by concerted action to accomplish an unlawful purpose by an unlawful means.

72. In furtherance of the conspiracy, each of the coconspirators committed overt acts and was an otherwise willful participant in joint activity.

73. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

74. The misconduct described in this Count was undertaken pursuant to the San Jacinto County's and the Fort Bend County's policies and practices in the manner more fully described above.

75. As a result of this misconduct, Plaintiff sustained, and continues to sustain, injuries including emotional pain and suffering.

Count V – State Law Claim
Malicious Prosecution

76. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

77. Defendants Rogers, Lenard, Huff, Duff, Wright and Pikett (hereinafter the "Individual Defendants") caused Plaintiff to be improperly subjected to judicial proceedings for which there was no legitimate probable cause. Judicial proceedings were instituted and continued maliciously, resulting in injury, and all such proceedings were ultimately terminated in Plaintiff's favor in a manner indicative of innocence.

78. The Individual Defendants accused Plaintiff of criminal activities knowing those accusations to be without genuine probable cause, and they made statements to prosecutors with the intent of exerting influence to institute and continue the judicial proceedings.

79. Statements the Individual Defendants made regarding Plaintiff's alleged culpability were made with the knowledge that said statements were false and perjured. The Individual Defendants also fabricated evidence by coercing false inculpatory testimony from purported witnesses, and through dog scent lineups. The Individual Defendants withheld the facts of their manipulation and the resulting fabrications from Plaintiff.

80. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

81. As a result of this misconduct, Plaintiff sustained and continues to sustain injuries including emotional pain and suffering.

82. This Count is only brought against the Individual Defendants in their individual capacities and is not brought against any municipality or any of the Sheriffs in their official capacities.

Count VI – State Law Claim
Abuse of Process

83. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

84. The Individual Defendants made an illegal, improper, or perverted use of the process, a use neither warranted nor authorized by the process.

85. The Individual Defendants had an ulterior motive or purpose in exercising such illegal, improper, or perverted use of the process.

86. As a result of the Individual Defendants' misconduct, Plaintiff sustained, and continues to sustain, injuries including emotional pain and suffering.

87. This Count is only brought against the Individual Defendants in their individual capacities and is not brought against any municipality or any of the Sheriffs in their official capacities.

Count VII – State Law Claim
Intentional Infliction of Emotional Distress

88. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

89. In the manner described more fully above, by wrongfully arresting and prosecuting Plaintiff for a capital murder that he did not commit, the Individual Defendants intended to cause emotional distress.

90. In doing so, the Individual Defendants' conduct was extreme and outrageous and caused Plaintiff severe, disabling emotional distress.

91. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

92. As a result of this misconduct, Plaintiff sustained, and continues to sustain, injuries including emotional pain and suffering.

93. This Count is only brought against the Individual Defendants in their individual capacities and is not brought against any municipality or any of the Sheriffs in their official capacities.

Count VIII – State Law Claim
Civil Conspiracy

94. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

95. In the manner described more fully above, after the crimes at issue, the Individual Defendants reached an agreement among themselves and a meeting of the minds to frame Plaintiff for the murder.

96. In furtherance of that conspiracy, the Defendants undertook one or more unlawful, overt acts as described above.

97. As a result of this misconduct, Plaintiff sustained, and continues to sustain, injuries including emotional pain and suffering.

98. This Count is only brought against the Individual Defendants in their individual capacities and is not brought against any municipality or any of the Sheriffs in their official capacities.

WHEREFORE, Plaintiff, RICHARD WINFREY, JR., respectfully requests that this Court enter judgment in his favor and against Defendants SAN JACINTO COUNTY, JAMES WALTERS, LACY ROGERS, LENARD JOHNSON, GROVER HUFF,

RONALD DUFF, FORT BEND COUNTY, MILTON WRIGHT, KEITH PIKETT AND other as-of-yet UNKNOWN EMPLOYEES, awarding compensatory damages, costs, and attorneys' fees as well as punitive damages against each of the Individual Defendants and any other relief this Court deems appropriate.

JURY DEMAND

Plaintiff, RICHARD WINFREY, JR., hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all issues so triable.

RESPECTFULLY SUBMITTED:

/s/Gayle Horn

Attorneys for Plaintiff

Arthur Loevy
Jon Loevy
Gayle Horn
Rachel Steinback
LOEVY & LOEVY
312 North May Street
Suite 100
Chicago, IL 60607
(312) 243-5900

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MEGAN WINFREY, Plaintiff, v. KEITH PIKETT, Former Fort Bend County Sheriff's Deputy, LACY ROGERS, Former San Jacinto County Sheriff, LENARD JOHNSON, Former San Jacinto County Sheriff's Deputy Chief, SAN JACINTO COUNTY, and FORT BEND COUNTY, Defendants.	4:14-CV-448 Judge Lynn N. Hughes JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

(Filed Apr. 14, 2014)

Plaintiff, MEGAN WINFREY, by and through her attorneys, Loevy & Loevy, hereby complains of Defendants KEITH PIKETT, Former Fort Bend County Sheriff's Deputy, LACY ROGERS, Former San Jacinto County Sheriff, LENARD JOHNSON, Former San Jacinto County Sheriff's Deputy Chief, SAN JACINTO COUNTY, and FORT BEND COUNTY, and states as follows:

Introduction

1. Plaintiff, Megan Winfrey, was wrongfully prosecuted for and convicted of capital murder and conspiracy to commit capital murder on the basis of knowingly contrived dog scent lineups, knowingly or recklessly false affidavits, and coerced false testimony. She spent more than six years in prison for crimes that she did not commit.

2. The contrived dog scent lineups, which were developed by Defendant Keith Pikett, epitomized the worst of junk science. Defendant Pikett developed the dog scent lineups without any training, without any mechanism for testing their scientific reliability or even for ensuring that the "scents" were not contaminated.

3. Defendant Pikett made knowing efforts to secure a false identification of Plaintiff using his dogs, and these fabricated results from the dog scent lineups were used to obtain search and arrest warrants for Plaintiff and inculpate her in a murder that she did not commit.

4. In addition, in an attempt to ensure that Plaintiff was convicted despite her innocence, Defendants Lacy Rogers and Lenard Johnson fabricated evidence—including coerced false inculpatory testimony from a jailhouse informant—to corroborate the sham findings of the dog scent lineups.

5. Although no physical evidence linked Plaintiff to the crime, Defendants Rogers, Johnson, and Pikett

nonetheless decided to secure Plaintiff's wrongful arrest, prosecution, conviction, and imprisonment.

6. Ultimately, the criminal case against Plaintiff fell apart. On February 27, 2013, the Texas Court of Criminal Appeals overturned Ms. Winfrey's convictions and rendered acquittals for her on both charges. She was released from custody shortly thereafter, after spending approximately 6 years wrongfully incarcerated.

Jurisdiction and Venue

7. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation under color of law of Plaintiff's rights as secured by the United States Constitution.

8. This court has jurisdiction of the federal claims pursuant to 28 U.S.C. § 1331 and the state law claims pursuant to 28 U.S.C. § 1367.

9. Venue is proper under 28 U.S.C. § 1391(b). All parties reside in this judicial district, and the events giving rise to the claims asserted herein occurred in this judicial district.

The Parties

10. Plaintiff Megan Winfrey is a 26 year-old resident of Texas. In 2004, at the time of the murder of which she was accused, Ms. Winfrey was a 16 year-old girl attending Coldspring High School. When she was

arrested in 2007, Ms. Winfrey was 19 years old and a mother to her young daughter.

11. At all relevant times, Defendant Lenard Johnson was a law enforcement officer employed by the San Jacinto County Sheriff's Department and was acting within the scope of his employment and under color of law. Defendant Johnson is sued in his individual capacity.

12. At all relevant times, Defendant Lacy Rogers was the San Jacinto County Sheriff, was acting within the scope of his employment and under color of law, and was the final policymaking authority for the San Jacinto County Sheriff's Department. Defendant Rogers is sued in his individual capacity.

13. At all relevant times, Defendant Keith Pikett was a Deputy with the Fort Bend County Sheriff's Department and was acting within the scope of his employment and under color of law at all relevant times. Defendant Pikett is sued in his individual capacity.

14. Defendant San Jacinto County is a county of the State of Texas.

15. Defendant Fort Bend County is a county of the State of Texas.

The Murder

16. Murray Burr was a custodian at the high school that Megan Winfrey and her brother, Richard Winfrey, Jr., attended.

17. On or about August 7, 2004, the body of Burr was discovered inside his home. Burr had been beaten and stabbed to death.

18. At the time of Burr's murder, Plaintiff was only 16 years old and her brother was only 17 years old. Neither Plaintiff nor anyone else in her family had anything to do with this crime. Megan Winfrey is completely innocent.

Defendants Fabricate Evidence to Inculpate Plaintiff

19. In the days following Burr's murder, Defendants Rogers and Johnson canvassed the neighborhood looking for potential witnesses. During this canvass, Defendants Rogers and Johnson learned that Plaintiff and her brother would visit Burr on occasion on their way to church on Sundays. Plaintiff and her family lived near Burr.

20. The day after Burr was found, Defendant Rogers visited Plaintiff, her brother, and their father at their home and asked them when was the last time that they were over at Burr's house. Richard Winfrey, Jr. stated that he did not remember but that he and his sister would visit Burr from time to time.

21. Upon request, Plaintiff voluntarily provided buccal swabs, a scent pad, and fingerprints to Defendants Rogers and Johnson to assist them in their investigation.

22. Defendants learned no information indicating that Plaintiff, her brother, or her father had anything to do with Burr's murder, because the Winfreys had nothing to do with it.

23. Instead of initiating a search for the perpetrator of this heinous crime, Defendants Rogers and Johnson simply decided that Plaintiff, her brother, and her father were the offenders. The Defendants actively ignored all evidence to the contrary, including DNA tests performed on evidence collected at the crime scene that excluded Plaintiff and her family as offenders.

24. Approximately two weeks after they approached Plaintiff, and having found no legitimate evidence that would inculpate her, Defendants Rogers and Johnson turned to Defendant Pikett and his dogs. The Defendants subjected Plaintiff to dog scent lineups on August 24, 2004.

Pikett's Fraudulent Dog Scent Lineups

25. In the early 1990s, Defendant Pikett developed a fraudulent investigative technique he coined "dog scent lineups" which supposedly connected suspects to crime scenes.

26. In this technique, a dog is introduced to a scent sample that has been collected from a crime scene or piece of evidence. After "getting" that scent, the dog is then presented with a series of paint cans containing pieces of gauze with scents on them ("scent

pads"). The scent pads normally include one suspect who has been asked to wipe his or her hands on the gauze and other, "filler" scents taken from individuals purportedly matching the gender and race of the suspect. Defendant Pikett carried around the "filler" scents in a duffel bag in his truck, but the scent pads from suspects were freshly obtained from the suspects.

27. In a dog scent lineup, Defendant Pikett would line up the paint cans containing the scent pads of the suspect and the fillers and instruct his dogs to sniff the cans to see if there was a "match" between a scent on one of the scent pads and the scent sample collected from the crime scene or piece of evidence. According to Defendant Pikett, his dogs would then communicate to him if the scent that it "got" the first time "matches" a scent in one of the containers. Pikett decided whether one of his dogs "alerted" to or "matched" a scent.

28. In reality, it is impossible to tell whether Defendant Pikett's dogs alerted to any specific can or made any alert at all during the dog scent lineups.

29. Without a doubt, these lineups epitomize the worst of junk science. Defendant Pikett developed the dog scent lineups without any training—he simply purchased bloodhound dogs and "trained" them to indicate when two human scents "matched." Defendant Pikett never tested the dog scent lineups' accuracy, nor did he establish a set of standards under which to conduct the lineups. Instead, Defendant Pikett has repeatedly lied under oath about his qualifications, his

training, and the supposed infallibility of his dog identifications.

30. Defendants Rogers and Johnson knew or should have known that Defendant Pikett was a fraud.

Defendants' Misconduct

31. To conduct the dog scent lineups in Plaintiff's case, Defendant Pikett took a "scent sample" from the victim's clothing and had his dogs "compare" this scent to six other scent samples in cans, including one from Plaintiff, who had readily complied with the request that she wipe her hands with a piece of gauze.

32. The dog scent lineups purportedly "confirmed" that Plaintiff's scent was on Burr's clothing. However, these results were manufactured by Defendant Pikett. For instance, Defendant Pikett used his ability to see inside the cans and identify which can contained the target suspect's scent pad rather than relying on his dogs to identify the can that contained a "matching" scent. Pikett cued his dogs by jerking on his dogs' leashes and strategically stopping as he walked his dogs by the cans in the scent lineup. Moreover, Pikett manipulated the lineups by using a fresh scent obtained from Plaintiff and older, "filler" scents that his dogs were accustomed to smelling because they were carried around in the same truck.

33. Defendant Pikett never disclosed the fraudulent nature of his dog scent lineup results to Plaintiff, her counsel, or prosecutors.

34. The fraudulent results of Defendant Pikett's dog scent lineups were included in the search and arrest warrant affidavits for Megan Winfrey executed by Defendants Rogers and Johnson.

35. To provide additional "confirmation" of the dog scent lineups' results, Defendant Pikett conducted what he described as a dog "drop trail." That is, two dogs were allegedly provided with Plaintiff's brother Richard's scent outside the victim's home. After several stops and re-starts, including portions of the "drop trail" where the two dogs were driven from one location to the next, the dogs—accompanied by Pikett—arrived at Plaintiff's home, supposedly by having followed Richard's scent.

36. Unfortunately for the Defendants, it was later discovered that the "drop trail" was conducted using the scent of another man named Christopher Hammond, who was not related to Plaintiff and did not live in Plaintiff's home. There is no question that this "drop trail" was a sham.

37. Once Defendant Pikett learned that the supposedly-inculpatory "drop trail" had actually been performed using another individual's scent, he called the "drop trail" an "accident."

38. Defendant Pikett wrote in his case report that the "drop trail" had been conducted using Christopher Hammond's scent, not Richard Winfrey, Jr.'s scent. Approximately one day after the dog scent lineups and "drop trail" were conducted, Defendant Pikett provided a copy of his report to the Texas

Ranger who was assisting Defendants Rogers and Johnson with the investigation, and the Ranger provided the report to Defendants Rogers and Johnson. The Texas Ranger also told Defendants Rogers and/or Johnson about the fact that Hammond's scent was used in the "drop trail."

39. Despite this knowledge, Defendant Rogers falsely wrote in his sworn affidavit for probable cause for a search warrant for Plaintiff's hair that the "drop trail" was conducted using Richard Winfrey, Jr.'s scent. Rogers executed this affidavit in January 2005, when no time exigency existed that would have explained the absence of accurate information.

40. Also despite the knowledge that it was Hammond's scent and not Richard Winfrey, Jr.'s scent used in the "drop trail," Defendant Johnson falsely wrote in his sworn affidavit for probable cause for Plaintiff's arrest that the "drop trail" was conducted using Richard Winfrey, Jr.'s scent. Johnson executed this affidavit in February 2007, when no time exigency existed that would have explained the absence of accurate information.

41. To corroborate Defendant Pikett's fabricated scent identifications of Plaintiff, Defendants Johnson and Rogers coached and manipulated a jailhouse informant, David Campbell, into falsely identifying Plaintiff, her brother, and her father as the perpetrators of Burr's murder. Campbell told the false story that Defendants Rogers and Johnson had made up for him at Megan Winfrey's trial.

42. Defendants Johnson and Rogers never disclosed their improper coaching and manipulation of Campbell to Plaintiff or her defense counsel. They also never disclosed to Plaintiff, her defense counsel, or prosecutors the fact that Campbell's statement implicating the Winfreys was false and manufactured.

43. Campbell has since fully admitted the truth about his prior false statements, and he has testified under oath that Defendants fed him a "story."

44. Moreover, Defendants Rogers and Johnson knowingly or recklessly omitted material irregularities in Campbell's story from their search and arrest warrant affidavits. For instance, according to Rogers and Johnson's contemporaneous reports, Campbell said that Plaintiff's father shot and mutilated Burr, but this was not true. Campbell first said that one of the Winfrey children had assisted in the murder, but then averred that it was one of the father's cousins, also a major inconsistency. Also according to Campbell, Plaintiff's father allegedly murdered Burr in retribution for molesting Plaintiff or her brother, but there was never any corroboration of any such molestation. Furthermore, the guns and knife that Campbell claimed Plaintiff's father admitted stealing from Burr's house were never found, and Burr's family reported that he previously owned a small-bore shotgun, not the .3030 caliber long rifle described by Campbell.

45. Defendant Johnson's arrest warrant affidavit for Plaintiff also knowingly or recklessly omitted material information that DNA testing on forensic

evidence recovered from the crime scene had excluded Plaintiff and her brother. At the same time, Defendant Johnson included questionable propensity evidence in his affidavit concerning an alleged altercation between Plaintiff and a high school teacher that occurred over a year-and-a-half before the murder.

Plaintiff's Wrongful Prosecution and Conviction

46. Despite the fact that Plaintiff had done absolutely nothing wrong, and the fact that the Defendants had no legitimate evidence against her, on or about February 8, 2007, more than two-and-a-half years after Burr's death, Plaintiff was arrested for the murder of Murray Burr.

47. For the next six years, Plaintiff was confined inside jail and prison cells and branded a murderer.

48. On October 9, 2008, Plaintiff was convicted of the murder of Murray Burr and conspiracy to commit murder.

49. As a direct result of the Defendants' misconduct, Plaintiff was falsely arrested, wrongfully prosecuted for crimes she did not commit, wrongfully convicted of capital murder and conspiracy to commit murder, and wrongfully imprisoned for more than six years.

Plaintiff's Exoneration

50. On February 27, 2013, the Texas Court of Criminal Appeals overturned Plaintiff's conviction and rendered a judgment of acquittal on both charges against her.

51. Plaintiff's brother, Richard Winfrey, Jr., was acquitted after a trial in which the jury deliberated for 13 minutes. Plaintiff's father, Richard Winfrey, was convicted, but his conviction was subsequently overturned by the Texas Court of Criminal Appeals, and a judgment of acquittal was rendered for him.

52. Although Plaintiff has regained her freedom, it has come at a tremendous cost. Megan Winfrey spent six years incarcerated for a capital crime that she did not commit. During her wrongful incarceration, Plaintiff was deprived of the various pleasures of basic human experience, which all free people enjoy as a matter of right, including the opportunity to raise her daughter, who was one year old at the time of her arrest. As a direct result of her wrongful incarceration and Defendants' misconduct, Plaintiff has suffered tremendous damage, including extreme emotional distress, physical suffering and financial loss.

53. Defendants Pikett, Rogers, and Johnson actively concealed their misconduct, and thus actively concealed from Plaintiff the fact that she had suffered constitutional and other injuries, and the fact that the Defendants had inflicted those injuries.

54. The misconduct of Defendants Pikett, Rogers, and Johnson was objectively unreasonable and undertaken intentionally, with malice and reckless indifference to Plaintiff's rights.

Count I – 42 U.S.C. § 1983
Violation of Due Process Right to Fair Trial – Keith Pikett

55. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

56. As described more fully above, Defendant Pikett, while acting under color of law and within the scope of his employment, deprived Plaintiff of her rights under the Fourth and Fourteenth Amendments to the U.S. Constitution.

57. In the manner described more fully above, Defendant Pikett's fabricated dog scent lineup results were used to obtain search and arrest warrants for Plaintiff, causing her to be arrested without probable cause.

58. Defendant Pikett also knowingly used fabricated junk science, manipulated and falsified the results of the dog scent lineups, and employed an unduly suggestive lineup procedure resulting in a faulty "identification" of Plaintiff that was used at trial and deprived Plaintiff of due process.

59. In addition, Defendant Pikett deliberately withheld material exculpatory evidence from Plaintiff, from prosecutors, and from the court. As described

above, Defendant Pikett manipulated and falsified the results of his dog scent lineups, obtained Plaintiff's conviction using that false evidence, and failed to correct evidence that he knew to be false when it was used against Plaintiff at her criminal trial. Defendant Pikett instead provided Plaintiff, prosecutors, and the court with falsified inculpatory evidence, in violation of the United States Constitution. There is a reasonable probability that, had this evidence been disclosed to the Plaintiff or her counsel, the result of her criminal trial would have been different.

60. Plaintiff was prosecuted, convicted, and imprisoned because Defendant Pikett withheld material, exculpatory evidence, and instead provided falsified inculpatory evidence.

61. Defendant Pikett's misconduct directly resulted in the unjust criminal prosecution and conviction of Plaintiff, thereby denying her right to a fair trial guaranteed by the U.S. Constitution. Absent this misconduct, the prosecution of Plaintiff could not and would not have been pursued.

62. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

63. As a result of Defendant Pikett's misconduct, Plaintiff suffered injuries including loss of liberty, financial harm, and emotional pain and suffering.

Count II – 42 U.S.C. § 1983
Violation of Due Process Right to Fair Trial –
Lenard Johnson, Lacy Rogers,
and San Jacinto County

64. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

65. As described more fully above, Defendants Rogers and Johnson, while acting under color of law and within the scope of their employment, deprived Plaintiff of her rights under the Fourth and Fourteenth Amendments to the U.S. Constitution.

66. In the manner more fully described above, Defendants Rogers and Johnson violated Plaintiff's constitutional rights when they intentionally and knowingly, or with reckless disregard for the truth, submitted affidavits containing false statements, material misrepresentations, and material omissions in order to obtain search and arrest warrants for Plaintiff. This resulted in warrants being issued without probable cause.

67. Defendants Rogers and Johnson also deliberately withheld material exculpatory evidence from Plaintiff, from the prosecutors, and from the court. The Defendants solicited false evidence, including testimony that they knew to be false and perjured from David Campbell, obtained Plaintiff's conviction using that false evidence, and failed to correct evidence that they knew to be false when it was used against Plaintiff at her criminal trial. Defendants Rogers and Johnson instead provided Plaintiff, prosecutors, and the

court with falsified inculpatory evidence, in violation of the United States Constitution. There is a reasonable probability that, had this evidence been disclosed to the Plaintiff or her counsel, the result of her criminal trial would have been different.

68. Plaintiff was prosecuted, convicted, and imprisoned because Defendants Rogers and Johnson withheld material, exculpatory evidence, and instead provided falsified inculpatory evidence.

69. Defendants Rogers and Johnson's misconduct directly resulted in the unjust criminal prosecution and conviction of Plaintiff, thereby denying her right to a fair trial guaranteed by the due process clause of the U.S. Constitution. Absent this misconduct, the prosecution of Plaintiff could not and would not have been pursued.

70. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

71. As a result of the Defendants' misconduct, Plaintiff suffered injuries including loss of liberty, financial harm, and emotional pain and suffering.

72. The misconduct described in this Count was undertaken pursuant to the policy and practice of San Jacinto County and the San Jacinto County Sheriff in that Defendant Rogers was the final policymaker of the San Jacinto County Sheriff's Department and the final policymaker of San Jacinto County in the area of

law enforcement at all relevant times, and he took the unconstitutional actions against Plaintiff described above.

73. Furthermore, the misconduct described in this Count was undertaken pursuant to the policy and practice of San Jacinto County and the San Jacinto County Sheriff in that, as a matter of policy and practice, officers in the San Jacinto County Sheriff's Department did not review investigative reports and files before executing affidavits for search and arrest warrants to ensure their accuracy, thus including material misstatements and omission of material facts in their affidavits for search and arrest warrants; and as a matter of policy and practice, officers in the San Jacinto County Sheriff's Department failed to properly follow-up on leads and corroborate information, including from jailhouse informants. The Sheriff, who was the final policymaker for the San Jacinto County Sheriff's Department, failed to provide sufficient, or any, training to his officers in writing and executing affidavits for search and arrest warrants.

74. These policies and widespread practices were so well-settled as to constitute *de facto* policy in the San Jacinto County Sheriff's Department, and were allowed to exist because the municipal policymakers with authority over the same—namely, Defendant Rogers—actually or constructively knew of its existence and exhibited deliberate indifference to the problem, thereby effectively ratifying it.

75. The policies and widespread practices described in the preceding paragraphs were allowed to flourish because San Jacinto County and the San Jacinto County Sheriff declined to implement sufficient training and/or any legitimate mechanism for oversight or punishment, thereby leading officers to believe that they could violate citizens' constitutional rights with impunity.

76. As a direct and proximate result of the County's policies and practices, Plaintiff's constitutional rights were violated and she suffered injuries, as set forth in this Complaint.

Count III – 42 U.S.C. § 1983
Violation of Procedural Due Process –
Keith Pikett, Lacy Rogers, and Lenard Johnson

77. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

78. As described more fully above, Defendants Pikett, Rogers, and Johnson, while acting under color of law and within the scope of their employment, deprived Plaintiff of her rights under the Fourteenth Amendment to the U.S. Constitution.

79. Through their misconduct, Defendants Pikett, Rogers, and Johnson deprived Plaintiff of a protected liberty interest. Texas does not provide an adequate state law remedy because the Texas Tort Claims Act absolutely immunizes governmental employees such as Pikett, Rogers, and Johnson acting within the scope

of their employment, and it absolutely immunizes governmental units from suit for intentional torts, including false arrest and malicious prosecution. Thus, Defendants Pikett, Rogers, and Johnson violated Plaintiff's right to procedural due process guaranteed by the Fourteenth Amendment to the U.S. Constitution.

80. As described more fully above, Defendants Pikett, Rogers, and Johnson falsely accused Plaintiff of criminal activity and caused Plaintiff to be improperly subjected to criminal prosecution for which there was no probable cause. Criminal prosecution was commenced and continued maliciously, resulting in injury, and all proceedings were ultimately terminated in Plaintiff's favor in a manner indicative of innocence.

81. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

82. As a result of the Defendants' misconduct, Plaintiff suffered injuries including loss of liberty, financial harm, and emotional pain and suffering.

Count IV – 42 U.S.C. § 1983
Violation of Substantive Due Process –
Keith Pikett, Lacy Rogers, and Lenard Johnson

83. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

84. As described more fully above, Defendants Pikett, Johnson, and Rogers, while acting under color of law and within the scope of their employment, deprived Plaintiff of her rights under the Fourteenth Amendment to the U.S. Constitution.

85. In the manner described more fully above, Defendants engaged in deliberative, arbitrary, and conscience- shocking behavior by fabricating false evidence, deliberately withholding material exculpatory evidence from Plaintiff, providing false inculpatory evidence used to obtain Plaintiff's wrongful conviction at her criminal trial, and/or coercing witness David Campbell to testify falsely and provide false statements used to convict Plaintiff at her criminal trial. As a result of Defendants' misconduct, Plaintiff was wrongfully convicted and imprisoned. Thus, Defendants violated Plaintiff's right to substantive due process guaranteed by the Fourteenth Amendment to the U.S. Constitution.

86. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with deliberate indifference to Plaintiff's constitutional rights.

87. As a result of Defendants' misconduct, Plaintiff suffered injuries including loss of liberty, financial harm, and emotional pain and suffering.

Count V – 42 U.S.C. § 1983
Malicious Prosecution in Violation of
Fourth Amendment – Keith Pikett,
Lenard Johnson, and Lacy Rogers[1]

88. Each of the paragraphs of this Complaint is incorporated as if restated herein.

89. As described more fully above, Defendants Pikett, Rogers, and Johnson, while acting under color of law and within the scope of their employment, deprived Plaintiff of her rights under the Fourth Amendment to the U.S. Constitution.

90. Through their misconduct, Defendants Pikett, Rogers, and Johnson caused Plaintiff to be unreasonably seized without probable cause, in violation of the Fourth Amendment. Plaintiff was deprived of her liberty, pursuant to legal process. Defendants Pikett, Rogers, and Johnson falsely accused Plaintiff of criminal activity and caused Plaintiff to be improperly subjected to criminal prosecution for which there was no probable cause. Criminal prosecution was commenced and continued maliciously, resulting in injury, and all proceedings were ultimately terminated in Plaintiff's favor in a manner indicative of innocence.

---

[1] Plaintiff recognizes that the Court of Appeals for the Fifth Circuit currently holds that a Fourth Amendment malicious prosecution claim is not actionable under 42 U.S.C. § 1983. Other Courts of Appeals have taken the opposite position. Plaintiff pleads the claim here to preserve the issue for reconsideration in the Fifth Circuit or review in the Supreme Court of the United States.

91. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

92. As a result of the Defendants' misconduct, Plaintiff suffered injuries including loss of liberty, financial harm, and emotional pain and suffering.

Count VI – 42 U.S.C. § 1983
Failure to Intervene – Lenard Johnson and Lacy Rogers

93. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

94. Defendants Johnson and Rogers had a reasonable opportunity, had they been so inclined, to prevent another Defendant from violating Plaintiff's rights in the manner described above, but they failed to do so.

95. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

96. As a result of Defendants' misconduct, Plaintiff suffered injuries including loss of liberty, financial harm, and emotional pain and suffering.

Count VII – State Law Claim
Malicious Prosecution – San Jacinto County and Fort Bend County[2]

97. Each of the paragraphs of this Complaint is incorporated as if restated fully herein.

98. In the manner described above, Defendant San Jacinto County, through Lacy Rogers and Lenard Johnson, and Defendant Fort Bend County, through Keith Pikett, all of whom acted within the scope of their employment, falsely accused Plaintiff of criminal activity and caused Plaintiff to be improperly subjected to criminal prosecution for which there was no probable cause. Criminal prosecution was commenced and continued maliciously, resulting in injury, and all proceedings were ultimately terminated in Plaintiff's favor in a manner indicative of innocence. Also as alleged above, Plaintiff is innocent and suffered damages.

99. Through Lacy Rogers, Lenard Johnson, and Keith Pikett, who acted within the scope of their employment, Defendants San Jacinto County and Fort Bend County accused Plaintiff of criminal activities knowing those accusations to be without genuine probable cause, and they made statements with the intent

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[2] Pursuant to Section 101.106(f) of the Texas Tort Claims Act, Plaintiff has dismissed Defendants Rogers, Johnson, and Pikett from her Texas state law malicious prosecution claim and named instead the governmental units San Jacinto County and Fort Bend County.

of exerting influence to institute and continue the judicial proceedings.

100. Statements that Defendants San Jacinto County and Fort Bend County made through Lacy Rogers, Lenard Johnson, and Keith Pikett, acting within the scope of their employment, regarding Plaintiff's alleged culpability were made with the knowledge that said statements were false. Defendant San Jacinto County, through the acts of Rogers and Johnson, also fabricated evidence by coercing false inculpatory testimony from purported witnesses. Defendant Fort Bend County, through the acts of Pikett, also fabricated evidence by fabricating dog scent lineup results. Defendants withheld the facts of their manipulation and the resulting fabrications from Plaintiff.

101. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the rights of others.

102. As a result of this misconduct, Plaintiff suffered injuries including loss of liberty, financial harm, and emotional pain and suffering.

WHEREFORE, Plaintiff, MEGAN WINFREY, respectfully requests that this Court enter judgment in her favor and against Defendants KEITH PIKETT, LACY ROGERS, LENARD JOHNSON, SAN JACINTO COUNTY, and FORT BEND COUNTY, awarding compensatory damages, costs, and attorneys' fees as well as punitive or exemplary damages against

Defendants PIKETT, ROGERS, and JOHNSON, and any other relief this Court deems appropriate.

JURY DEMAND

Plaintiff, MEGAN WINFREY, hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all issues so triable.

RESPECTFULLY SUBMITTED,

/s/ Elizabeth Wang
Attorney-in-Charge for Plaintiff

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CERTIFICATE OF SERVICE

I, Elizabeth Wang, an attorney, hereby certify that on April 14, 2014, I served the foregoing First Amended Complaint on all counsel of record via CM/ECF.

/s/ Elizabeth Wang
Attorney-in-Charge for Plaintiff

APPENDIX M

REPORTER'S RECORD
VOLUME 2 OF 2 VOLUMES
TRIAL COURT CAUSE NO. 9526

STATE OF TEXAS	)	IN THE DISTRICT COURT
PLAINTIFF,	)	
VS.	)	SAN JACINTO COUNTY, TEXAS
RICHARD LYNN WINFREY, JR.	)	
DEFENDANT.	)	411TH JUDICIAL DISTRICT

*****

***TRANSCRIPTION OF
DAVID WAYNE CAMPBELL
DVD
***

*****

DVD TRANSCRIPTION OF DAVID WAYNE CAMPBELL, produced at the instance of the DEFENDANT, was transcribed in the above-styled and numbered cause on the 7th of June, 2009, by Toyloria Lanay Hunter, CSR in and for the State of Texas.

PARTICIPANTS IDENTIFIED ON DVD

1) Lacy Rogers
Sheriff
San Jacinto County

2) Leonard Johnson
Chief Deputy
San Jacinto County

3) David Wayne Campbell
Inmate State Prison

[3] (BEGINNING OF DVD)

MR. ROGERS: How old are you.

MR. CAMPBELL: 42.

MR. ROGERS: 42? Are you (inaudible).

MR. CAMPBELL: Yeah. I used to work for Tommy Braxton and Howard (inaudible) moving houses.

MR. ROGERS: Oh, you did?

MR. CAMPBELL: Yeah. Both of them passed away.

MR. ROGERS: Yeah, Tommy just died there not long ago. How long did you work for Tommy?

MR. CAMPBELL: Oh, since – since I was a boy. Shit, as long as I remember. I don't like to move blocks – roadblocks, I should say.

MR. ROGERS: We want to come in and talk to you and try to find out exactly what you, you know, you know, and you told – evidently, you talked to my chief and told him a few things?

MR. CAMPBELL: Uh-huh.

MR. ROGERS: But anyway. I'm going to identify my name. My name is Lacy Rogers and I'm the sheriff of San Jacinto County and I've been the sheriff for about 18 years. So – but I've been – you and (inaudible) go back, don't you?

MR. CAMPBELL: Uh-huh. This is being [4] videoed?

MR. JOHNSON: Yes, sir.

MR. ROGERS: Oh, you don't have to – don't worry about that. The time is 9:10.

MR. CAMPBELL: Well, I – I do worry about it.

MR. ROGERS: And my Chief Deputy, Leonard Johnson's here. Just tell him your name. That's all you got to do.

MR. CAMPBELL: David Wayne Campbell.

MR. ROGERS: David Wayne. Are you from San Jacinto County, David?

MR. CAMPBELL: No, I'm right across the Pitch Creek in Montgomery County.

MR. ROGERS: Well, whereabouts did you live over there?

MR. CAMPBELL: (Inaudible) country market store.

MR. ROGERS: What are you in jail for?

MR. CAMPBELL: Possession of a prohibited weapon.

MR. ROGERS: What – what prohibited weapon?

MR. CAMPBELL: (Inaudible) belt .22 glock. I got arrested six years ago for it.

[5] MR. ROGERS: Okay. Okay. So when did you – are you on probation? Is that what you're on?

MR. CAMPBELL: Uh-huh.

MR. ROGERS: Okay. So you're on probation?

MR. CAMPBELL: Uh-huh.

MR. ROGERS: Have they revoked your probation?

MR. CAMPBELL: Well, I was supposed to be on revoked. I got paper work saying it was revoked, but they say they didn't recognize it. But then come to find out, they didn't have a search warrant to – to -for the officer enter the home that he found this gun in when I was at work.

Then I ended up getting possession of a prohibited weapon for (inaudible) at my dad's house. It's a screwed up matter, sir. I'm getting charged for a gun that, you know, I have no – no connections with. But then six months later, they – I guess, they found out I'm at the house, and so they arrest me over there.

And I get charged for the prohibited weapon. Now that one weapon is turned into possession of prohibited weapons six years later, but yet they don't know to deal with it.

MR. ROGERS: How long have you been in [6] jail in Montgomery County?

MR. CAMPBELL: For three months by now.

MR. ROGERS: Three months?

MR. CAMPBELL: Yes. And before that 129 days.

MR. ROGERS: When – when was that?

MR. CAMPBELL: Whenever (inaudible) –

MR. ROGERS: Pardon me?

MR. CAMPBELL: March 18, 2003 when I left here (inaudible).

MR. ROGERS: Okay.

MR. CAMPBELL: I haven't been out. I've been locked up ever since.

MR. ROGERS: Oh, have you?

MR. CAMPBELL: Yes,

MR. ROGERS: You been in – you been in the cell of (inaudible) –

MR. CAMPBELL: Oh-huh.

MR. ROGERS: Richard Lynn Winfrey?

MR. CAMPBELL: Yes.

MR. ROGERS: How long were you – how long were you in the cell with him?

MR. CAMPBELL: Up to two days ago, my whole time I've been here.

MR. ROGERS: Okay. Did Richard ever talk [7] to you about anything while you were there?

MR. CAMPBELL: Uh-huh.

MR. ROGERS: Okay. Did he talk to you about a homicide that happened?

MR. CAMPBELL: Yes, talked about a Murray Bird.

MR. ROGERS: Murray who?

MR. CAMPBELL: Murray Bird. I think that's his – Bird.

MR. ROGERS: Did he call him by name?

MR. CAMPBELL: Yes.

MR. ROGERS: Did he say what happened? Did he tell you any details or anything in reference to what – what took place at Murray Burr's house?

MR. CAMPBELL: Well that he was brutally murdered and that he mentioned somebody chopped his dick off and shoved it In his mouth and he was stabbed and I believe shot or some shit. I don't know.

MR. ROGERS: Okay. Did – did Richard say that he knew who killed him?

MR. CAMPBELL: Pretty much.

MR. ROGERS: Okay. Who did he say killed him?

MR. CAMPBELL: I'd rather not say.

MR. ROGERS: So you're not – you're not [8] – you don't – you don't want to talk to us and give us a statement about what took place?

MR. CAMPBELL: Yeah, I would as long as it wasn't videoed. I would talk to you. I'd be glad to give you all the other information I have too as long I'm not on a video because it comes back to me.

MR. ROGERS: Comes back what?

MR. CAMPBELL: If it comes back when he gets out in August, you know, like the way I told the detectives there, you know, my life ain't worth a shit. If y'all have to use this video and confront him with it –

MR. JOHNSON: We're not going to confront him with the video.

MR. CAMPBELL: So why am I being videoed?

MR. ROGERS: We're trying to nail down everything that we can to see if – if what he told you is true.

MR. CAMPBELL: Okay.

MR. ROGERS: If exactly what he told you fits the crime scene –

MR. CAMPBELL: Okay.

MR. ROGERS: – that's what we're working toward.

MR. CAMPBELL: Okay.

[9] MR. ROGERS: I want to – I want to make sure that what he told you is – is what took place at that house.

MR. CAMPBELL: Okay.

MR. ROGERS: And there's only – only person would know what took place there would be the people that were in there.

MR. CAMPBELL: Yes, sir, I understand.

MR. ROGERS: You know, the only people that really knows what happens in – in crimes are the people that are there.

MR. CAMPBELL: That actually took part in it.

MR. ROGERS: Right. So there's a lot of stuff that we haven't said to anybody about anything.

MR. CAMPBELL: Okay. Well, that's what I was trying to tell him. I haven't been out. I've been locked up. I've been here. I've been in this cell listening to all the bullshit that they say and (inaudible) let me get to the part that after he's left.

MR. ROGERS: You been in a cell – you've been in a cell with Richard all this time?

MR. CAMPBELL: All the time up to two days ago. They took him back to Huntsville.

MR. ROGERS: Went down to TDC?

[10] MR. CAMPBELL: Okay. There's supposed to be two guns and a knife, which you're supposed to be looking for okay.

MR. ROGERS: Okay.

MR. CAMPBELL: And I got a whereabouts where they possibly could be found.

MR. ROGERS: Okay.

MR. CAMPBELL: So I mean, if there's any –

MR. ROGERS: Okay.

MR. CAMPBELL: – you know, if there's any truth to it. I mean, that's what he said.

MR. ROGERS: Okay. What did he say happened at the house?

MR. CAMPBELL: Him – I guess it's his cousin or whatever it is; it's a neighbor there – come up through the back. And so his kids, little Richard or whatever his name is and his daughter, are friends with him or would talk to him or something, influence their way into the house. And however they got through the back and they supposedly beat the hell out of him and then it escalated from there.

MR. ROGERS: Okay. And then they supposedly did what after they beat him?

MR. CAMPBELL: One of them stabbed him or [11] something. And what Richard said, cut his penis off and supposedly stuck it in his mouth or throat or whatever. And – but he – he said I think somebody shot him with his own gun and then they stole it.

There was two guns and a knife. They's supposed to be between Murray's and the Winfrey place over at the hollow – where they run them foxes. And he said something about they run foxes over on Winfrey property, foxes or coyotes.

MR. ROGERS: Coyotes?

MR. CAMPBELL: Yeah, whatever the dogs are there. Whatever they call the hollow. There's a hollow over there, supposedly.

MR. ROGERS: Okay.

MR. CAMPBELL: And that's the location you could probably find the weapons. And after I talked to this officer here, whatever was said or whatever took place after he left here has raised some issues because he got three visits right after he left.

And it was a week or so Miss Winfrey come up here; little Richard come up here; his daughter come up here; and I want to say it's his aunt, whatever, whoever it is across the street. Whatever she is to them. Might be – I don't know.

MR. ROGERS: Talking about Debbie [12] Winfrey?

MR. CAMPBELL: Whoever is across the street.

MR. ROGERS: It's there – it's there where he lives.

MR. CAMPBELL: Ok.

MR. ROGERS: Just he lives across the street from Bob Richard.

MR. CAMPBELL: Right.

MR. ROGERS: Well, little Richard –

MR. CAMPBELL: I see y'all pushing a bunch of – I guess it's –

MR. ROGERS: No, he had nothing to do with that. I went over and jacked little Richard up about taking a polygraph test 'cause he had never had

one. And that's probably what it was. It had nothing to do with you.

It had to do with he hadn't taken a polygraph test. Then the rangers went by and seen him, told him he needed to take a polygraph test:

MR. CAMPBELL: Well, the message got back here to – to big Richard. And he – he went silent for about three or four days, worried where he wouldn't speak to nobody. He stayed in his bunk and something was really bothering. Whatever his momma and little [13] Richard come back and said.

MR. ROGERS: Well, that's 'cause I went to little Richard's job myself and talked to him and told him, you need to take a polygraph test. And I didn't even know anything about what was going on with you. And the ranger went and told him and he finally went and took the polygraph test the other day.

MR. CAMPBELL: Okay.

MR. ROGERS: So that's why I'm back talking to you.

MR. CAMPBELL: You just now finding out about me?

MR. ROGERS: I didn't really know about who you were or anything. I know who you are now, but I didn't know who you were.

MR. CAMPBELL: Okay.

MR. ROGERS: I know who you are.

MR. CAMPBELL: Ok.

MR. ROGERS: Because you worked with Tommy Jackson and them. But I remember who you are after you mentioned that.

MR. CAMPBELL: Anything (inaudible) –

MR. ROGERS: Did Richard – did Richard say anything about the kids with Murray?

MR. CAMPBELL: Yeah. I don't know if he [14] was talking – if he was thinking of his daughter or the niece. But one of them either got molested or fondled or – I could never get all of that out of him. But that's what escalated the situation that took place.

MR. ROGERS: So they let Richard in, in the back door; is that what happened?

MR. CAMPBELL: This was supposed to happen before Richard got out, that he would handle it when he got out.

MR. ROGERS: Okay.

MR. CAMPBELL: 'Cause he said he was locked up somewheres; y'all had him locked up. And then whatever escalated at the time, he was supposed to have been locked up. And when he got out, that's when he -he says he takes care of, you know, anything that happens around the Winfrey road, Winfrey property. If anything, he's the main or whatever, big dog. Whatever you want to call him. So –

MR. ROGERS: So he said that – that when he got out – when he got out of jail –

(Interruption; cell phone ringing.)

MR. ROGERS: – that he was going to take care of it?

MR. CAMPBELL: Yes.

MR. ROGERS: So he took your van; is that [15] – is that correct?

MR. CAMPBELL: That's my understanding. That's what I could get out of it without him – I mean, being where I'm at and talking and getting him to talk about stuff, (inaudible) you know, it don't take much to put one and two together and find out what you're really up to. And right before he left, I do believe he has an idea that I'm up to no good.

MR. ROGERS: Well, I wouldn't think that that – that he would think that. I think that he knows about it that – about the polygraph test because we – we had had the girl to take one. And she didn't finish her polygraph test. So we – we've been after them to take them.

MR. CAMPBELL: Well, I know that talking to him has, you know, 'cause I told him I'd go back and get what I could get out of him. And I did a little bit more. Each time he talked about it – it was harder and harder for him to keep on going with what he, you know –

MR. ROGERS: So he said that – that the knife is in the hollow back there?

MR. CAMPBELL: Yeah. There's supposed to be an old gun and some kind of an old pistol and a – some kind of a – I don't know if he said a buck knife [16] with about an 8-inch blade on it. Whatever they call the hollow off – off in the back of the Winfrey property where they run the –

MR. ROGERS: Hounds?

MR. CAMPBELL: Yeah, them hounds for the fox hunt. He said fox hunt or coyote hunt, something they call a hollow. So whatever – whatever took place there, they left there walking.

MR. ROGERS: Okay. He and somebody else?

MR. CAMPBELL: Yeah. Him and somebody else took off walking after they left that property. (Inaudible) I believe.

MR. ROGERS: So him and another person walked?

MR. CAMPBELL: Yes. And they went skating across. And they said it's less – not even a quarter of a mile.

MR. ROGERS: Okay.

MR. CAMPBELL: Through the woods there's a crow of flies back to the Winfrey over-toward his house.

MR. ROGERS: Okay.

MR. CAMPBELL: So –

MR. ROGERS: So they came in the back door and didn't go out – didn't come in the front door?

[17] MR. CAMPBELL: Yeah. I guess to keep people from seeing what was – they entered or whatever.

MR. ROGERS: 'Cause the people across the street?

MR. CAMPBELL: Right. I thought it was his kinfolk across the street, what he said.

MR. ROGERS: Well, not from Murray Burr. That's to what – it's kinfolk live down there all by the road where he lives.

MR. CAMPBELL: That's niece (inaudible) and brother-in-law.

MR. ROGERS: Yeah, and his brother lives there and his sister-in-law lives next to him.

MR. CAMPBELL: Why wouldn't – (inaudible).

MR. JOHNSON: Yeah, go ahead.

MR. CAMPBELL: McDougal, why wouldn't McDougal make contact with you?

MR. JOHNSON: McDougal?

MR. CAMPBELL: Yeah.

MR. JOHNSON: What do you mean McDougal?

MR. CAMPBELL: The district attorney.

MR. JOHNSON: Why wouldn't he?

MR. CAMPBELL: Yeah.

MR. JOHNSON: Oh, I dont know.

[18] MR. CAMPBELL: I mean, I don't understand. I understand that I caught him in a bind in my case. I wrote him a little letter to let the district attorney know that I was, you know, that you come and interview me and that I had additional information I needed to get to you. And –

MR. JOHNSON: Why he wouldn't make contact with me?

MR. CAMPBELL: Yeah. He didn't want to help you out or do jack shit 'cause y'all are not in his county. I dont understand that. I mean, I thought district attorneys was the big dog to other people.

MR. JOHNSON: We worked with him before. I'll get with him and find out what the deal is.

MR. CAMPBELL: He got a letter. He got a letter last week. I wrote to let him know I got interviewed by you and after you spoke to me if you need additional information and that I took the time to –

MR. JOHNSON: We'll make contact with him. Don't worry.

MR. ROGERS: But he says the stuff's in the hollow?

MR. CAMPBELL: Yeah. Over by the hollow – whatever they call the hollow. I don't know – I don't know if he was talking about a hollow tree or –

[19] MR. ROGERS: Well, I know what he's talking about (inaudible).

MR. CAMPBELL: Okay.

MR. ROGERS: Next door to him?

MR. CAMPBELL: Okay.

MR. JOHNSON: Did he throw the weapons away or did he say he placed them in a certain area?

MR. CAMPBELL: He just said over by the hollow. So I don't know what the hollow is and I don't know what the – so that part I couldn't get out of him. All I know whatever we – whatever you went back and done or whoever did it –

MR. ROGERS: He didn't – he didn't know I was talking to Richard.

MR. CAMPBELL: Oh, okay.

MR. ROGERS: This has been an ongoing thing with me. And the children – the children had been suspects in this since the first.

MR. CAMPBELL: Right. Well, see, that's like I told him, I've been locked in federal prison. I came here. Everything I tell you – (inaudible) 'cause he

asked if I was – everything I got, I'm getting straight from the inmates when I'm over here.

MR. ROGERS: So it's not something – not something that you read or heard?

[20] MR. CAMPBELL: No, no, sir. I come straight from Louisiana. I come straight from Louisiana prison straight to here.

MR. ROGERS: Did he – did he – did he mention how or where he was at when all this – when he – when he confronted Murray?

MR. CAMPBELL: I don't get it.

MR. ROGERS: Well, I mean, where was – where was Murray at when he went in? Did he say anything about that?

MR. CAMPBELL: All I know, in the living room watching TV.

MR. ROGERS: Oh, he was in the living room watching TV?

MR. CAMPBELL: Yeah, sitting in a chair.

MR. ROGERS: The kids had came in?

MR. CAMPBELL: Yeah, I believe they did.

MR. ROGERS: I mean, the kids had come in in some kind of way?

MR. CAMPBELL: Who, Richard?

MR. ROGERS: Yes.

MR. CAMPBELL: I don't know. He come through the back is all I know.

MR. ROGERS: Well, did the children get in the house to get him in there or how did they get in [21] the house?

MR. CAMPBELL: What do you mean, how –

MR. ROGERS: How did he get in the house?

MR. CAMPBELL: I guess he just walked in. The way he talked, they didn't – Richard never locked his doors.

MR. ROGERS: Oh, Murray didn't lock his door?

MR. CAMPBELL: I mean, yeah, Murray didn't – they said Murray didn't have that much anyway. He didn't – he was a – they said he was slow. I mean, they said Richard was real slow. Had some kind of –

MR. ROGERS: Murray?

MR. CAMPBELL: Yeah, I mean Murray. Yeah, dysfunctional.

MR. ROGERS: Yeah.

MR. CAMPBELL: Dysfunctional.

MR. ROGERS: Okay.

MR. CAMPBELL: So, I mean, my understanding that, you know, I guess he didn't lock his house and they took advantage of it. I don't know.

MR. ROGERS: Okay.

MR. CAMPBELL: I mean, he didn't say he had to break nothing or do nothing. He was able to walk right in the house.

[22] MR. ROGERS: They came in the back door?

MR. CAMPBELL: Right. And that's the same way he said they left. So nobody could see him through the front.

MR. ROGERS: Okay. You said Richard went to TDC?

MR. CAMPBELL: Yes, three days ago.

MR. ROGERS: Three days ago?

MR. CAMPBELL: Two or three days ago. What is today?

MR. ROGERS: Today's Friday.

MR. CAMPBELL: (Inaudible) money change. Yeah, I keep losing days.

MR. JOHNSON: You said that there were two guns that was stolen from Murray Burr's house?

MR. CAMPBELL: My understanding.

MR. JOHNSON: And you said and a buck knife?

MR. CAMPBELL: Well, the buck knife what was used to –

MR. JOHNSON: The buck knife with the 8-inch blade, did he say why he threw the old guns in the hollow? I mean, the old gun and the buck knife in the hollow?

MR. CAMPBELL: No.

[23] MR. JOHNSON: Were they long guns or pistols?

MR. CAMPBELL: One was an old pistol and like a 3030 he said. An old rifle.

MR. ROGERS: It was an old rifle?

MR. JOHNSON: A pistol and a 3030 and a buck knife?

MR. CAMPBELL: Yeah.

MR. ROGERS: And the kids were already in the house when Richard –

MR. CAMPBELL: Entered?

MR. ROGERS: Yes. That's what I was asking you, were the kids at the house?

MR. CAMPBELL: Yeah, yeah. I guess the way he used the kids was to get him I guess to calm down – or whatever. To feel –

MR. ROGERS: Safe?

MR. CAMPBELL: Yeah, yeah. And they said that the kids used to go over there and visit with him all the time anyway.

MR. ROGERS: Yeah, the kids.

MR. CAMPBELL: And that's why he –

MR. ROGERS: So he was using the kids?

MR. CAMPBELL: Yes.

MR. JOHNSON: And you say him and a [24] cousin walked up through the back?

MR. CAMPBELL: Yes.

MR. JOHNSON: While the kids were in the house?

MR. CAMPBELL: His cousin or brother-in-law or whatever he is. The niece's –

MR. ROGERS: The one that lives next to him.

MR. JOHNSON: And this was some type of revenge you said for fondling the kids?

MR. CAMPBELL: Yeah. Whatever happened while he was locked up. And he took care of whatever took place whenever he would get out.

MR. JOHNSON: The cutting off the penis, Richard – Richard –

MR. CAMPBELL: Yeah, that's what he said. One of them cut the penis off and put it in this man's mouth. And that's when I – after I listened – 'cause I listened to this story, you know. And at first I just said – 'cause you could hear a lot of bullshit talk. But then when he specifically said they cut this man's penis off, that's when I made contact to you.

MR. JOHNSON: Okay. Well, you said Murray Burr was in the living room watching television when they –

[25] MR. CAMPBELL: Yeah, that's my understanding.

MR. JOHNSON: Okay. Did they leave the body in the living room? Did he ever tell you –

MR. CAMPBELL: No, I dont know what they did with the body. I never did get that out of him.

MR. ROGERS: He didn't say?

MR. CAMPBELL: Yeah, I mean, my main thing was to – talking to him about the gun 'cause he already getting suspicious when his mother came and his aunt or whoever that was. And then after that, the back door was his son, okay? Right there, that showed me –

MR. ROGERS: No, I didn't know and my only thing was, I was after him, little Richard, about the polygraph.

MR. CAMPBELL: Oh.

MR. ROGERS: And it's been ongoing for over a year.

MR. CAMPBELL: Well what got everybody in the cell is his mother came and then either his aunt and his daughter came; that's two visits. And all of a sudden, he gets back doored that afternoon with a third visit. 'Cause that's not allowed. That's when I figured –

MR. ROGERS: No, no. He ain't talked to [26] any of us.

MR. CAMPBELL: I figure because they got them stirred up down there and got them on the move or whatever; that y'all's probably listening to the –

MR. ROGERS: Well, like I said, if I hadn't been after little Richard about that polygraph test, that was what –

MR. CAMPBELL: Well, you got him nervous. He's coming down to his dad and big Richard's really worried about him breaking. So whatever you're doing, you almost got him to the point that he's to break. I know that much before he left 'cause that's what he said after little Richard came –

MR. ROGERS: What day was this?

MR. CAMPBELL: The weekend – I'll say the weekend before last night.

MR. ROGERS: He took the polygraph –

MR. JOHNSON: Monday.

MR. ROGERS: Monday of this week.

MR. JOHNSON: That's been around the same time. You said before he left he said what?

MR. CAMPBELL: Yeah, that's when his son came. His son came on a Monday.

MR. JOHNSON: Yeah, but you said before Richard left he said – you were mentioning about him [27] saying that he was about to break?

MR. CAMPBELL: Yeah. Yeah, whatever one of y'all questioned him on about this, whatever is going on, yeah, he's about to break.

MR. ROGERS: I am the one questioning him.

MR. CAMPBELL: Well, you're doing a good job. Whatever you're doing, you're about to get him – and big Richard's really worried about his son breaking.

MR. ROGERS: How do you know that?

MR. CAMPBELL: Well, because he sit down and we talked about it. Because after that visit, he come in there and he come straight over to me. And he was pacing the floor, walking around. I'm going – (inaudible) visit? Bullshit. (Inaudible).

I said, man, where did your visit go concern you; your daughter and the baby or your mom? He goes, nah, man. He said my some come over here. I said well, ain't it still a good visit? Ain't he still with that

21-year-old lady? He goes yeah, but he ain't worried about that right now.

Them people out there are really pressuring my son. And he kind of put his head down and walking around, He was really worried about it. I said that's when I tried to pressure him again to keep [28] talking.

And he said – I thought he was talking about you. But anyway he said if they keep on, he's finally going to break because he's only 19 years old. And I said what's he going to break too? And he puts his head down. He didn't want to finish it.

He walked and laid down about an hour more and walked around again and come back over start talking about, you know, that he break to some involvement that he might have had.

But he's really worried. I know that. He's scared more or less. I can tell it by – whatever y'all doing, y'all about to get wherever y'all need to be. But – and I can (inaudible) talking to a suspect.

MR. ROGERS: So Richard – Richard really upset, nervous?

MR. CAMPBELL: Yes. Yes, he figures this is not going to let him out in August.

MR. ROGERS: Yep.

MR. CAMPBELL: Whatever y'all doing is going to stop him from getting his freedom in August.

MR. ROGERS: He's pretty much right.

MR. CAMPBELL: Oh, yeah? Anything I did to help you or that did help you –

MR. ROGERS: Well, just appreciate you [29] letting him know – let her know about it, you know, calling somebody. Letting the officer –

MR. CAMPBELL: Well, when it comes to murder, I don't like – you know. I'm like a lot of people. And like I try to tell –

MR. ROGERS: But he talked to you about the murder, though?

MR. CAMPBELL: Yes.

MR. ROGERS: And – and he – and he -the kids were at the house when Richard and them came to the house?

MR. CAMPBELL: Yes.

MR. ROGERS: Came through the back?

MR. CAMPBELL: (Nods head affirmatively).

MR. ROGERS: And then he said that – said that he told you that when you – and he said you were where now? Where did you say Murray was?

MR. CAMPBELL: Murray was in the living room.

MR. ROGERS: In the living-room?

MR. CAMPBELL: Sitting in his chair wherever he sits.

MR. ROGERS: Okay. And the kids were there also?

MR. CAMPBELL: Yes. And didn't not get [30] out of him that they moved him. The body stayed in the same spot.

MR. ROGERS: Did he say anything else was taken from the house?

MR. CAMPBELL: No, that he said – yeah, he did too. Some miscellaneous bullshit 'cause he bragged that Murray didn't have that much. But he didn't say what, just some sentimental value stuff.

MR. JOHNSON: Like what?

MR. CAMPBELL: I don't know. He didn't say. He said Murray didn't have much of anything, but he did have two old guns and they made sure they got them.

MR. ROGERS: Two old (inaudible)?

MR. CAMPBELL: Yeah.

MR. ROGERS: Okay.

MR. CAMPBELL: And a knife. I don't know whose it was, but –

MR. ROGERS: Just sentimental stuff he said?

MR. CAMPBELL: Right. He said Murray didn't have that much anyhow. I couldn't understand why they took out whatever they did to somebody

that's got a mental problem or slow or whatever he called him. Nobody deserves to die for that. And he need to get [31] help, if anything.

MR. ROGERS: He is slow.

MR. CAMPBELL: Or he was.

MR. ROGERS: Yeah, he was slow. Hard worker. Worked for years at the school as a janitor.

MR. CAMPBELL: Right. (Inaudible) 'cause I mean, we were only there for over in that part of the county. I just couldn't place him.

MR. ROGERS: So you didn't know who he was?

MR. CAMPBELL: If I did, I mean –

MR. ROGERS: You couldn't –

MR. CAMPBELL: I wouldn't – I couldn't put a finger on it. I mean, you know how much Jackson was. We go – it's like a hundred people. And we get an audience every time we move a big house.

MR. ROGERS: Yeah.

MR. CAMPBELL: So the next two weeks the shit we moved and on the run in that part of the county.

MR. ROGERS: Well, Mr. Campbell, I appreciate your time and everything. It's 20 minutes to 10:00 or 9:40, either way you look at it. When we get through, I want to talk to you about something.

MR. CAMPBELL: So what's this tape going –

[32] MR. ROGERS: I want to talk to you about something.

MR. CAMPBELL: Nobody's going to see this? Not a thing.

MR. ROGERS: No, no. Rangers – mid rangers going to go over it. Richard, I need to talk – I need to see you. Hey, I don't need to tell you to –

(End of DVD).

[33] REPORTER'S CERTIFICATION
OF DVD TAPE TRANSCRIPTION
June 9, 2009

I, Toyloria Lanay Hunter, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the above and foregoing contains a true and correct transcription of all conversations contained on the tape requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which was transcribed by me.

I further certify that this Reporter's Record of the tape recorded proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or

attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 9th day of June, 2009.

/s/ Toyloria Laney Hunter
Toyloria Laney Hunter
Texas CSR No. 7978
Expiration Date: 12/31/09
(713) 686-9401

APPENDIX N

CERTIFIED COPY

[SW14-2006]

AFFIDAVIT FOR SEARCH WARRANT

STATE OF TEXAS
COUNTY OF SAN JACINTO

THE UNDERSIGNED AFFIANT, BEING A PEACE OFFICER UNDER THE LAWS OF TEXAS AND BEING DULY SWORN, ON OATH MAKES THE FOLLOWING STATEMENTS AND ACCUSATIONS:

1. THERE IS IN SAN JACINTO COUNTY, TEXAS A SUSPECTED PLACE AND PREMISES DESCRIBED AND LOCATED AS FOLLOWS:
A WHITE MALE BODY

2. THERE IS AT SAID PLACE AND PREMISES PROPERTY CONCEALED AND KEPT IN VIOLATION OF THE LAWS OF TEXAS AND DESCRIBED AS FOLLOWS:
D.N.A EVIDENCE (PUBIC HAIRS)

3. SAID SUSPECTED PLACE AND PREMISES ARE IN CHARGE OF AND CONTROLLED BY EACH OF THE FOLLOWING PERSONS:
WINFREY, RICHARD LYNN JR DOB#[redacted]

4. IT IS THE BELIEF OF AFFIANT, AND HE HEREBY CHARGES AND ACCUSES, THAT:
HE IS A SUSPECT IN A MURDER CASE WHERE PUBIC HAIRS WERE LEFT BEHIND THAT DID NOT BELONG TO THE VICTIM

5. AFFIANT HAS PROBABLE CAUSE FOR SAID BELIEF BY REASON OF THE FOLLOWING FACTS:

ON 08-07-04 I WAS ADVISED BY DISPATCH THAT SOMEONE HAD FOUND A WHITE MALE DEAD IN HIS HOME AT 851 WILLOW SPRING RD. ARRIVED ON LOCATION AND MADE CONTACT WITH DEPUTY LASCO WHO ADVISED ME THAT THERE WAS A WHITE MALE IN THE BACK BED ROOM WHO APPEARED TO BE BEATEN TO DEATH. I THEN WENT INTO THE CRIME SCENE AND NOTICED THE SAME.

I AT THAT POINT MADE CONTACT WITH LT. JIM TURNER ADVISED HIM OF WHAT I HAD AND HE THEN CALLED SHERIFF ROGERS. SHERIFF ROGERS ARRIVED ON LOCATION AND MADE CONTACT WITH THE NEIGHBORS, ASKING THEM WHO HAD BEEN AT THE VICTIM HOME IN THE PAST.

HE WAS ADVISED BY A WITNESS THAT APPROX TWO WEEKS BEFORE THE MURDER HE HAD SEEN MEGAN AND RICHARD WINFREY AT THE HOME OF THE VICTIM. THE WITNESS ADVISED ROGERS THAT THE VICTIM ADVISED THEM THAT THE WINFREY KIDS WANTED TO MOVE IN WITH HIM BUT HE TOLD THEM NO.

ROGERS WAS THEN GIVEN A LIST OF PEOPLE TO INTERVIEW AND FOUND AFTER THE INTERVIEWS WERE DONE, THE WINFREY KIDS

WERE THE ONLY ONES THAT HAD CAME TO THE VICTIM HOME.

ON 03-12-04, I ALONG WITH SHERIFF ROGERS WAS AT THE COLDSPRING HIGH SCHOOL WHEN WE WERE ADVISED THAT A TEACHER BY THE NAME OF KAREN ROBERTSON WHO ADVISED US THAT THERE WERE TWO MORE TEACHERS WHO HAD INFO THAT MIGHT HELP US ON THIS CASE.

AT THAT POINT WE MADE CONTACT WITH DEBORAH GLADDEN WHO ADVISED US THAT ON 03-20-03 MEGAN WINFREY HAD ASSAULTED HERE. SHE ALSO STATED THAT IN JULY 2004 SHE WAS ADVISED BY MRS. WINFREY THAT WHEN SHE ASSAULTED HERE LAST YEAR SHE WISHED SHE (WINFREY) HAD A KNIFE OR A PAIR OF SCISSORS TO ASSAULT HER WITH.

I THEN MADE CONTACT WITH MRS. ROBERTSON ONCE AGAIN WHO THEN ADVISED ME THAT DURING THE 2004 SUMMER SCHOOL THE VICTIM CAME BY HER ROOM WHILE WINFREY WAS IN SUMMER SCHOOL.

SHE STATED THAT WHEN WINFREY SAW THE VICTIM, SHE RAN UP TO HIM AND ASKED HIM WHEN WAS HE GOING TO TAKE HER OUT AND SPEND SOME OF HIS MONEY THAT HE HAD HID IN HIS HOUSE.

WE THEN MADE CONTACT WITH DEBRA JESSUP WHO ADVISED US THAT SHE SAW WINFREY AND THE VICTIM TALKING IN THE HALLWAY AT THE SCHOOL SHE STATES THAT SHE WAS NOT CLOSE ENOUGH TO SEE WHAT WAS GOING ON BUT THEY LOOKED TO BE AT ODDS. SHE STATES THAT SHE GOT CLOSER, SAW THE VICTIM TURN HIS BACK AND HEARD WINFREY STATE SOMEONE NEED TO BEAT THE SHIT OUT OF HIM. SHE STATES THAT WINFREY FIST WAS CLINCHED AT THE TIME.

TEXAS RANGERS HUFF THEN HAD EVERY-ONE THAT WAS INTERVIEWED TAKE A SCENT PAD (D.N.A, BANDAGE) LINE UP, THIS IS DONE WITH THE USE OF A DOG (BLOOD HOUND) EACH PERSON RUBS THEIR HANDS WITH A STERILE BANDAGE AND THE ITEM IS PLACE IN A ZIP LOCK BAG ALSO A SCENT BANDAGE WAS RUB ON THE VICTIM CLOTHING AND PLACED IN A ZIP LOCK BAG.

WE THEN HAD DEPUTY PICKETT OF THE FORT BEND COUNTY SHERIFF'S OFFICE BRING HIS K-9 UNIT TO OUR LOCATION. HE HAD WITH HIM TWO BLOOD HOUNDS:

1. **QUINCY, DOB#02-26-97, WITH 670 FEL-ONY TRAIL, 25 LOST OR MISSING PER-SONS, 31 PERSON LINE UP CASES 400 SCENT PAD LINE UP CASES, 5 CADAVER SEARCHES CASES**

2. **JAG, DOB#01-29-00, WITH 250 FELONY TRAILS, 10 LOST OR MISSING PERSONS LINE UPS AND 60 SCENT PAD LINE UPS.**

IN THE FIRST LINE UP THERE WAS 6 STERILE BANDAGES IN 6 CLOSED ZIP LOCK BAGS THE SAMPLES BELONG TO

1. **D. POE**
2. **C. HAMMOND**
3. **P. REID**
4. **R. WINFREY**
5. **H. BUNTING**
6. **R. HOLLMAN**

HOUND #1 (QUINCY) WAS ALLOWED TO SMELL THE BANDAGE FROM THE VICTIM 'S ZIP LOCK BAG, THEN WAS WALKED BY THE 6 SAMPLES, HOUND#1 THEN ALERTED ON SAMPLE #4 BELONGING TO MR. RICHARD WINFREY JR.

HOUND #2(JAG) WAS ALLOWED TO DO THE SAME, HE ALSO ALERTED TO SAMPLE #4.

THE SECOND LINE UP ALSO HAD 6 STERILE BANDAGES IN 6 CLOSED ZIP LOCK BAGS. THE SAMPLES BELONG TO:

1. **J.TYREE**
2. **A.DOUGHERTY**
3. **B.JOWERS**
4. **N.OLHEISE**
5. **M.BATES**
6. **MEGAN WINFREY**

HOUND #1 WAS ALLOWED TO SMELL THE BANDAGE FROM THE VICTIM'S ZIP LOCK

BAG, THEN WALKED BY THE 6 SAMPLES, HOUND#1 THEN ALERTED ON SAMPLE#6 BELONGING TO MEGAN WINFREY

HOUND#2 WAS ALLOWED TO DO THE SAME, HE ALSO ALERTED TO SAMPLE # 6.

AT THAT TIME BOTH HOUNDS WERE THEN TAKEN TO THE VICTIM'S HOME AT THIS POINT DEPUTY PICKETT NOR THE HOUNDS KNEW WHERE THE WINFREY KIDS LIVE OR HAD EVER BEEN IN THAT LOCATION. THE HOUNDS WERE ALLOWED TO PICK UP A SCENT FROM THE VICTIM HOME USING THE SCENT PADS THAT THEY HAD ALERTED TO. AT THAT POINT THE HOUNDS FOLLOWED A SCENT TRAIL THAT LEAD TO THE HOME OF RICHARD WINFREY JR. AND MEGAN WINFREY.

ON 06-15-06 I WAS ADVISED BY DISPATCH THAT AN INMATE AT THE MONTGOMERY COUNTY JAIL, ADVISED JAILERS WITH THAT DEPARTMENT THAT HE KNEW SOMETHING ABOUT A MURDER IN SAN JACINTO COUNTY.

I THEN MADE CONTACT WITH THAT INMATE AT THE MONTGOMERY COUNTY JAIL WHO ADVISED ME THAT HE WAS IN THE SAME TANK WITH A SUBJECT WHO ADVISED HIM THAT HE HAD KILLED A SUBJECT BY THE NAME OF MURRAY BURR HE ADVISED ME THAT THIS SUBJECT NAME IS RICHARD WINFREY (DOB#[redacted]). I THEN ADVISED HIM THAT

I WOULD BE BACK AT A LATER DATE SO I COULD GET AN OFFICIAL STATEMENT FROM HIM.

AFTER FOLLOWING OTHER LEADS ON THIS CASE I RETURNED ON 07-14-06 ALONG WITH SHERIFF'S LACY ROGERS AT THIS POINT I ADVISED THE SUBJECT THAT WE WERE THERE FOR THE OFFICIAL STATEMENT. HE ADVISED US THAT HE WAS IN JAIL WITH RICHARD WINFREY; WINFREY ADVISED HIM THAT HE HAD KILLED A MAN IN OUR COUNTY.

I ASKED THE SUBJECT WHAT WAS THE NAME OF THE VICTIM HE ADVISED ME THAT MR. WINFREY TOLD HIM THAT THE VICTIM NAME WAS MURRAY BURR. HE ADVISED ME THAT MR. WINFREY TOLD HIM THAT HE CAME IN THE BACK OF THE HOUSE AFTER THE CHILDREN OF RICHARD WINFREY (MEGAN WINFREY, RICHARD WINFREY JR) LET HIM IN.

HE ADVISED ME THAT THE VICTIM WAS SITTING IN THE FRONT ROOM WHEN THE KILLING TOOK PLACE. HE ADVISED ME THAT HE WAS TOLD BY MR. WINFREY THAT HE HAD BEAT THE SUBJECT UP BAD AND CUT HIS NECK. HE ADVISED ME THAT MR. WINFREY TOLD HIM THAT HE HAD STOLEN TWO GUNS OUT OF THE HOUSE.

HE THEN ADVISED ME THAT MR. WINFREY TOLD HIM THAT HE HAD HID THE GUNS AND

A BUCK KNIFE THAT WAS USED IN THE CRIME IN AN HOLLOW NEAR THE CRIME SCENE. HE ADVISED ME THAT MR. WINFREY TOLD HIM THAT THEY RAN FOXES OR COYOTE WITH DOGS NEAR THE HOLLOW WHERE HE HID THE ITEMS. ON 07-20-06, SHERIFF ROGERS ADVISED ME THAT HE ONLY KNEW ABOUT ONE PLACE WHERE THEY RAN FOXES, HE ADVISED ME THAT THE PROPERTY WAS OWNED BY JOYCE BERRY THE MOTHER OF RICHARD WINFREY.

I THEN WAS ADVISED BY ROGERS THAT THOMAS C. WINFREY OWNED PART OF THE PROPERTY WHERE THEY RAN THE FOXES. I ALONG WITH SHERIFF ROGERS AND DET. MACIAS WENT TO PROPERTY BEHIND THE WINFREY LOCATION AND NOTICE WHAT WE WOULD CALL A HOLLOW ON THE PROPERTY BELONGING TO JOYCE BERRY AND THOMAS WINFREY.

ON 07-24-06, I MADE CONTACT WITH VELMA OATES THE SISTER OF THE VICTIM, ASKED HER IF HER BROTHER HAD ANY GUNS AT HIS LOCATION, SHE ADVISED ME THAT HER HUSBAND (JESSE) HAD ADVISED HER THAT THE VICTIM HAD TWO GUNS (SINGLE SHOT SHOTGUN//.22 SEMI AUTO GLENFIELD OR MARLIN). SHE ADVISED ME THAT THE GUNS WERE MISSING; SHE ADVISED ME THAT THEY WERE NOT THERE WHEN SHE HELPED CLEAN UP THE VICTIM HOME AFTER THE CRIME.

LAW ENFORCEMENT WAS NOT AWARE OF WEAPONS BEING STOLEN FROM THE BURR RESIDENT AT THE TIME OF THE MURDER. LAW ENFORCEMENT FIRST LEARNED OF THE MISSING WEAPONS WHILE CONDUCTING THE INTERVIEW WITH RICHARD WINFREY SR. CELL MATE IN MONTGOMERY COUNTY JAIL

LAW ENFORCEMENT CONFIRMED THIS INFORMATION IN A FOLLOW UP INVESTIGATION DONE ON JULY 24 2006.

I ADVISED SHERIFF ROGERS THAT THE PUBLIC COULD NOT HAVE KNOW THAT THE KILLING STARTED IN THE FRONT ROOM, THAT THERE WAS A HOLLOW ON THE PROPERTY WHERE THE SUSPECT LIVED AND THAT WEAPONS WHERE STOLEN FROM THE VICTIM HOME.

AFTER MAKING CONTACT WITH D.P.S CRIME LAB, I WAS ADVISED THAT THERE WAS PUBIC HAIRS THAT ARE MICROSCOPICALLY DIFFERENT TO KNOWN PUBIC HAIRS FROM THE VICTIM. I WAS ADVISED THAT I NEEDED TO COLLECT PUBIC HAIRS FROM MY KNOWN SUSPECTS. AT THIS POINT DUE TO THE FACT THAT I HAVE A WITNESS STATING THAT HE WAS ADVISED BY ONE OF MY SUSPECT THAT HE KILLED THE VICTIM AND THE HOUNDS LEADING DEPUTY TO THE HOME OF MY OTHER TWO SUSPECT I THINK I HAVE

ENOUGH " P. C " TO GET A SEARCH WARRANT FOR THE HAIRS OF MY SUSPECTS.

WHEREFORE, AFFIANT ASKS FOR ISSUANCE OF A WARRANT THAT WILL AUTHORIZES HIM TO SEARCH SAID SUSPECTED PLACE AND PREMISES FOR SAID PROPERTY AND SEIZE THE SAME.

/s/ Lenard Johnson
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME BY SAID AFFIANT OF THIS THE 23rd DAY OF August, A.D., 2006

/s/ Robert H. Trapp
MAGISTRATE, SAN JACINTO COUNTY, TEXAS

[SEAL]

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD LYNN WINFREY, JR.,	§	
PLAINTIFF,	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. 4:10-CV-1896
SAN JACINTO COUNTY, SAN JACINTO COUNTY SHERIFF JAMES WALTERS FORMER SAN JACINTO COUNTY SHERIFF LACY ROGERS, FORMER SAN JACINTO COUNTY SHERIFF'S DEPARTMENT DEPUTY LENARD JOHNSON,TEXAS RANGER GROVER HUFF,TEXAS RANGER RONALD DUFF, FORT BEND COUNTY, FORT BEND COUNTY SHERIFF MILTON WRIGHT,FORMER FORT BEND COUNTY SHERIFF'S DEPARTMENT DEPUTY KEITH PIKETT, AS-OF-YET UNKNOWN EMPLOYEES OF SAN JACINTO COUNTY, AS-OF-YET UNKNOWN TEXAS RANGERS, ANDAS-OF-YET UNKNOWN EMPLOYEES OF FT. BEND COUNTY,	§	JURY TRIAL DEMANDED
DEFENDANTS.	§	

FULL AND FINAL RELEASE TO
FORT BEND COUNTY AND FORT BEND
COUNTY DEPUTY KEITH PIKETT

STATE OF TEXAS	§	KNOW ALL MEN BY
	§	THESE PRESENTS
COUNTY OF HARRIS	§	

THAT I, PLAINTIFF RICHARD LYNN WINFREY, JR., resident of the State of Texas for full consideration of FIVE HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS ($550,000.00) cash to me in hand by the Defendant FORT BEND COUNTY, a governmental entity of the State of Texas, the receipt of which is hereby ACKNOWLEDGED, and have released and forever discharged, and by these present, do for myself, my heirs, executors and administrators, FULLY, FINALLY AND COMPLETELY RELEASE AND DISCHARGE the FORT BEND COUNTY, a governmental entity located in the State of Texas and FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity and any employees of Fort Bend County of and from all liability or demand now accrued or which may hereafter accrue, on account of any and all claims for damages or causes of action, including but not limited to Civil Rights 42 U.S.C. § 1983 due process and civil conspiracy claims, at law or in equity, which 1 may now have, or-which any of my heirs, executors or administrators at any time hereafter may claim to have against FORT BEND COUNTY and FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity and all employees of Fort Bend County and, by

reason of any claim for damages, losses or demands, including but not limited to loss of services, hospital, medical, doctor and nursing bills, and any and all damages for personal injury, Incapacity, loss or reduced earning capacity, and any and all causes of action,' subrogation interests, medical liens, losses and expenses of whatsoever nature that may have been sustained by me in the past, or which may exist at the present time, or which may be claimed by me or anyone on my behalf to exist in the future, as a result of the August 2004 Murray Wayne Burr murder and murder investigation in San Jacinto County wherein Fort Bend County Deputy Keith Pikett, a canine handler, assisted in the San Jacinto County Sheriff's investigation by conducting scent lineups and drop trail scent methods using blood hounds with results used in the Burr Murder investigation by San Jacinto County investigators and with said investigation resulting in the criminal charge of Capital Murder and incarceration against Plaintiff Richard Lynn Winfrey, Jr., the allegations which are included in Plaintiff's Complaint styled "RICHARD LYNN WINFREY, JR. V. SAN JACINTO COUNTY, ET AL."

IT IS EXPRESSLY AGREED AND UNDERSTOOD by me that the compromise and settlement hereby evidenced is not an admission of liability on the part of the FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity or any employees of FORT BEND County, but is merely a compromise of a bona fide disputed claim between Plaintiff RICHARD

LYNN WINFREY, JR. and Defendant FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity.

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD that as to Keith Pikett and Fort Bend County, we will enter into a Stipulation of Dismissal to dismiss with prejudice my lawsuit styled "RICHARD LYNN WINFREY, JR. V. SAN JACINTO COUNTY, ET AL." under Civil Action NO. 4:10-CV-1896, In the United States District Court in and for the Southern District of Texas, Houston Division,

THE UNDERSIGNED DOES UNDERSTAND AND AGREE not to assert or prosecute any further claims or lawsuits against the FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity or any employees of Fort Bend County, with reference to the described incident as alleged in Plaintiffs' Complaint under Civil Action No. 4:10-CV-1896 styled "RICHARD LYNN WINFREY, JR. V. SAN JACINTO COUNTY, ET AL."

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD that the settlement payout set out herein is allocated to and is intended to compensate Plaintiff for the physical injuries/sickness as well as the physical pain and suffering and emotional and mental pain and suffering stemming from said physical injuries/sickness, caused by the search and seizure of his person that occurred on August 16, 2004, and

search and seizure of his person on August 23, 2006, as well as the associated seizure of bodily materials. It is also agreed that the payout for the damages set forth above is intended to fall within the meaning and scope of Section 104(a)(2) of the Internal Revenue Code of 1986 as amended. No ruling by any court of competent jurisdiction regarding the validity or enforceability of this paragraph shall effect the validity and enforceability of the remaining portions of this agreement.

Any and all claims against parties not specifically released herein, if any, are hereby assigned in full to the parties hereby released.

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD AND ACKNOWLEDGED by RICHARD LYNN WINFREY the undersigned, that I fully understand that this is a FULL, FINAL AND COMPLETE RELEASE by me to FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity and all employees of the Fort Bend County for all causes of action which may now exist as a result of the hereinabove-mentioned incident, and that NO ADDITIONAL OR FURTHER SUM whatsoever is to be paid to me by the said FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity or any employees of FORT BEND County other than the sum hereinabove first mentioned.

IT IS ALSO AGREED AND UNDERSTOOD that each party to this lawsuit will pay its own costs of Court and its own attorneys' fees.

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD AND ACKNOWLEDGED BY me that I will pay out of the above mentioned settlement any and all claims of any hospital or provider of medical or legal services for any and all medical or other expenses of any kind or nature whatsoever, incurred or to be incurred by or on behalf of the undersigned as a result of or to result from the above described incident.

I DO FURTHER WARRANT AND REPRESENT that there are no liens or encumbrances against the claim asserted herein, nor the settlement proceeds paid hereunder, nor the undersigned's causes of action which could or might be made with respect to or arising out of the injuries to us as a result of the said incident made the basis of this lawsuit, for or on account of monies payable to any hospitals, physicians and/or practitioners of the healing arts, health care providers and any and all medical services provided on account of any injury to me as a result of the incident made the basis of this lawsuit that have not been paid.

Plaintiff RICHARD LYNN WINFREY, JR, agrees to release, indemnify, discharge, and forever hold Defendants FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT harmless from any and all claims, counter-claims, demands or suits, known or unknown, fixed or contingent, liquidated or

unliquidated, whether or not asserted in the above styled case.

I, DO FURTHER WARRANT that I am of legal age and legally competent to execute this release and that I do so of my own free will and accord without reliance of any representation of any kind or character not expressly set forth herein.

I, FURTHER WARRANT, that I have read the foregoing document carefully, that I know and understand the contents hereof and sign same as I own free act.

THIS RELEASE; contains the ENTIRE AGREEMENT between the Plaintiff RICHARD LYNN WINFREY, JR and FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT, In his Individual and Official Capacity.

IN WITNESS WHEREOF, we have hereunto below signed my name on this, the 27th day of September 2013.

/s/ Richard Winfrey, Jr.
RICHARD LYNN WINFREY, JR.

STATE OF TEXAS §

COUNTY OF §

BEFORE ME, the undersigned Notary Public in and for the State of North Dakota, on this day personally appeared RICHARD LYNN WINFREY, JR., known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration and under the circumstances therein expressed.

/s/ Richard Winfrey, Jr.
RICHARD LYNN WINFREY, JR.

SWORN TO AND SUBSCRIBED BEFORE ME by the said RICHARD LYNN WINFREY, JR. to certify which witness my hand and seal of office on this, the 27 day of September, 2013.

/s/ Renee R Paasch
Notary Public in and for
the State of North Dakota

My Commission expires: April 8, 2017.

RENEE R PAASCH
NOTARY PUBLIC,
STATE OF NORTH DAKOTA
MY COMMISSION EXPIRES
APRIL 8, 2017

APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

MEGAN WINFREY, Plaintiff, vs. **KEITH PIKETT**, FORMER FORT BEND COUNTY SHERIFF'S DEPUTY, **LACY ROGERS**, FORMER SAN JACINTO COUNTY SHERIFF, **LENARD JOHNSON**, FORMER SAN JACINTO COUNTY SHERIFF'S DEPUTY CHIEF, **SAN JACINTO COUNTY**, AND **FORT BEND COUNTY** Defendants.	§	CIVIL ACTION NO. 4:10-CV-00448

FULL AND FINAL RELEASE TO FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT

STATE OF TEXAS	§	KNOW ALL MEN BY
	§	THESE PRESENTS
COUNTY OF HARRIS	§	

THAT I, PLAINTIFF MEGAN WINFREY (now known as MEGAN HOLT), resident of the State of Texas for full

consideration of **ONE MILLION DOLLARDS AND No/100 DOLLARS ($1,000,000.00)** cash to me in hand by the Defendant **FORT BEND COUNTY**, a governmental entity of the State of Texas, the receipt of which is hereby **ACKNOWLEDGED**, and have released and forever discharged, and by these present, do for myself; my heirs, executors and administrators, **FULLY, FINALLY AND COMPLETELY RELEASE AND DISCHARGE** the **FORT BEND COUNTY**, a governmental entity located in the State of Texas and **FORT BEND COUNTY DEPUTY KEITH PIKETT**, In his Individual and Official Capacity and any employees of Fort Bend County of and from all liability or demand now accrued or which may hereafter accrue, on account of any and all claims for damages or causes of action, including but not limited to Civil Rights 42 U.S.C. §1983, procedural and substantive due process claims and civil conspiracy claims, and state and federal malicious prosecution claims, or any claims at law or in equity, which I may now have, or which any of my heirs, executors or administrators at any time hereafter may claim to have against **FORT BEND COUNTY** and **FORT BEND COUNTY DEPUTY KEITH PIKETT**, In his Individual and Official Capacity and all employees of Fort Bend County and, by reason of any claim for damages, losses or demands, including but not limited to loss of services, hospital, medical, doctor and nursing bills, and any and all damages for personal injury, incapacity, loss or reduced earning capacity, and any and all causes of action, subrogation interests, medical liens, losses and expenses of whatsoever nature that may have been sustained by

me in the past, or which may exist at the present time, or which may be claimed by me or anyone on my behalf to exist in the future, as a result of the August 2004 Murray Wayne Burr murder and murder investigation in San Jacinto County wherein Fort Bend County Deputy Keith Pikett, a canine handler, assisted in the San Jacinto County Sheriff's investigation by conducting scent lineups and drop trail scent methods using blood hounds with results used in the Burr Murder investigation by San Jacinto County Investigators and with said investigation resulting in the criminal charge of Capital Murder and incarceration against Plaintiff MEGAN HOLT (nee WINFREY), the allegations which are included in Plaintiff's First Amended Complaint styled "MEGAN WINFREY V. KEITH PIKETT, FORMER FT. BEND COUNTY SHERIFF'S DEPUTY, LACY ROGERS, FORMER SAN JACINTO COUNTY SHERIFF, LENARD JOHNSON, FORMER SAN JACINTO SHERIFF'S DEPUTY CHIEF, SAN JACINTO COUNTY AND FT. BEND COUNTY", Civil Action No. 4:14-Cv-448, In The United States District Court For The Southern District Of Texas, Houston Division.

IT IS EXPRESSLY AGREED AND UNDERSTOOD by me that the compromise and settlement hereby evidenced is not an admission of liability on the part of the **FORT BEND COUNTY** and **FORT BEND COUNTY DEPUTY KEITH PIKETT**, In His Individual and Official Capacity or any employees of FORT BEND County, but is merely a compromise of a bona fide disputed claim between Plaintiff **MEGAN HOLT (nee WINFREY)** and Defendant **FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY**

KEITH PIKETT, In his Individual and Official Capacity.

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD that as to Keith Pikett and Ft. Bend County, I will enter into a Stipulation of Dismissal to dismiss with prejudice my lawsuit styled "MEGAN WINFREY V. KEITH PIKETT, FORMER FT. BEND COUNTY SHERIFF'S DEPUTY, LACY ROGERS, FORMER SAN JACINTO COUNTY SHERIFF, LENARD JOHNSON, FORMER SAN JACINTO SHERIFF'S DEPUTY CHIEF, SAN JACINTO COUNTY AND FT. BEND COUNTY", Civil Action No. 4:14-cv-448, In The United States District Court for the Southern District of Texas, Houston Division.

THE UNDERSIGNED DOES UNDERSTAND AND AGREE not to assert or prosecute any further claims or lawsuits against the **FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT**, In his Individual and Official Capacity or any employees of Fort send County, with reference to the described incident as alleged in Plaintiffs' First Amended First Amended Complaint under Civil Action No. 4:14-cv-448, styled "MEGAN WINFREY V. KEITH PIKETT, FORMER FT. BEND COUNTY SHERIFF'S DEPUTY, LACY ROGERS, FORMER SAN JACINTO COUNTY SHERIFF, LENARD JOHNSON, FORMER SAN JACINTO SHERIFF'S DEPUTY CHIEF, SAN JACINTO COUNTY AND FT. BEND COUNTY", In The United States District Court for the Southern District of Texas, Houston Division.

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD that the settlement payout set out

herein is allocated to and is intended to compensate Plaintiff for the physical injuries / sickness as well as the physical pain and suffering and emotional and mental pain and suffering stemming from said physical injuries/sickness, caused by the search and seizure of her person that occurred when Plaintiff was subjected to a dog scent lineup on August 24, 2004 and search and seizure of Plaintiff's person when Plaintiff was arrested February 8, 2007 including Plaintiffs subsequent incarceration as well as the associated seizure of bodily materials. It is also agreed that the payout for the damages set forth above is intended to fall within the meaning and scope of Section 104(0(2) of the Internal Revenue Code of 1986, as amended. No ruling by any court of competent jurisdiction regarding the validity or enforceability of this paragraph shall affect the validity and enforceability of the remaining portions of this agreement.

Any and all claims against parties not specifically released herein, if any, are hereby assigned in full to the parties hereby released.

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD AND ACKNOWLEDGED by **MEGAN HOLT (nee WINFREY)** the undersigned, that I fully understand that this is a **FULL, FINAL AND COMPLETE RELEASE** by me to **FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT**, In his Individual and Official Capacity and all employees of the Fort Bend County for all causes of action which may now exist as a result of the hereinabove-mentioned incident, and that **NO ADDITIONAL**

OR FURTHER SUM whatsoever is to be paid to me by the said **FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT**, In his Individual and Official Capacity or any employees of Fort Bend County other than the sum hereinabove first mentioned.

IT IS ALSO AGREED AND UNDERSTOOD that each party to this lawsuit will pay its own costs of Court and its own attorneys' fees.

IT IS FURTHER EXPRESSLY AGREED AND UNDERSTOOD AND ACKNOWLEDGED BY me that I will pay out of the above-mentioned settlement any and all claims of any hospital or provider of medical or legal services for any and all medical or other expenses of any kind or nature whatsoever, incurred or to be incurred by or on behalf of the undersigned as a result of or to result from the above described incident.

I DO FURTHER WARRANT AND REPRESENT that there are no liens or encumbrances against the claim asserted herein, nor the settlement proceeds paid hereunder, nor the undersigned's causes of action which could or might be made with respect to or arising out of the injuries to me as a result of the said incident made the basis of this lawsuit, for or on account of monies payable to any hospitals, physicians and/or practitioners of the healing arts, health care providers and any and all medical services provided on account of any injury to me as a result of the incident made the basis of this lawsuit that have not been paid.

Plaintiff **MEGAN HOLT (nee WINFREY)** agrees to release, indemnify, discharge, and forever hold Defendants **FORT BEND COUNTY** and **FORT BEND COUNTY DEPUTY KEITH PIKETT** harmless from any and all claims, counter-claims, demands or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the above styled case.

I, DO FURTHER WARRANT that I am of legal age and legally competent to execute this release and that I do so of my own free will and accord without reliance of any representation of any kind or character not expressly set forth herein.

I, FURTHER WARRANT, that I have read the foregoing document carefully, that I know and understand the contents hereof and sign same as I own free act.

THIS RELEASE contains the **ENTIRE AGREEMENT** between the Plaintiff **MEGAN HOLT (nee WINFREY)** and **FORT BEND COUNTY AND FORT BEND COUNTY DEPUTY KEITH PIKETT**, In his Individual and Official Capacity.

IN WITNESS WHEREOF, I have hereunto below signed my name on this, the 19 day of December 2017.

/s/ Megan Holt
MEGAN HOLT (nee WINFREY)

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned Notary Public in and for the State Texas, on this day personally appeared **MEGAN HOLT (nee WINFREY)**, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration and under the circumstances therein expressed.

/s/ Megan Holt
MEGAN HOLT (nee WINFREY)

SWORN TO AND SUBSCRIBED BEFORE ME by the said **MEGAN HOLT (nee WINFREY)** to certify which witness my hand and seal of office on this, the q .4' day of WNW 2017,

[SEAL] ELISHA GONZALES
NOTARY PUBLIC
STATE OF TEXAS
MY COMM. EXP.
7/1/2020
NOTARY ID
12898504-4

/s/ Elisha Gonzales
Notary Public in and
for the State of Texas

My Commission expires:
07/11/2020

APPROVED AS TO FORM:

LOEVY AND
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312-243-5900
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BY: /s/ Elizabeth Wang
Elizabeth C. Wang
ATTORNEYS FOR PLAINTIFF
MEGAN HOLT (nee
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BY: /s/ Charles S. Frigerio
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SBN: 07477500
ATTORNEYS FOR DEFENDANT
FORT BEND COUNTY AND
FORT BEND COUNTY DEPUTY KEITH PIKETT

APPENDIX Q

PLAINTIFFS' PROPOSAL RE: FOURTH AMENDMENT CLAIM

Plaintiffs Megan Winfrey and Richard Winfrey, Jr. claim that Defendant Johnson fraudulently obtained a warrant to arrest them. To succeed on this claim, Plaintiffs must prove each of the following by a preponderance of the evidence:

1. The affidavit for the arrest warrants contained a materially false statement of fact or omitted a material fact. A statement or omission of fact is material if, without the false statement or the omission, the affidavit would have been insufficient to establish probable cause.

2. Plaintiffs must prove that Defendant Johnson recklessly, knowingly, or intentionally made the false statements or material omissions. A person recklessly, knowingly, or intentionally makes a false statement if he is aware the statement is false or if he has serious doubts about the truth of the statement, but makes it anyway.

In this case, I instruct you that the first element of this claim has been proven. The affidavits for the arrest warrants contained materially false statements of fact and omitted material facts, namely: the false statement of fact that Keith Pikett's drop trail from Murray Burr's home to the Winfrey home used the scents of Plaintiffs when the drop trail actually used the scent of Christopher Hammond; the material omission that David Campbell stated that Burr was shot, his penis cut off and that his body was not moved, when this was contradicted by the physical

evidence; and the material omission that David Campbell identified a cousin as participating in the murder with Richard Winfrey, Sr., instead of Plaintiffs.

You need only consider the second element of this claim, which is whether Defendant Johnson recklessly, knowingly, or intentionally made the false statements or material omissions.

Plaintiffs' Proposed Jury Instruction No. 16

Source: *Richard Winfrey, Jr. v. Rogers, et al.*, 901 F.3d 483, 495-96, 498 (5th Cir. 2018) (*Winfrey II*); *Megan Winfrey v. Johnson*, 766 F. App'x 66, 70-71 (5th Cir. 2019) (*Winfrey III*); *Franks v. Delaware*, 438 U.S. 154, 155-156, 165 (1978); *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997); *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980); *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir. 1982); 7th Circuit Pattern Civil Jury Instruction No. 7.05 (modified).

In particular, the following language from *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018) (*Winfrey II*) and *Winfrey v. Johnson*, 766 F. App'x 66, 70-71 (5th Cir. 2019) (*Winfrey III*) supports the language in this instruction:

First, in *Winfrey II*, the Court identified specifically the misstatement and two omissions that were not included in the affidavit:

(1) omitting Campbell's statements that were contradicted by the physical evidence; (2) misstating that Pikett's drop-trail from Burr's house to the

> Winfrey house used Junior's scent, when the drop-trail actually used Hammond's scent; and (3) omitting Campbell's inconsistencies between his statements, that is, between Campbell's first statement—which was related in the affidavit—that said that Megan and Junior helped Senior to murder Burr and Campbell's inconsistent later statement that Senior's cousin was the accomplice.

Winfrey II, 901 F.3d at 494.

Second, the Court held that a corrected affidavit, which includes this information, would not support probable cause.

> In this opinion, we have held that (1) Junior has alleged a valid Fourth Amendment claim against Johnson; (2) Junior's claim is not time-barred; (3) Johnson has not shown that his alleged conduct is protected by qualified immunity; (4) **a corrected affidavit did not establish probable cause;** (5) Johnson is not protected by the independent-intermediary doctrine; (6) because the district court did not expressly rule whether to exclude Kunkle, we do not address whether the court abused its discretion; and (7) we find no basis for remanding the matter to a different district judge.

Winfrey I, 901 F.3d at 498 (emphasis added); *see also Winfrey II*, 766 Fed. App'x at 70-71 ("[*Winfrey v. Rogers*] held that the affidavits contained material misrepresentations and omissions, and that a 'corrected' affidavit would not have satisfied the probable-cause requirement. *Id*. at 496 . . . Because the panel in *Winfrey II* rejected most of the same objections Johnson

now raises, Johnson is precluded from relitigating these issues.").

Third, the Court held that that the issue for the jury was the *mens rea* of Defendant Johnson. Specifically, the Court held:

> The primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements.

Winfrey II, 901 F.3d at 498; *Winfrey III*, 766 Fed. App'x at 70-71 (explaining *Winfrey II* was" remanded for trial 'on the factual issue of whether Johnson acted recklessly, knowingly or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior.' ").

___ Given
___ Rejected
___ Withdrawn
_X_ Objected to Officer Johnson objects to plaintiffs' proposed instruction that misstates the controlling legal standard, incorrectly instructs the jury, and usurps the jury's fact finding role.

Plaintiffs did not move for affirmative relief and no court has awarded affirmative relief to either plaintiff. The Fifth Circuit "panel vacated the district court's judgment and **remanded for trial 'on the factual issue of whether Johnson acted**

recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for [plaintiff]." *Winfrey v. Johnson*, 766 Fed. Appx. 66, 71 (5th Cir. 2019) (quoting *Winfrey v. Rogers*, 901 F.3d 483, 488 (5th Cir. 2018)). "**In sum, assuming all factual disputes in favor of [plaintiff],** we hold **(1) there is an issue of material fact as to whether Johnson recklessly, knowingly, or intentionally made material misstatements and omitted material information and (2) a corrected affidavit would not show probable cause to arrest [plaintiff].**" *Winfrey*, 901 F.3d at 496, The Court has not, and lacks jurisdiction to, enter relief in either plaintiff's favor on this record so plaintiffs' proposed jury direction is insupportable. The Fifth Circuit Court's opinion based solely on *alleged* omissions and misstatements does not call for the Court to usurp the jury's fact-finding role. *Id*. at 494, 498.

Prominently as well, the proposed instruction does not accurately identify the legal standard the Supreme Court established in *Franks v. Delaware*, 438 U.S. 154, 155-156, 98 S. Ct. 2674 (1978) that governs plaintiffs' Fourth Amendment claims.

No claim for *fraudulently* obtaining an arrest warrant exists under the Fourth Amendment. Even if such a claim existed, plaintiffs' proposed instruction fails to properly state the standard the Supreme Court established in *Franks*. The Supreme Court has not extended *Franks* from false statements to alleged omissions in an affidavit.

Additionally, the test the Seventh Circuit applies does not govern this suit and, even if it did, Plaintiffs' proposed instruction does not comport with 7th Circuit Pattern Civil Jury Instruction No. 705. The 7th Circuit Pattern states "[For a false statement of fact, Plaintiff must prove that] Defendant **knowingly** made the false statement[s]. (emphasis added). A person knowingly makes a false statement if he is aware the statement is false or if he has serious doubts about the truth of the statement, but makes it anyway." The 7th Circuit Pattern also requires that "[For an omission of fact, Plaintiff must prove that] Defendant **deliberately** omitted [a] material fact[s] to mislead the judge issuing the warrant [or omitted [a] material fact[s] despite strongly suspecting that the judge would not issue the warrant if Defendant disclosed the omitted fact[s]]. (emphasis added). Plaintiffs

propose a more lenient standard for plaintiffs that conflicts with both *Franks* and the 7th Circuit pattern.

Furthermore, Officer Johnson objects to the interpretation of the Fourth Amendment the Fifth Circuit relied on in ruling on Officer Johnson's motion for summary judgment which conflicts with *Franks*. Assuming *arguendo*, without conceding that the Fifth Circuit correctly identified the appropriate Fourth Amendment standard for judging the constitutionality of Officer Johnson's actions, the instruction plaintiffs propose conflicts with the statement of law the Fifth Circuit opinions are based on. *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018); *Winfrey v. Rogers*, 766 Fed. Appx. 66 (5th Cir. 2019). The Fifth Circuit has not approved a claim against Officer Johnson based on fraudulently obtaining an arrest warrant. Plaintiff's proposal also fails to inform the jury how to determine whether probable cause still supported Plaintiffs' arrests, even if Officer Johnson knowingly and intentionally, or with reckless disregard for the truth, made a false statement in the affidavit he submitted. *Winfrey*, 901 F.3d at 494-495.

Plaintiffs' response: See Plaintiffs' trial memorandum of law and

citations to the Fifth Circuit opinions above. If the Court determines that the Fifth Circuit left it to the jury to determine whether a corrected affidavit would provide probable cause to arrest Plaintiffs, then Plaintiffs' propose their claim instruction without the last paragraph, which begins "In this case, I instruct you that the first element of this claim has been proven. . . . "

DEFENDANT'S PROPOSAL RE:
FOURTH AMENDMENT CLAIM

Plaintiffs Megan Winfrey and Richard Winfrey, Jr. claim Defendant Lenard Johnson violated the Fourth Amendment by knowingly and intentionally, or with reckless disregard for the truth, making a false statement necessary to establish probable cause in the affidavits Defendant Johnson submitted when he requested warrants for Plaintiffs' arrests.[2]

"[A] proven misstatement can vitiate an affidavit only if it is established that the misstatement was the product 'of deliberate falsehood or of reckless disregard for the truth.'"[3] Recklessness requires proof that Defendant Johnson "'in fact entertained serious doubts as to the truth' of the statement."[4]

If you find the Plaintiffs have proven that Defendant Johnson knowingly and intentionally, or with reckless disregard for the truth, made a false statement in the affidavit he submitted requesting warrants for Plaintiffs' arrests, you must determine whether the affidavit, nonetheless, established

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[2] *Franks v. Delaware*, 438 U.S. 154, 155-156, 98 S. Ct. 2674 (1978).

[3] *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018) (quoting *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (quoting *Franks*, 438 U.S. at 171)).

[4] *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018) (quoting *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)), *abrogation on other grounds recognized by Spivey v. Robertson*, 197 F.3d 772, 775 (5th Cir. 1999)).

probable cause for Plaintiffs' arrests when the false statement you found is deleted from the affidavit.[5]

Defendant's Proposed Instruction No. 16

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: Plaintiffs object for the reasons discussed in their trial memorandum of law. Furthermore, the Supreme Court and the Fifth Circuit have clearly held that both false statements *and* material omissions matter for a Fourth Amendment claim under *Franks*. Defendant's proposal is a misstatement of controlling law. Furthermore, the last sentence of the Defendant's proposal, "you must determine whether the affidavit, nonetheless, established probable cause for Plaintiffs' arrests when the false statement you found is deleted from the affidavit," is confusing. The question is whether a reasonable judge or magistrate would have found probable cause if the affidavit did not contain false statements or material omissions. This is accurately captured by the first paragraph of Plaintiffs' proposal: "A statement or omission of fact is material if, without the false statement or the omission, the affidavit would have been insufficient to establish probable cause."

Defendant's response: Defendant has presented a concise, accurate instruction that provides the jury

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[5] *Winfrey v. Rogers*, 901 F.3d 483, 494-95 (5th Cir. 2018).

with the information necessary to decide the Fourth Amendment issue in accordance with *Franks*.

PROBABLE CAUSE[6]

Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause is a practical and common-sense standard that looks to the totality of the circumstances to determine whether a reasonable judge viewing the affidavit would believe there was sufficient evidence that the suspect committed the crime for which he or she is being arrested.

Winfrey v. Rogers, 901 F.3d 483, 495 (5th Cir. 2018), *cert. denied sub nom. Johnson v. Winfrey*, 139 S. Ct. 1549 (2019)

Plaintiffs' Proposed Instruction No. 17

___ Given
___ Rejected
___ Withdrawn
_x_ Objected to:

Since the objective reasonableness of Officer Johnson's action – not the judge's action - is the relevant issue in this case, Defendant contends the word "officer" should replace the words "judge viewing the affidavit" in plaintiff's proposal and that an appropriate instruction would further include the following information from the Supreme Court's recent decision in *District of Columbia v. Wesby*, 138 S. Ct. 577, 586

[6] Plaintiffs only propose this instruction in the event that the Court disagrees with Plaintiffs' position that the Fifth Circuit has already found that a corrected affidavit would not provide probable cause and that the trial is limited to Johnson's *mens rea*.

(2018); compare *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000).

Plaintiff's response: Defendant's objection conflicts with the law as set forth in *Franks* and by the Fifth Circuit opinions in this case, which clearly identify the relevant question as whether a reasonable judge or magistrate would have found probable cause, given a corrected affidavit.

DEFENDANT'S PROPOSED SUPPLEMENTAL INSTRUCTION ON PROBABLE CAUSE

Probable cause is not a high bar. It is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules.

Defendant's Proposed Supplemental Instruction No. 18

___ Given
___ Rejected
___ Withdrawn
_X_ Objected to: Plaintiff objects that this is confusing to the jury and not an accurate statement of the law. The Fifth Circuit opinion in this case (quoted in Plaintiff's probable cause instruction, above) contains the controlling definition of probable cause.

Defendant's response: Defendant avers that these direct quotes from the Supreme Court's decision in *Wesby*, 138 S. Ct. at 586 correctly and appropriately state applicable controlling law.

DEFENDANT'S PROPOSAL RE: QUALIFIED IMMUNITY

If you find Plaintiffs have proved by a preponderance of the evidence that Officer Johnson violated the Fourth Amendment by knowingly and intentionally, or with reckless disregard for the truth, making a false statement necessary to establish probable cause in the affidavits Defendant Johnson submitted when he requested warrants for Plaintiffs' arrests, you must then consider whether Officer Johnson is entitled to qualified immunity, which is a bar to liability that I will explain in the following paragraph.[7]

Qualified immunity exists to give government officials breathing room to make reasonable but mistaken judgments about open legal questions. Qualified immunity provides protection from liability for all but the plainly incompetent officers, or those who knowingly violate the law.

It is Plaintiffs' burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case. Qualified immunity applies if a reasonable officer could have believed Officer Johnson's action was lawful in light of clearly established law and the information Officer Johnson possessed. But Officer Johnson is not entitled to qualified immunity if, at the time he submitted the arrest warrant affidavit, a reasonable officer with the same information Officer Johnson had

[7] 5th Circuit Pattern Jury Instruction Nos. 10.1, 10.3.

could not have believed Officer Johnson's action was lawful.

Officers are presumed to know the clearly established constitutional rights of individuals they encounter. In this case, the relevant clearly established law at the time was that [an officer is prohibited from submitting a warrant affidavit that no objective law enforcement officer could have reasonably believed was lawful under the particular circumstances of this case].[8] An officer is not protected by qualified immunity if the evidence proves that every objective officer would have known Officer Johnson's action was clearly unlawful.[9]

If, after considering the scope of discretion and responsibility generally given to officers in performing their duties, and after considering all of the circumstances of this case as they would have reasonably appeared to Officer Johnson, you find Plaintiffs failed to prove that no reasonable officer could have believed submitting the warrant affidavit Officer Johnson provided to a judge for review was lawful, then Officer Johnson is entitled to qualified immunity, and your verdict must be for Officer Johnson. But if you find that Plaintiffs proved Officer Johnson violated Plaintiffs'

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[8] *Anderson v. Creighton*, 483 U.S. 635, 646, 107 S. Ct. 3034 (1984); *Malley v. Briggs*, 475 U.S. 335, 344, 106 S. Ct. 1092 (1986); *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534 (1991); *District of Columbia v. Wesby*, 138 S. Ct. 577, 582 (2018); *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000).

[9] *Anderson*, 483 U.S. at 646; *Malley*, 475 U.S. at 344; *Hunter*, 502 U.S. at 227; *Wesby*, 138 S. Ct. at 582 (2018); *Mendenhall*, 213 F.3d at 230-37.

constitutional rights and also that Officer Johnson is not entitled to qualified immunity, then your verdict must be for the Plaintiffs.

Defendant's Proposed Instruction No. 19

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: see Plaintiffs' trial memorandum of law. Qualified immunity, and particularly, the question of whether the law was clearly established at the time, is not a question for the jury. This also contravenes the Fifth Circuit opinions, which already decided that the law was clearly established.

Defendant's response: Plaintiffs' objection and request for the Court to usurp the jury's role in this case are insupportable for the same reasons identified *supra* regarding plaintiffs' requested Fourth Amendment instruction, and for other reasons as well. The Fifth Circuit's opinion denying immunity to Officer Johnson is premised on "**assuming all factual disputes in favor of [plaintiff] . . . "** *Winfrey*, 901 F.3d at 496, The court of appeals specifically held "**there is an issue of material fact** as to **whether [Officer] Johnson violated [plaintiff's] clearly established rights**, and he **is entitled to present his case to the factfinder**." *Id*. (emphasis added).

Moreover, Officer Johnson's immunity does not hinge on whether his action violated the Fourth Amendment. *See Anderson v. Creighton*, 483 U.S. 635,

641, 107 S. Ct. 3034, 3040 (1987); *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536 (1991) (*per curiam*); *Wesby*, 138 S. Ct. at 586; *Mendenhall*, 213 F.3d at 237. Probable cause and immunity (arguable probable cause) are distinct issues the Court has not decided in this case. See *Pierson v. Ray*, 386 U.S. 547, 556-57, 87 S. Ct. 1213, 1219 (1967); and *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).

Furthermore, when as here, the courts fail to decide qualified immunity before trial, it is appropriate for the jury to do so. *See Cole v. Carson*, 905 F.3d 334, 347 (5th Cir. 2018) (en banc); *Snyder v. Trepagnier*, 142 F.3d 791, 799-801 (5th Cir. 1998).

COMPENSATORY DAMAGES

If you find that Defendant Lenard Johnson is liable to Plaintiff Megan Winfrey or Richard Winfrey, Jr., then you must determine an amount that is fair compensation for all of their damages. These damages are called compensatory damages. The purpose of compensatory damages is to make Plaintiffs whole–that is, to compensate Plaintiffs for the damage that he or she has suffered. Compensatory damages are not limited to expenses that Plaintiffs may have incurred because of his or her injury. If Plaintiff Megan Winfrey or Richard Winfrey, Jr. win, he or she is entitled to compensatory damages for the physical injury, pain and suffering, and mental anguish that he or she has suffered because of Defendant Johnson's wrongful conduct.

You may award compensatory damages only for injuries that Plaintiff Megan Winfrey or Richard Winfrey, Jr. prove were proximately caused by Defendant Johnson's allegedly wrongful conduct. The damages that you award must be fair compensation for all of Plaintiffs' damages, no more and no less. You should not award compensatory damages for speculative injuries, but only for those injuries that Plaintiffs have actually suffered or that Plaintiffs are reasonably likely to suffer in the future.

If you decide to award compensatory damages you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary

guesswork. On the other hand, the law does not require that Plaintiffs prove the amount of her or her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

You may award damages for any pain and suffering, mental anguish, and/or loss of capacity of enjoyment of life that Plaintiff Megan Winfrey or Richard Winfrey, Jr. experienced in the past or will experience in the future. [However, I instruct you that you may not award damages to Megan Winfrey based on her detention that occurred after her grand jury indictment on October 9, 2008, even if you find Defendant Johnson violated Megan Winfrey's rights].[10] No evidence of the value of intangible things, such as mental or physical pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate Plaintiff Megan Winfrey and Richard Winfrey, Jr. for the damages he or she has

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[10] *Winfrey v. Rogers*, 766 Fed. Appx. 66, 72 (5th Cir. 2019). Officer Johnson anticipates the evidence admitted at trial will establish that further such limitations will be appropriate based on other grand jury indictments.

suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make must be fair in light of the evidence.

Proposed Jury Instruction No. 20

Source: 5th Circuit Pattern Civil Jury Instruction Nos. 15.2, 15.3 (modified).

___ Given
___ Rejected
___ Withdrawn
___ Objected to as

DUTY TO DELIBERATE; NOTES

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Remember at all times, you are the judges of the facts. You have been allowed to take notes during this trial. Any notes that you took during this trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes of other jurors. Notes are not entitled to greater weight than the recollection or impression of each juror about the testimony.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. You must select a jury foreperson to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have reached a unanimous verdict, your jury foreperson must fill out the answers to the written questions on the verdict form and sign and date it. After you have

concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations the jury foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your deliberations.

Proposed Jury Instruction No. 21

Source: 5th Circuit Pattern Civil Jury Instruction No. 3.7

___ Given
___ Rejected
___ Withdrawn

PLAINTIFF'S PROPOSED VERDICT FORMS:

Plaintiff Richard Winfrey, Jr.'s Claim Against Defendant Lenard Johnson

We, the Jury in this case, having been duly impaneled and sworn find that Plaintiff Richard Winfrey, Jr., _____ (enter "has proven" or "has not proven") by a preponderance of the evidence that Defendant Lenard Johnson violated Plaintiff's Fourth Amendment rights, and that Defendant Johnson's actions proximately caused Plaintiff's injuries.

Each of us Jurors concurring in said verdict signs his/her name hereto this ___ day of February, 2020.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

FOREPERSON

Plaintiffs' Proposed Verdict Form No. 1

___ Given
___ Rejected
___ Withdrawn
_X_ Objected to Plaintiffs' proposed jury questions are inconsistent with the format used in the Fifth Circuit and fail to support a judgment against Officer Johnson, who has asserted his presumed qualified immunity. Officer

Johnson has *infra* submitted appropriate jury questions.

Plaintiff Megan Winfrey's Claim Against Defendant Lenard Johnson

We, the Jury in this case, having been duly impaneled and sworn find that Plaintiff Megan Winfrey _____ (enter "has proven" or "has not proven") by a preponderance of the evidence that Defendant Lenard Johnson violated Plaintiff's Fourth Amendment rights, and that Defendant Johnson's actions proximately caused Plaintiff's injuries.

Each of us Jurors concurring in said verdict signs his/her name hereto this ___ day of February, 2020.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

FOREPERSON

Plaintiffs' Proposed Verdict Form No. 2

___ Given
___ Rejected
___ Withdrawn
_X_ Objected to Plaintiffs' proposed jury questions are inconsistent with the format used in the Fifth Circuit and fail to support a judgment against Officer Johnson, who has asserted his presumed qualified immunity. Officer

Johnson has *infra* submitted appropriate jury questions.

COMPENSATORY DAMAGES

We, the Jury, award Plaintiff Richard Winfrey, Jr., compensatory damages in the amount of $_____.

We, the Jury, award Plaintiff Megan Winfrey, compensatory damages in the amount of $_____.

Each of us Jurors concurring in said verdict signs his/her name hereto this ___ day of February, 2020.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

FOREPERSON

Plaintiffs' Proposed Verdict Form No. 3

___ Given
___ Rejected
___ Withdrawn
___ Objected to

DEFENDANT'S PROPOSED VERDICT FORM

VERDICT FORM

QUESTION NUMBER ONE

Has Plaintiff Megan Winfrey proven Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, made a false statement in the affidavit Defendant Johnson submitted when he requested a warrant for Megan Winfrey's arrest?

Answer "Yes" or "No." ____

After you answer question number 1, answer question number 2.

Defendant's Proposed Jury Question No. 1

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: see Plaintiffs' proposed verdict forms and trial memorandum of law. This misstates the law and contravenes the Fifth Circuit opinion because it excludes material omissions.

Defendant's response: Contrary to plaintiffs' contention, this question accurately identifies the legal standard the Supreme Court established in *Franks v. Delaware*, 438 U.S. 154, 155-156, 98 S. Ct. 2674 (1978) that governs plaintiffs' Fourth Amendment claims.

Although Defendant denies that the Supreme Court has extended *Franks* from false statements to alleged omissions in an affidavit, if this Court opines otherwise, the Court should amend Defendant's proposed jury question no. 1 to "Has Plaintiff Megan Winfrey proven Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, made a false [or misleading] statement in the affidavit Defendant Johnson submitted when he requested a warrant for Megan Winfrey's arrest?

QUESTION NUMBER TWO

Has Plaintiff Richard Winfrey, Jr. proven Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, made a false statement in the affidavit Defendant Johnson submitted when he requested a warrant for Richard Winfrey, Jr.'s arrest?

Answer "Yes" or "No." ____

If you answered "No" to both question numbers 1 and 2, then do not answer any other question.

Defendant's Proposed Jury Question No. 2

___ Given
___ Rejected
___ Withdrawn
_x_ Objected to: see Plaintiffs' proposed verdict forms and trial memorandum of law. This misstates the law

and contravenes the Fifth Circuit opinion because it excludes material omissions.

Defendant's response: Contrary to plaintiffs' contention, this question accurately identifies the legal standard the Supreme Court established in *Franks* that governs plaintiffs' Fourth Amendment claims. Although Defendant denies that the Supreme Court has extended *Franks* from false statements to alleged omissions in an affidavit, if this Court opines otherwise, the Court should amend Defendant's proposed jury question no. 1 to "Has Plaintiff Richard Winfrey, Jr. proven Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, made a false [or misleading] statement in the affidavit Defendant Johnson submitted when he requested a warrant for Richard Winfrey, Jr.'s arrest?"

Moreover, this question appropriately addresses the factual dispute the court of appeals found regarding "**whether [Officer] Johnson recklessly, knowingly, or intentionally made material misstatements and omitted material information . . .** " *Winfrey*, 901 F.3d at 496,

QUESTION NUMBER THREE

If you answered "Yes" to question number 1, then answer question number 3. If you answered "No" to question number 1, then skip question number 3.

Has Plaintiff Megan Winfrey proven that when false statements, if any, Defendant Lenard Johnson

knowingly and intentionally, or with reckless disregard for the truth, included in the affidavit he submitted requesting a warrant for Megan Winfrey's arrest are excluded from the affidavit, the affidavit fails to support probable cause for Megan Winfrey's arrest?

Answer "Yes" or "No." ____

Defendant's Proposed Jury Question No. 3

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: see Plaintiffs' trial memorandum of law. This contravenes the Fifth Circuit opinion and remand order and fails to include material omissions. The way this question is written is also unclear, grammatically incorrect and vague.

Defendant's response: Contrary to plaintiffs' argument, this question appropriately addresses the factual dispute the court of appeals found regarding whether "**a corrected affidavit would not show probable cause to arrest [plaintiff].**" *Winfrey*, 901 F.3d at 496.

Moreover, this question appropriately addresses the factual dispute the court of appeals found regarding "**whether [Officer] Johnson recklessly, knowingly, or intentionally made material misstatements and omitted material information . . .** " *Winfrey*, 901 F.3d at 496.

QUESTION NUMBER FOUR

If you answered "Yes" to question number 2, then answer question number 4. If you answered "No" to question number 2, then skip question number 4.

Has Plaintiff Richard Winfrey, Jr. proven that when false statements, if any, Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, included in the affidavit he submitted requesting a warrant for Richard Winfrey, Jr.'s arrest are excluded from the affidavit, the affidavit fails to support probable cause for Richard Winfrey, Jr.'s arrest?

Answer "Yes" or "No." ____

Defendant's Proposed Jury Question No. 4

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: see Plaintiffs' trial memorandum of law. This contravenes the Fifth Circuit opinion and remand order. and fails to include material omissions. The way this question is written is also unclear, grammatically incorrect and vague.

Defendant's response: Contrary to plaintiffs' argument, this question appropriately addresses the factual dispute the court of appeals found regarding whether "**a corrected affidavit would not show probable cause to arrest [plaintiff].**" *Winfrey*, 901 F.3d at 496.

QUESTION NUMBER FIVE

If you answered "Yes" to question number 3, then answer question number 5. If you answered "No" to question number 3, then skip question number 5.

Has Plaintiff Megan Winfrey proven that no reasonable officer could have believed submitting the warrant affidavit for Megan Winfrey's arrest was lawful in light of clearly established law at the time?

Answer "Yes" or "No." ____

Defendant's Proposed Jury Question No. 5

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: see Plaintiffs' trial memorandum of law. Qualified immunity, particularly whether the law was clearly established at the time, is not a question for the jury.

Defendant's response: Contrary to plaintiffs' argument, this question is necessary to address Officer Johnson's qualified immunity. Officer Johnson's immunity does not depend on whether his action violated the Fourth Amendment. *See Anderson*, 483 U.S. at 641; *Hunter*, 502 U.S. at 227; *Saucier v. Katz*, 533 U.S. 194, 197, 121 S. Ct. 2151, 2154 (2001); *Wesby*, 138 S. Ct. at 586; *Mendenhall*, 213 F.3d at 237.

QUESTION NUMBER SIX

If you answered "Yes" to question number 4, then answer question number 6. If you answered "No" to question number 4, then skip question number 6.

Has Plaintiff Richard Winfrey, Jr. proven that no reasonable officer could have believed submitting the warrant affidavit for Richard Megan Winfrey, Jr.'s arrest was lawful in light of clearly established law at the time?

Answer "Yes" or "No."

Defendant's Proposed Jury Question No. 6

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: see Plaintiffs' trial memorandum of law. Qualified immunity, particularly whether the law was clearly established at the time, is not a question for the jury.

Defendant's response: Contrary to plaintiffs' argument, this question is necessary to address Officer Johnson's qualified immunity. Officer Johnson's immunity does not depend on whether his action violated the Fourth Amendment. *See Anderson*, 483 U.S. at 641; *Hunter*, 502 U.S. at 227; *Saucier v. Katz*, 533 U.S. 194, 197, 121 S. Ct. 2151, 2154 (2001); *Wesby*, 138 S. Ct. at 586; *Mendenhall*, 213 F.3d at 237.

QUESTION NUMBER SEVEN

If you answered "Yes" to question number 5, then answer question number 7. If you answered "No" to question number 5, then skip question number 7.

What sum of money, if any, would fairly and reasonably compensate Plaintiff Megan Winfrey for damages, if any, that resulted from Deputy Lenard Johnson's violation of the Fourth Amendment?

Answer in dollars and cents, if any. _____

Defendant's Proposed Jury Question No. 7

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: This is duplicative and unnecessary. See Plaintiffs' compensatory damages verdict form and trial memorandum of law.

Defendant's response: Plaintiffs' damage question is inappropriate for the reason stated in Defendant's specific objection *supra*.

QUESTION NUMBER EIGHT

If you answered "Yes" to question number 6, then answer question number 8. If you answered "No" to question number 6, then skip question number 8.

What sum of money, if any, would fairly and reasonably compensate Plaintiff Richard Winfrey, Jr. for

damages, if any, that resulted from Deputy Lenard Johnson's violation of the Fourth Amendment?

Answer in dollars and cents, if any. _____

The foregoing is the unanimous verdict of the jury.

_____
Jury Foreperson
February, ___, 2020.

Defendant's Proposed Jury Question No. 8

___ Given
___ Rejected
___ Withdrawn
_x__ Objected to: This is duplicative and unnecessary. See Plaintiffs' compensatory damages verdict form and trial memorandum of law.

Defendant's response: Plaintiffs' damage question is inappropriate for the reason stated in Defendant's specific objection *supra*.

APPENDIX R

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY JR.,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO.
SAN JACINTO COUNTY, *et al*,	§	4:10-CV-1896
Defendants.	§	

ORDER

These two consolidated actions are before the Court on remand from the Fifth Circuit for factfinding by a jury on certain issues. The parties have moved to exclude certain witness testimony and moved *in limine* to bar certain testimony and evidence on certain issues. Each party has also proposed jury instructions and questions eliciting objection from the opposing party.

Procedural Background

Richard Winfrey Jr. ("Junior") and his sister, Megan Winfrey, were arrested and charged with murder after what the Fifth Circuit has called a "botched investigation." Junior was acquitted by a jury. Megan was convicted, and her conviction was overturned. Both now assert claims against Deputy Sheriff Lenard

Johnson of the San Jacinto County Sheriff's Office for violations of their Fourth Amendment rights.

Another court in the Southern District of Texas, presiding over the action before September 2019, granted summary judgment for Johnson on the issue of qualified immunity. Junior and Megan appealed.

The Fifth Circuit reversed the district court's grant of summary judgment on qualified immunity. To resolve qualified immunity on summary judgment, the Fifth Circuit determined (1) whether the facts, taken in the light most favorable to the party asserting the injury, show the officer violated a federal right, and (2) whether the right was "clearly established" when the violation occurred. *Winfrey v. Rogers*, 901 F.3d 483, 493 (5th Cir. 2018) ("*Winfrey II*"), *cert. denied sub nom. Johnson v. Winfrey*, 139 S. Ct. 1549 (2019).

The Winfreys asserted that they have a clearly established constitutional right under the Fourth Amendment to be free from police arrest without a good faith showing of probable cause. *Id.* at 494. The Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978) clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes "a false statement knowingly and intentionally, or with reckless disregard for the truth," and (2) "the allegedly false statement is necessary to the finding of probable cause." *Id.*

The Fifth Circuit "conclude[d] that Junior alleges a clearly established constitutional violation." *Id.* As to

the first *Frank* prong, the Fifth Circuit found that "Junior provide[d] evidence that Johnson made false statements in his affidavit" and that the record was "sufficient to demonstrate that there is an issue of material fact as to whether Johnson acted intentionally, knowingly, or recklessly." *Id.*

As to the second prong, the Fifth Circuit found "that the corrected affidavit does not contain sufficient information to satisfy the probable-cause requirement." *Id.* at 495. In reaching this determination, the court reviewed the probable cause standard, and described what facts, omitted from Johnson's affidavit, would have been included in a "corrected" affidavit. *Id.* at 495–96.

"The primary question on remand,' the court concluded, "appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements." *Id.* The Fifth Circuit vacated the district court's judgment and remanded for "trial without delay in a manner not inconsistent with this opinion." *Id.*

In its opinion on Megan Winfrey's appeal, the Fifth Circuit reiterated its holdings in Junior Winfrey's appeal: "It held that the affidavits contained material misrepresentations and omissions, and that a 'corrected' affidavit would not have satisfied the probable-cause requirement. Thus, the panel vacated the district court's judgment and remanded for trial 'on the factual issue of whether Johnson acted recklessly,

knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for Junior." *Winfrey v. Johnson*, 766 F. App'x 66, 71 (5th Cir. 2019) ("*Winfrey III*"), *cert. denied*, 140 S. Ct. 377 (2019).

The two actions are now set for consolidated trial to begin on Monday, February 3, 2020.

The Parties' Disputes

I. Whether a Corrected Affidavit Would Have Established Probable Cause

The parties dispute the effect of the Fifth Circuit's rulings in *Winfrey II* and *Winfrey III*. Plaintiffs argue that the primary issue on which the jury will issue findings of fact is whether Lenard, in support of the faulty warrant, included "a false statement knowingly and intentionally, or with reckless disregard for the truth." Plaintiffs assert the Fifth Circuit has already determined that a corrected affidavit would not support a finding of probable cause, and that therefore the jury need not make a finding as to that issue.

Defendant argues that Plaintiffs' interpretation of the Fifth Circuit's rulings would "usurp[] the jury's fact-finding role." *See*, *e.g.*, Dkt. 203-7 at 20. He argues that the Fifth Circuit did *not* hold that a corrected affidavit would not establish probable cause, but rather only found that a genuine dispute of material fact on that issue precluded summary judgment for Defendant. Defendant proposes several jury instructions in

line with Defendant's apparent assertion that the Fifth Circuit remanded these actions for a jury to find not only whether Johnson acted recklessly, knowingly, or intentionally, but also whether a "corrected" affidavit would establish probable cause for Plaintiffs' arrests. *See*, *e.g.*, Dkt. 203-7 at 23.

A. Analysis

The Fifth Circuit has clearly and consistently held that a corrected affidavit would not have established probable cause. In Junior's appeal, the Fifth Circuit "[found] that the corrected affidavit does not contain sufficient information to satisfy the probable-cause requirement." *Winfrey II* at 495. After reviewing the materiality of the omitted information, the Fifth Circuit reiterated, "Weighing the totality of the circumstances, we conclude that a reasonable magistrate would not have issued a warrant on the basis of this corrected affidavit, because the addition of the omitted material facts would have dissuaded the judge from issuing the warrant." *Id.* at 496. Summarizing its holdings, it stated that "a corrected affidavit did not establish probable cause." *Id.* at 498.

Seven months after *Winfrey II*, a completely different panel of the Fifth Circuit repeated its holding on this issue: "a 'corrected' affidavit would not have satisfied the probable-cause requirement." *Winfrey III* at 70–71. Considering Johnson's renewed objections to the corrected affidavit finding in *Winfrey III*, the Fifth

Circuit stated that "Johnson is precluded from relitigating these issues." *Id.*

This clear and consistent holding is on a legal question which the Fifth Circuit has authority to decide as a matter of law. *See*, *e.g.*, *Hamilton v. Collett*, 83 F. App'x 634, 637 (5th Cir. 2003) (finding that evidence known to law enforcement, excluding evidence which plaintiff alleged to be false, "established probable cause as a matter of law"); *see also Smith v. Edwards*, 175 F.3d 99, 105 (2d Cir. 1999) (courts must "determine whether as a matter of law the corrected affidavit did or did not support probable cause").

"The 'law of the case' doctrine generally precludes the reexamination of issues decided on appeal, either by the district court on remand or by the appellate court itself on a subsequent appeal." *Moore v. Felger*, 51 F.3d 1043 (5th Cir. 1995). "If an issue was decided on appeal—either expressly or by necessary implication—the determination will be binding on remand and on any subsequent appeal." *Id.* A determination of a legal issue by an appellate court must be followed in all subsequent proceedings in the same case in the district court or in a later appeal unless "(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work manifest injustice." *Id.*

B. Conclusion

The Court will not permit any party to introduce evidence for the sole purpose of showing that a corrected affidavit would have established probable cause. To do so would contravene the law of the case doctrine and the direct order of the Fifth Circuit that "[t]he primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements. This case should go to trial without delay in a manner not inconsistent with this opinion." *Winfrey II* at 498.

It would prejudice Plaintiffs to permit Johnson to freely introduce evidence meant to establish that a corrected affidavit would have established probable cause. The question for the jury will be whether, at the time that Deputy Sheriff Johnson signed affidavits for warrants to arrest Plaintiffs, Johnson acted with the *mens rea* required to establish the constitutional violation at issue.

Whether there is any evidence that *could have* established probable cause is irrelevant to that inquiry. Therefore, the jury will not be instructed to determine that issue, and no evidence will be introduced for the sole or primary purpose of establishing that a corrected warrant would have established probable cause or whether probable cause "actually existed" at the time Johnson signed the Winfreys' arrest warrants.

C. Plaintiffs' Related Motions

Only to the extent consistent with this opinion:

- Plaintiffs' Amended Motion to Bar Defense Expert Mark Young Under *Daubert* and FRE 702 (Dkt. 189) is **GRANTED**.
- Plaintiffs' Motion *in Limine* No. 1: Barring References to Dismissed Claims and Defendants and Settlement with Keith Pikett (Dkt. 192) is **GRANTED**. The only permissible basis for Defendant to introduce such evidence would be to show whether "Johnson made a false or misleading statement with reckless disregard for the truth." (Dkt. 219 at 2.) Because that is only one of several arguments Defendant raised for the relevance of this evidence, and the connection between dismissed claims and Johnson's mindset is attenuated at best, the motion is granted.
- Plaintiffs' Motion *in Limine* No. 2: Barring Certain of Defendant's Proposed Witnesses (Dkt. 193) is **GRANTED**.
- Plaintiffs' Motion *in Limine* No. 3: Barring All Witnesses from Testifying about Probable Cause (Dkt. 194) is **GRANTED**.

II. Whether Material *Omissions Implicate* the Fourth Amendment

Johnson argues that "Plaintiffs' proposed [jury] instruction fails to properly state the standard the Supreme Court established in *Franks*. The Supreme Court has not extended *Franks* from false statements to alleged omissions in an affidavit." *E.g.*, Dkt. 203-7 at

21. The Court overrules this objection and any other similar objections.

"[A]n officer who makes knowing and intentional omissions that result in a warrant being issued without probable cause" is also liable under *Franks. Michalik v. Hermann*, 422 F.3d 252, 258 n.5 (5th Cir. 2005); *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017). The Fifth Circuit's decision in *Winfrey II* also applied that rule and its analysis described "[a] corrected affidavit" that "would contain the following facts, which were omitted from Johnson's affidavit." *Winfrey II* at 495–96. Thus, the jury must determine whether Johnson's mindset not only to material misstatements, but also omissions, in the arrest-warrant affidavit.

III. Other Motions *in Limine*

This Court also rules that:

- Plaintiffs' Motion *in Limine* No. 4: Barring Witnesses from Testifying about Other Witnesses' Credibility (Dkt. 195) is **GRANTED** in part. Plaintiffs' previous statements about who they blame for their legal injuries are irrelevant. Defendant is free to introduce *evidence* tending to show that a witnesses' testimony is incorrect. One witness's bare assertion that another witness is not to be believed is inadmissible.
- Plaintiffs' Motion *in Limine* No. 5: Barring References to Qualified Immunity or Clearly Established Law (Dkt. 196) is GRANTED in part. Whether the Winfreys have a "clearly established" Fourth Amendment right to be free from

police arrest without a good faith showing of probable cause is already decided. *Winfrey* at 493–94. Plaintiffs' motion to bar reference to whether a reasonable officer would have done what Johnson did is **DENIED *only* to the extent** that the jury must determine whether Johnson acted recklessly, knowingly, or intentionally by presenting the arrest-warrant affidavit, which is a formulation of the reasonable officer question under qualified immunity. *See Winfrey II* at 494 ("[N]egligence alone will not defeat qualified immunity. [A] proven misstatement can vitiate an affidavit only if it is established that the misstatement was the product 'of deliberate falsehood or of reckless disregard for the truth.").

- Plaintiffs' Motions *in Limine* Nos. 6 and 7 are **GRANTED as unopposed**.
- Plaintiff's Motion *in Limine* No. 9: Barring Argument Regarding Whether the Affidavits Contain a Material Falsehood and Material Omissions (Dkt. 202) is **DENIED without prejudice to oral motion after the close of evidence**. As a general matter, parties may not argue issues not raised by the evidence presented.
- Defendant's Motion *in Limine* (Dkt. 205) is **GRANTED in part**.
    - It appears Plaintiffs do not intend to introduce evidence about litigation or disciplinary actions against San Jacinto County, Fort Bend County, or the State of Texas or its employees that does not arise out of the events that gave rise to this action. Defendant's Motion in Limine as to items 1 and 2 is **taken**

under advisement pending clarification from the parties.

- Defendant's Motion *in Limine* as to items 3 and 4 is **taken under advisement**.

The Court takes the following motions under advisement:

- Plaintiffs' Motion to Bar Defense Expert Dr. George Glass. Dkt. 190.
- Defendant's Opposed Motion to Exclude, or Alternatively Limit, the Testimony of Plaintiffs' Purported Expert Witness Mary Cablk. Dkt. 191.
- Plaintiffs' Motion *in Limine* No. 8: Barring Prior Bad Acts or Character Evidence. Dkt. 201.

Signed at Houston, Texas on the 31st day of January, 2020.

/s/ George C. Hanks, Jr.
George C. Hanks, Jr.
United States District Judge

APPENDIX S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

– – –

HONORABLE GEORGE C. HANKS, JR.,
JUDGE PRESIDING

RICHARD WINFREY, JR., and MEGAN WINFREY,

Plaintiffs,

vs.

SAN JACINTO COUNTY, et al.,

Defendants.

No. 4:10-cv-01896

JURY TRIAL – DAY 2

OFFICIAL REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Houston, Texas

February 4, 2020

APPEARANCES:

For the Plaintiffs: Gayle Horn, Esq.
Elizabeth Wang, Esq.

For the Defendants: William Helfand, Esq.
Norman Giles, Esq.

Reported by: Nichole Forrest, RDR, CRR, CRC
Official Court Reporter
United States District Court

Southern District of Texas
nichole_forrest@txs.uscourts.gov

Proceedings recorded by mechanical stenography. Transcript produced by Reporter on computer.

* * *

[9] MR. HELFAND: One other thing. I did bring some case law on the independent intermediary. And I've provided a copy to Ms. Horn of the *Buehler* case. I have a copy for the Court and clerk.

May I give those to the clerk?

THE COURT: Sure.

MR. HELFAND: They speak to the burden.

I would point out also in the second – in the Megan Winfrey opinion, Judge Jones explains that – that the – well, I'm sorry. I'll get to that later. I don't want to take up time.

I'll leave that with you now.

THE COURT: We'll take it up during the break. Okay. Is everyone ready to begin?

MS. WANG: Yes.

THE COURT: Bring in the jury.

Again, I know I'm saying this for the third time: If you have objections, make them. Otherwise, we're moving on. (The jury entered the courtroom.)

THE COURT: Good morning. I notice some of you noticed the temperature in this building. You

brought your jackets. Very good. I was going to mention that to you, but you figured that all out.

Thank you so much for your patience and being on time this morning.

[10] Before we get started this morning, I'm going to give you some instructions that are to govern your deliberations in this matter.

The Court believes that you may be confused as to the fact issues that you will be deciding in this case. And in order to eliminate that confusion, the Court gives you the following instructions:

Probable cause is a requirement for the issuance of an arrest warrant. It requires a probability or substantial chance of criminal activity not an actual showing of such activity.

I instruct you that it has been established that the affidavits for the arrest warrants signed by the defendant Lenard Johnson in this case contained materially false statements of fact or omitted material facts. A statement or the omission of fact is material if without the false statement or the omission the affidavit would have been insufficient to establish probable cause.

The materially false statements or omitted material facts in the arrest warrant are as follows:

One, misstating that Keith Pikett's drop trail for Murray Burr's house to the Winfrey house used the scents of plaintiffs when the drop trail actually used the scent of Christopher Hammond;

Two, omitting David Campbell's statements that were [11] contradicted by the physical evidence;

And three, omitting that David Campbell identified a cousin as participating in the murder with Richard Winfrey, Senior instead of the plaintiffs.

At the end of this trial among other things you will be asked to decide whether the defendant Johnson recklessly, knowingly or intentionally made material misstatements and omitted material information in the arrest warrants affidavits in this case.

So those are my instructions to you now. You'll get those instructions again at the end of this case when the case is submitted to you for your decision.

You may call your first witness.

MS. WANG: We call Richard Winfrey, Junior.

RICHARD WINFREY, JR.

The witness, after being sworn, testified as follows:

DIRECT EXAMINATION

BY MS. WANG:

Q. Good morning. Could you please state your name and spell it for the record.

A. Richard Lynn Winfrey, Junior.

Q. How old are you?

A. 33.

Q. And where do you live?

A. I live in Houston, Texas.

* * *

[123] Q. There is certainly no evidence that it came from anything that you're suing over, is there?

A. No.

THE COURT: Ladies and gentlemen, as an aside, you're probably seeing me working up here. What I'm working on is the jury charge for you, so that when you hear all the evidence we won't have a very long break. We'll be able to get you the charge, get the arguments, and then the case will get to you pretty quickly.

So I apologize – hopefully what I'm doing is not distracting you. I'm trying to get everything together for you.

MR. HELFAND: Judge, may I inquire about something at the bench?

(The following proceedings held at sidebar.)

MR. HELFAND: I would like to inquire of Mr. Winfrey about his claims against other people and his settlements.

THE COURT: Okay. I'm not going to allow any – I mean, we can make a record during the break, but I'm not allowing any discussion regarding settlements with other individuals or – with the individuals or the amount.

And I'm also making that ruling regarding experts as well.

Unless you have a case, and I've looked, and maybe I've missed one, that under 1983 there could be some sort of apportionment of damages among responsible parties.

[124] I'm not going to allow it.

If you have that case law, let me see it. But I've looked and I've not seen it.

MR. GILES: There is some case law.

MR. HELFAND: There is case law offset not apportionment –

THE COURT: That is what I would like to find is offset.

The only thing that I understand 1983 bars from Texas law is limitations. It doesn't bar Texas offset law.

If it does, let me know, and I'll definitely look at it. But I've not found a case yet.

Mr. Giles, if you've got one I'll take it.

MR. GILES: I think there is federal law and –

MR. HELFAND: I think there is federal law and offset –

THE COURT: It's got to be federal law from this district adopting the offset laws that – offset principles that you want me to apply.

MR. HELFAND: I understand. To be clear, you said this district. I assume you mean this Circuit.

THE COURT: This Circuit.

MR. HELFAND: It's not being offered for purposes of the value of the settlement.

Let's just say – okay, I get the Court's ruling. I'll [125] bring up the settlement issue later. We'll give you some case law.

I'm not worried about the settlement as much as that he blamed other people for the same thing he's blaming my client.

Ms. Wang is shaking her head no, but that is in fact the case.

The question is whether it's admissible; I believe that it is.

THE COURT: Okay.

MS. WANG: It's not admissible because there is no relevance. The standard jury instructions from this Circuit on compensatory damages ask the jury to find that Johnson, the defendant, proximately caused – proximately caused the damages.

It's in the jury instructions. And so there is no basis for bringing this in. Because that is what they're being asked to find.

THE COURT: Okay. You get the last word.

MR. HELFAND: Yes, Judge. It's not a question of proximate cause of damages. It's a prior inconsistent statement. He previously blamed other people for his arrest besides Johnson.

THE COURT: Okay. Let me hear your response.

MS. WANG: I mean, when they're multiple – when there are multiple tortfeasors, they're all responsible for the [126] individual injury.

The way that this comes in is not through evidence. But if there is applicable offset law, as Your Honor said, which we don't think there is, it doesn't get put before the jury.

THE COURT: One second.

At this time I'm not going to allow you to get into it. You can make a bill, but I'm not allowing any testimony that he blamed anyone else for the incident – strike that.

Is the question you're going to ask is: Do you think that there is anyone else to blame? And you can ask him that question.

But then – well, what is question you want to ask?

MR. HELFAND: The question I – I'll ask him the question that the Court will permit –

THE COURT: No, no –

MR. HELFAND: But I'll ask whatever question the Court will permit.

The question I intended to ask is: Isn't it true that you previously blamed other law enforcement officers for the arrest that you're suing Deputy Johnson over?

MS. WANG: That makes it sound like –

THE COURT: Yeah, 403. I'm with you.

Here is the question I'll allow you to ask. You make a bill.

The question is: Do you blame anyone other than Officer [127] Johnson for you being incarcerated?

He can answer yes or no. And then that's it. Because then we get into who and why. You can ask him that question. But that's it.

MR. HELFAND: May I change the word "incarcerated" to "arrested"?

THE COURT: Yes.

MR. HELFAND: Thank you.

THE COURT: Your response?

MS. HORN: I think that obviously begs the question – I don't think that solves the problem. Because if he says, yes, there are other people who were involved, then the jury is going to be left to wonder who those are. The only way we can clean it up is through redirection.

I mean, I don't think that solves the 403 problem. I think at the end of the day, this case is specifically against defendant Johnson, and the jury will be asked to determine defendant Johnson's liability.

Whether Mr. Winfrey, Junior blamed somebody else, I'm not sure is particularly relevant. Because the jury will have to make a determination of whether defendant Johnson recklessly or intentionally put in misinformation in the affidavit. They're not going to have to decide whether Mr. Winfrey, Junior blamed or doesn't blame him.

THE COURT: That's a good point.

[128] What is the point – if the jury is not going to be asked that question, what is the point again?

MR. HELFAND: Well, first of all, it goes to the question of whether he has evidence of this scienter that he's accusing defendant Johnson of.

Because initially he claimed other people were responsible for his – he blamed other people, to go back to the Court's question.

He's only pivoted to Deputy Johnson since he was – since all those other people have been dismissed or settled.

MS. HORN: But, Your Honor –

THE COURT: You can make a bill. I'm not going to allow it. I changed my mind.

At 3:30 let's stay behind and you can make a bill with this witness on the evidence. But respectfully, your objection is sustained.

Also, if you could, I would like the case law for – basic offset law under 1983.

MR. GILES: May I step out?

THE COURT: Sure.

MR. HELFAND: Do you want that now?

THE COURT: I can get it later. That is not really – at this point, I mean, if I decide to allow it, I'll allow you to bring the witness back.

(The following proceedings held in open court.)

[129] MR. HELFAND: May I proceed?

THE COURT: Yes.

MR. HELFAND: Subject to a bill, as we discussed at the bench, I will pass the witness for now.

THE COURT: Okay.

MR. HELFAND: Subject to recall in defendant's case-in-chief.

THE COURT: Redirect?

MS. WANG: Yes.

REDIRECT EXAMINATION

BY MS. WANG:

Q. Richey, during Mr. Helfand's questions, he asked if you were hiding your damages from your employer.

Do you remember those questions?

A. Yes.

Q. Do you like to talk about your wrongful arrest?

A. No.

Q. Is it hard to talk about?

A. Yes, ma'am.

Q. Why?

A. It's about the only way I can keep from thinking of it.

Q. Is it embarrassing?

A. Yes, ma'am.

Q. Why is it embarrassing to you?

A. Obvious reason. I mean, anybody – I mean, being accused

* * *

APPENDIX T

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

– – –

HONORABLE GEORGE C. HANKS, JR.,
JUDGE PRESIDING

RICHARD WINFREY, JR., and MEGAN WINFREY,

Plaintiffs,

vs.

SAN JACINTO COUNTY, et al.,

Defendants.

No. 4:10-cv-01896

JURY TRIAL – DAY 3

OFFICIAL REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Houston, Texas

February 5, 2020

APPEARANCES:

For the Plaintiffs: Gayle Horn, Esq.
Elizabeth Wang, Esq.

For the Defendants: William Helfand, Esq.
Norman Giles, Esq.

Reported by: Nichole Forrest, RDR, CRR, CRC
Official Court Reporter
United States District Court

Southern District of Texas
nichole_forrest@txs.uscourts.gov

Proceedings recorded by mechanical stenography. Transcript produced by Reporter on computer.

* * *

[15] didn't believe it. When he relied on the source in his affidavit he was being reckless.

That is sort of the nutshell theory.

There is one other thing I want to preview.

Before Megan testifies, I would like to get a ruling on or have a conversation about our motion in limine number 8, because it does go to her testimony.

But we don't have to do it now.

MR. HELFAND: Judge, I did my homework that you assigned. I brought a number of cases, including *Dodson versus Camden*, 705 F.2d 759.

THE COURT: Do you have a copies?

MR. HELFAND: Yes. I'll provide a copy to opposing counsel.

I should note that you'll see that *Dodson versus Camden* – the holding that requires apportionment and a setoff for damages for Texas cases under an interpretation of 1988 was left undisturbed but en banc, because after remand the Court found that claims for damages were not the same claim on remand.

After remand, en banc the Court at 725 F.2d 1003 did not set aside the holding of the panel that apportionment was appropriate, but rather found that it was no longer an issue because of the fact that the claims on which damages were granted was altered.

[16] However, I will provide the Court with a number of other cases, and I'll provide them to counsel as well, that have since cited the *Dodson versus Camden* opinion on apportionment and made it clear that in any state that in – Texas of course is one of them, as *Dodson* points out – where apportionment or setoff for settlements is appropriate, section 1988 requires that the Court use that gap-filling statute to allow a setoff.

So at some point we need to get a ruling from the Court one way or the other on the issue of setoff.

When Pikett comes to testify, I would like to ask for a ruling.

THE COURT: I'll have a ruling. I would love to see it. Because I could not find any cases with a – under 1983 from the Fifth Circuit saying that in a 1983 case the Fifth Circuit will adopt Texas case law – I mean, Texas statutory law on an offset. That is what I couldn't find. That is what I'm looking for.

MR. HELFAND: You'll find, as you may know, Judge Goldberg of the Fifth Circuit was a prolific writer. This is a very well-explained opinion of why 1988 is a gap-filler for that.

As I said, a number of District Courts have since pointed back to the *Dodson* one decision as the reason why in their state apportionment is also required.

And a number of Courts have pointed out that the en banc [17] decision of *Dodson* did not change the holding in *Dodson* one.

I'll provide those to Your Honor's clerk. I provided the *Dodson* case and the *Goad versus Macon County* case, 730 F. Supp. 1425 to counsel.

MS. HORN: We also found some cases unsurprisingly going the other way.

THE COURT: Give them to me.

MR. HELFAND: If there is a Fifth Circuit case on it that reverses *Dodson*, I think we should see that.

THE COURT: Provide me with those cases. Do you have them now? I can start looking at them.

MS. HORN: We can print the case –

We have *Mims versus Dallas County*, where the Court refused to apply proportionate responsibility because – so that is 2006 Westlaw 398177.

THE COURT: That is proportionment responsibility.

We're talking whether or not in a 1983 case the Court adopted or incorporated the Texas offset statute for purposes of damages in a 1983.

MR. HELFAND: We're not asking the jury to apportion fault. We're asking the jury to have one satisfaction rule.

THE COURT: Proportionment of responsibility doesn't apply. But I'd like – I'm familiar with *Mims versus Dallas County*. I know that case.

Next case?

[18] MS. HORN: The cases that we had found – we were under the impression they were trying to get in the evidence through Dr. Glass and whatnot and through Pikett of the proportionate responsibility.

So those are the two cases that we have.

But while we're testifying, we'll see if somebody from our office can't pull some cases specifically as to setoff.

THE COURT: What they're looking at is, whether or not under – I agree with you; 1988 is the mechanism for incorporating state statutes as part of 1983.

The question is whether or not the Fifth Circuit or any other Courts have done that with respect to the offset statute.

Sounds like maybe they have.

MR. HELFAND: Yes, it does, Judge. *Dodson* and *Goad* both explain – here is the bottom line – I know Your Honor is in a hurry to get the jury.

The rationale in *Dodson* that is then incorporated by the Court says that we don't ask the jury how much does Johnson pay for the damages.

The question that the Court will ask the jury is: What is reasonable compensation for the injuries that the plaintiffs have proven.

So if the jury wants to award $100,000 – I'm picking a number at random – and they put $100,000 in that blank, but they've already been paid $100,000, they would be making a [19] double recovery because the jury thinks the compensation is $100,000, but it doesn't know that there has already been compensation of the $100,000.

Dodson explains it better than I can, Judge.

MS. HORN: My understanding of offset is that it's a question of law for the Court after the jury has made its determination.

Maybe that is where the disconnect came for me. To the extent that they are trying to put on evidence of Pikett settlement or Pikett's responsibility for my client's wrongful arrest, I think that – I mean, he's just said the jury is going to ultimately award damages or not, and then the Court can take up the issue of offset.

THE COURT: Right.

MS. HORN: I don't know why we need to do that right now –

THE COURT: I want to look at these cases.

The other problem is that these are not economic damages. I want to see what it says when it talks about noneconomic damages. Because economic damages, it's easy. Offsets are easy. You've got $100,000 that is decided. If you've been paid $30,000, you don't get collect $100,000.

In this case, we're talking about intangibles. Emotional damages, mental anguish.

I want to see a case – I want to see how the Courts talk [20] about how offset would work in that situation. I've not seen it. But you've given me cases. I'll look at it. See where we go.

MR. HELFAND: I think you'll see, Judge, all of these cases to my recollection are – first of all, they're all 1983, and they're all nonpecuniary-damage awards. Nonliquidated damages.

Let me put on the record two other cases.

Davis versus Prison Health Services from USDC Northern District of the California, 2012 US District LEXIS 138556. Also 2012 Westlaw 4462520.

And *Hoffman versus McNamara* from the District of Connecticut, 688 F. Supp. 830 from 1988.

They all cite *Dodson*.

I'll give those to the Court.

THE COURT: I want to make sure we get the cases. I want to be looking at them.

MR. HELFAND: I still think that the jury should hear – again, I'll make an offer of proof and the Court can make – can confirm its decision.

I think the jury should hear that the plaintiffs blamed other people for their arrest.

THE COURT: Okay.

MR. HELFAND: Which is an issue the Fifth Circuit did not take up obviously.

[21] MS. HORN: Your Honor, do you want argument on it?

THE COURT: No. When that evidence wants to be offered, you offer it. You object. I rule on the objection.

MS. HORN: My concern with some of that is that the jury is – if we get the objection out too late, the jury has already heard the question.

THE COURT: Then the issue then is that it's covered by the motion in limine. The parties are instructed before we get into that topic, you know, lay the foundation without testifying – without asking the question. If you think you'll get into that, approach the bench, and then I'll rule.

MS. HORN: Thank you, Your Honor.

MR. HELFAND: Judge, I'm sorry, there is one more case I want to give to you.

Harris versus Angelina County, 31 F.3d, 331, Fifth Circuit, 1994.

I'll give you a copy.

THE COURT: Before we get started, on the issue of other investigations that Officer Johnson did, you ask the question. You make the objection. I will rule.

But understand that my concern is that if I do allow it, I'm not going to hear argument that we can't get into – well, offer the evidence. Make the objection. I'm going to rule. That is the way I can put it.

Are there some other topics you can cover before I [22] can – while I take a look at your cases on why the evidence that you want in here is – this is not a 404 issue?

MS. HORN: I don't have any other cases for Your Honor right now.

THE COURT: Are these all of the cases? Because the cases we'll be looking at are the cases on offset.

So I can look at that later. That doesn't come into play now.

The fact that you're saying this is not a 404 issue as to what other investigations he did; do I have those cases?

MS. HORN: The cases that we were able to locate last night are cited in the memo.

And I think – as I mentioned, I think the *Buchanek* case is the one that most directly analogizes to this case.

But it doesn't specifically discuss 404(b). That is not the analysis –

THE COURT: Here is what we are going to do: We're not going to get into that topic. I want to give you the chance to read the brief. I've only pulled up these cases this morning. I just glanced over it. I got it this morning when I walked in.

So continue the examination of Sergeant Johnson without getting into this, and I'll make a ruling.

Officer Johnson, you may take the stand.

Hold on.

* * *

CERTIFICATE

I hereby certify that pursuant to Title 28, Section 753 United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings in the above matter.

Certified on October 10, 2020.

/s/ Nichole Forrest
Nichole Forrest, RDR, CRR, CRC

APPENDIX U

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

– – –

HONORABLE GEORGE C. HANKS, JR.,
JUDGE PRESIDING

RICHARD WINFREY, JR., and MEGAN WINFREY,

Plaintiffs,

vs.

SAN JACINTO COUNTY, et al.,

Defendants.

No. 4:10-cv-01896

JURY TRIAL – DAY 4

OFFICIAL REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Houston, Texas

February 6, 2020

APPEARANCES:

For the Plaintiffs: Gayle Horn, Esq.
Elizabeth Wang, Esq.

For the Defendants: William Helfand, Esq.
Norman Giles, Esq.

Reported by: Nichole Forrest, RDR, CRR, CRC
Official Court Reporter
United States District Court

Southern District of Texas
nichole_forrest@txs.uscourts.gov

Proceedings recorded by mechanical stenography. Transcript produced by Reporter on computer.

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[5] I don't anticipate that we will need more than a day for the witnesses that we will call that the plaintiffs do not.

So the real question is how fast the plaintiffs go with their direct examination. But I think Tuesday or Wednesday is a very fair estimate.

THE COURT: Okay. Right. So that is what I'll tell the jury. I want them to have an idea so they can be planning their lives. But I'm not rushing either of you in any way. Take as much time as you need.

MS. HORN: Thank you.

THE COURT: Second issue was I received the plaintiffs' amended bench memorandum regarding the setoff. I've also reviewed the defendant's briefing on the setoff.

And here is my ruling. I'm not going to prepare a written order. I'm just going to read it on the record.

I understand the argument. Respectfully, I'm denying the request.

Very interesting issue, but the Fifth Circuit has not spoken clearly on this issue. I did read the case that you cited.

As you correctly cited to me, the Fifth Circuit didn't decide the issue. It decided on another issue on appeal.

And looking at the case law, my analysis is that 1983 borrows state law when there is a gap. In this case, there is not a gap.

[6] There is a gap when, for example, there is a need for statute of limitations, 1983 bars [sic] the state limitations.

Here the settlement credit setoff and proportionate responsibility statutes are not a gap-filler for 1983 in my opinion.

I understand the argument. It's not a gap-filler under 1983.

There is no need for federal courts to adopt state law on this issue.

Assuming that the state – assuming that there was not a gap, the next question would be: Does state law conflict with the principles of 1983? That is, does state law regarding settlement credits, settlement setoff and apportionment of responsibility conflict with the principles of 1983?

I find that it would. To apply settlement credits and setoff principles as well as proportional responsibility principes would weaken the deterrent effect of section 1983 actions elevating the concerns of a witness – I mean, a plaintiff's windfall over the concerns

of punishing known intentional violations by state actions.

So I think that even if I were to adopt – to consider using Texas law on settlement credits and offset, that the policies and principles of 1983 would not be served by doing that.

The other thing I noted is that the federal courts are [7] pretty clear that concepts of contribution are not accepted as part of 1983 statutes.

And I don't see a difference between contribution and settlement credits and setoff. That is, the federal courts have said that contribution doesn't apply.

And I'm struggling to find a world where contribution would not apply, but the Courts would take into consideration setoff and settlement credits.

Now, again, I acknowledge it's a very interesting issue. And hopefully maybe this will be the case where you guys appeal it or another case. But the Fifth Circuit needs to rule on it.

But that is my ruling.

So with respect to settlement credits or setoff, I'll allow you to make a bill so that you can establish what you would have shown had the Court presented that issue to the jury or considered that issue for apportionment.

MR. HELFAND: Thank you, Your Honor. I understand your ruling.

THE COURT: Anything else?

MS. HORN: Nothing from the plaintiff.

MR. HELFAND: Not at this time, Judge. Thank you.

I would put on the record, I would reply to what counsel submitted at 1:15 – 12:15 a.m. this morning, but it seems as though it's not necessary at this time in light of the Court's ruling.

* * *

[201] The whole idea is where did they go from home.

If Mr. Hammond went from the scene of the murder to the Winfrey home, that explains the question that keeps being asked, that I don't think belongs in this case, but now is, who is the fourth person.

THE COURT: Well, the proper question is who is the first person with respect to – with respect to Sergeant Johnson – Sergeant Johnson said he doesn't know.

He doesn't know anything about what this witness is about to testify to.

Respectfully, I'm not letting you get into it.

I mean, this case – I've said it several times, but I'll be clear on it. It's about the three categories of information that the Fifth Circuit has said was either knowing, recklessly or intentionally omitted from the affidavit.

The information respectfully that you're trying to get into, this witness has no knowledge of whatsoever.

MR. HELFAND: I'm not disagreeing, Your Honor. But the problem is that my job is to provide the jury with enough information to address the things – not just those things, but the other things Ms. Wang has chosen to raise.

THE COURT: She has raised it. And the problem is defendant – Sergeant Johnson doesn't know.

I mean, I wrote this down. The testimony was he doesn't know anything – other than there was a suspected fourth

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[232] CERTIFICATE

I hereby certify that pursuant to Title 28, Section 753 United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings in the above matter.

Certified on October 12, 2020.

/s/ Nichole Forrest
Nichole Forrest, RDR, CRR, CRC

APPENDIX V

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HONORABLE GEORGE C. HANKS, JR.,
JUDGE PRESIDING

RICHARD WINFREY, JR., and MEGAN WINFREY,

Plaintiffs,

vs.

SAN JACINTO COUNTY, et al.,

Defendants.

No. 4:10 cv 01896

JURY TRIAL – DAY 5

OFFICIAL REPORTER'S
TRANSCRIPT OF PROCEEDINGS

Houston, Texas

February 7, 2020

APPEARANCES:

For the Plaintiffs:	Gayle Horn, Esq. Elizabeth Wang, Esq.
For the Defendants:	William Helfand, Esq. Norman Giles, Esq.
Reported by:	Nichole Forrest, RDR, CRR, CRC Official Court Reporter

United States District Court
Southern District of Texas
nichole_forrest@txs.uscourts.gov

Proceedings recorded by mechanical stenography. Transcript produced by Reporter on computer.

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[70] THE COURT: Well, let me hear the explanation because what this witness believed or didn't believe about the investigation is irrelevant unless he communicated that to Mr. Johnson. So unless you're going to say that he communicated his reasonable beliefs because – well, unless this witness says that information was communicated to Mr. Johnson or Sergeant Johnson it's irrelevant.

MR. HELFAND: Do you want me to respond?

THE COURT: Yes.

MR. HELFAND: Is that the ruling?

THE COURT: Response.

MR. HELFAND: It's relevant for two reasons. One it goes to the issue of qualified immunity.

THE COURT: Qualified immunity is not an issue in the case.

MR. HELFAND: I wasn't aware the Court had already ruled on that.

THE COURT: Yes.

MR. HELFAND: Secondly, I will tie it back to the meeting of February 2.

THE COURT: Okay. Then we need to ask the witness did the witness communicate his beliefs about who committed the crime to Sergeant Johnson, yes or no, then I'll allow a follow-up question.

BY MR. HELFAND:

* * *

[82] MS. HORN: Plaintiff calls Ranger Huff, Your Honor.

(Off the record.)

THE COURT: Ladies and gentlemen, if I could ask you to give us just a five-minute break. And then we'll come back and continue until lunchtime.

(The jury exited the courtroom.)

THE COURT: Let the record reflect the jury is not present. We'll bring the Ranger back one more time so you can make a bill.

MR. HELFAND: The other thing I can put it on the record, if that's okay with counsel. I'll just put it on the record what I know he would testify to because it's truthful, which is that he was among a number of other people sued by the same plaintiffs in this case alleging that he played a role in their arrest without probable cause, incarceration and prosecution.

MS. HORN: And just one quick clarification. He was sued as a defendant in Mr. Winfrey, Junior's

case. He was not sued as a defendant in Ms. Winfrey's case. Subject to that clarification.

MR. HELFAND: That's correct. So we don't need to call him back on the stand because if he answered those questions I think we can agree that that was the case in Mr. Winfrey, Junior's case.

MS. HORN: That's correct, Your Honor.

[83] THE COURT: Okay.

THE COURT REPORTER: Your Honor, this is the bill with regard to Ranger Duff?

THE COURT: Yes.

MR. HELFAND: I'm sorry, you were in the middle of some scheduling discussions.

THE COURT: No. No. Let's get the Ranger back. Make sure that it's Ranger Huff this time; right?

MS. HORN: Yes.

THE COURT: I just wanted to make sure that you were not expecting to go and if you were that you were prepared.

MR. HELFAND: Okay.

THE COURT: But it sounds like you're probably not going to be able to start your case today.

MR. HELFAND: No. In fact, I'll have a Rule 50 motion. I want to pick up on something Your Honor said.

THE COURT: Qualified immunity. Here is my ruling. I've been working on the jury charge.

Reading the Fifth Circuit's opinion and looking at the questions that are being – that are asked regarding reckless knowing and intentional, if the jury finds reckless, knowing and intentional conduct, there is no qualified immunity. That is – that – the issue of qualified immunity is subsumed in the question regarding reckless, knowing and intentional conduct.

[84] So I understand that you're going to ask for the qualified immunity question. Based on what I've heard so far – unless the testimony changes, based on what I've heard so far, the only question that goes as to reckless, knowing and intentional conduct and that encompasses the qualified immunity issue.

MR. HELFAND: Okay. I'm not going to argue it unless the Court wants to –

THE COURT: No. No. At the charge conference I'll entertain argument on that issue. And if there is any case law, I would like to look at it. But this is based on what you all provided to me so far and the case law you've cited to me so far.

MR. HELFAND: Here is my concern. I'm happy to do it at the charge conference but then it's too late to get in evidence that's necessary for the jury's consideration.

The only thing I would say, and, again, I'm not quarreling with the Court, and if that's your ruling so be it. But the very merger that Your Honor is talking

about has been rejected by the Supreme Court and the Fifth Circuit. The resolution of the constitutional question is not the same as the resolution of the question of qualified immunity.

THE COURT: Give me that case law. I want to take a look at it.

MR. HELFAND: Sure. No question about it.

MR. GILES: I think we filed it. That was in *Saucier* [85] *versus Katz*.

THE COURT: That the fact issue that resolved in the constitutional question, the way it's going to be asked. That is, if I ask the question on the constitutional question granulating each – okay.

So the Fifth Circuit, this is what I've been working on – the Fifth Circuit says there is three categories of things that should have been in the warrants. And if they weren't, there's no probable cause.

If I take those three things and then the inconsistencies, granulate each one of them, that is, the jury finds reckless, knowing and intentional on each individual fact or the omission that you all allege, then why wouldn't – why can't once you get those fact-findings the Court rule as a matter of law one way or the other on qualified immunity?

MR. HELFAND: Because, to follow your hypothetical, let's say the jury says he was reckless, they're not going to choose between intentional and reckless.

But even intentional could be the subject of qualified immunity. Let's say the jury says he's reckless, which is not intentional, he didn't do the things that a reasonable officer would have done to the point of recklessness, however that's described.

If the law was not clearly established – by the way, qualified immunity is the Plaintiff's burden to disprove. We [86] know that.

So the Plaintiff must prove that the law was – that under the clearly established law, which the Court would tell the jury no reasonable officer could have believed that the inclusion of that information or the exclusion of the omitted information was permissible under whatever the Court tells the jury the clear established law was.

Now, the clearly established law has to be stated at a granular level so the jury understands what the question is before them. Not police officers cannot submit false information in a probable cause affidavit. It has to be at a granular level.

And here is the thing: It's particularly important as it relates to the omissions, because I know the Court has cited a case for the proposition that the law was clearly established that omissions were unconstitutional at the time that this warrant application was submitted.

However, when one looks at that case and at the case it actually cites, that holding is not actually the

holding of the case that the Fifth Circuit cited in support of that statement, nor is it a holding in that case.

And, of course, there is a whole line of cases Your Honor is familiar with I'm sure that talk about when is the law clearly established.

And it is not when one panel of the Fifth Circuit has [87] enunciated a position. In fact, I think it was *Mullinex versus Luna*, I may be wrong about that, Mr. Giles can tell us, where the Supreme Court actually rejected the Fifth Circuit's proposition that the law is clearly established simply because the Fifth Circuit says so.

So, again, I believe, and I say this with the utmost respect, it would be error not to ask the jury questions on probable cause. I think in fact – I'm sorry, on qualified immunity. I think, in fact, the opinions of the Fifth Circuit in this case imply that on remand at trial qualified immunity will be an issue if they don't so expressly state.

But my concern right now is if Your Honor has already decided you're not going to submit it, well, you've already – again, I'm not – I'm just observing – Your Honor has excluded evidence saying qualified from a witness because qualified immunity Your Honor has said is not an issue.

THE COURT: Well, there were two bases. I included them on both bases; qualified immunity and relevancy.

MR. HELFAND: I understand. But if it's relevant to qualified immunity, respectfully it's relevant.

But be that as it may –

THE COURT: The question was whether or not this witness thought there was probable cause. Also, was this witness – well, the testimony that you were trying to get from the witness was that the witness believed that there was [88] probable cause. It's irrelevant as to what the witness believed probable cause was.

The only thing that was relevant is even under your qualified immunity analysis is what Sergeant Johnson thought was probable cause.

MR. HELFAND: I respectfully disagree. But I understand the Court's ruling.

THE COURT: So – I understand the argument. If there is case law that – in addition to what's already been cited because I've been reading this stuff the last couple days, that says that I should in addition to granulating – assuming I'll granulate the omissions and alleged factual misrepresentations.

If I granulate that and the jury comes back with factual findings on that, is it possible under Fifth Circuit case law for the Court then to rule on the qualified immunity issue? Or is it Mr. Helfand's right that the Court also has to submit the question of whether or not it was clearly established law at the time.

I thought based on the reading that there is clearly established law. The only thing that qualified immunity – the only thing that needs to be decided with respect to qualified immunity is the facts regarding the Defendant in this case state of mind.

MR. HELFAND: Let me be clear on one thing. I didn't say it. I know Your Honor may have misheard me. I didn't say [89] the Court would ask the jury whether the law was clearly established. The Court would ask the jury whether under clearly established law as defined by the Court no reasonable officer could have believed that what Officer Johnson did was permissible under that clearly established law.

And let me just answer the question before opposing counsel does. The Fifth Circuit has made it clear repeatedly that when the issue of qualified immunity is not resolved pretrial as a matter of law it is a fact question for the jury.

THE COURT: And that's the question. To me reading the Fifth Circuit's opinion, the Fifth Circuit decided that if it was recklessly, knowingly and intentionally done, as a matter of law if the jury finds those facts, as a matter of law qualified immunity doesn't apply.

MR. HELFAND: I don't see how the Fifth Circuit would do that on a summary judgment where they have denied qualified immunity as a matter of law. All they're saying is that they can't find it as a matter of law. It would be inconsistent for the Fifth Circuit to say when we deny qualified immunity as a

matter of law it becomes a fact question for the jury. But then this panel to have said we deny qualified immunity, it can't be granted as a matter of law, and we're saying it can't be granted as a matter of fact. But, again, if that's the Court's interpretation, I respect it. But I would respectfully submit that that's error.

[90] THE COURT: Let me hear your argument and I'll take another look at the issue.

MS. WANG: Judge, you are correct. The Fifth Circuit, they strenuously argued in both appeals, I mean, all three appeals that we've had in the Fifth Circuit so far the issue of qualified immunity.

And on appeal they argued that it was not clearly established.

And the Fifth Circuit has already decided that as a matter of law. So only question – that is why they remand for the limited question to the jury, which is whether or not omission and false statements were reckless, knowing and intentional. That's a fact issue.

And that coincides with the first prong of qualified immunity, which is simply whether or not there was a constitutional violation. The question of whether or not the law was clearly established was resolved as a matter of law. And when Mr. Helfand talks about what a reasonable officer would have done, that's the clearly established law question. That is the question. And the Fifth Circuit has already resolved that.

So we submitted it in our briefs, and I'm happy to provide more, you know, briefing if Your Honor requests. But I think the Fifth Circuit has decided this.

And so the fact question is as you've described already. [91] And the jury just does not get to answer the question what a reasonable officer would have done under clearly established law. Because that is what the clearly established law question is, which the Court has already resolved.

THE COURT: I'll let you guys argue –

MR. HELFAND: Can I make one point?

THE COURT: Sure.

MR. HELFAND: There are two pieces to qualified immunity. Unfortunately, Ms. Wang is doing the same thing the Supreme Court has criticized, which is they cannot be conflated. The clearly established law is for the Court to decide.

To the extent that Your Honor believes that the Fifth Circuit has already said as Ms. Wang said what the clearly established law is, then the Court would feel itself bound by the Fifth Circuit's interpretation of the law and one could not quarrel with that.

I don't believe the Fifth Circuit's explanation of what clearly established law comports with what the Supreme Court has said is necessary for the law to be clearly established. But that is unquestionably a question of law for Your Honor to decide.

However, where Ms. Wang goes wrong is when she says the jury can't decide what a reasonable officer would do. That is the other prong of qualified immunity. It's not the same as a constitutional violation. In fact, it couldn't be the same as a [92] constitutional violation because if the question was did the officer violate the constitution under clearly established law, if the answer were yes then there would be no need for qualified immunity.

Qualified immunity exists for the officer who did violate the constitution. But where the Plaintiff cannot prove that no reasonable officer could have believed it was appropriate to do what the officer did under the clearly established law.

THE COURT: But if the jury finds he acted recklessly, knowingly and intentionally, doesn't that answer that question?

MR. HELFAND: No, Your Honor, it does not. Because again, if he acted – first of all, acting intentionally simply means he had the intent to –

THE COURT: Violate the law.

MR. HELFAND: – no. The question is whether or not he had the intent to violate the law. The question is whether he had the intent to put the information that is in there or leave the information that is out. That is intent to put what is in there – whatever is in there. It's not – there is no question where jury will be asked did he intend to violation the constitution. But –

THE COURT: Recklessly, knowingly, intentionally. So the issue of intentionally is just whether or not he intend to sign –

[93] MR. HELFAND: No. Put that information in the affidavit and leave out other information.

It goes to the question of whether it was a mistake or whether he intended for that information and that information alone to be in there.

THE COURT: Okay.

MR. HELFAND: We would never ask the jury, did he intend to violate the constitution. We won't ask the jury did he intend to violate the clearly established law.

THE COURT: I'm – I'm going to bring the jury in. We'll talk about it further. We'll have a full charge conference on this issue.

MR. HELFAND: My concern is not the charge at this moment. It's that I'm going to ask Huff questions about what a reasonable officer would have understood in 2006 about an affidavit like this. And if the Court is going to say there is no qualified immunity then I understand –

THE COURT: You can make a bill. That way if I'm wrong it's on the record.

MR. HELFAND: Sure. Okay. Again, I want to do whatever – I'll move in whatever direction the

Court's rulings send me. But I do want to be clear that I think that would be error.

THE COURT: Okay.

MR. HELFAND: I need to make a bill with Duff.

[94] THE COURT: Give me five minutes. I need to make arrangements for lunch for my staff and I'll be right back.

(Court in recess.)

THE COURT: You can bring him in and make a bill.

MR. HELFAND: He has a commitment. I'm just going to let him go and I'll do it through Huff.

THE COURT: That's okay.

MR. HELFAND: Judge, did you want those cites?

THE COURT: Yes, I do want to take look at that because this is something I've been working on all week. If I'm wrong, I want to know now before I finish the jury charge.

MS. HORN: We'll try to get those to you as well.

MR. HELFAND: I do actually think, Your Honor, that it's in the Winfrey two opinion. Specifically I think this is Winfrey two. I think it's 901 F.3d 496.

This is a quote: There is an issue of material fact as to whether Officer Johnson violated Plaintiff's clearly established rights. And he's entitled to present his case to the factfinder. That is Johnson.

The Fifth Circuit – again, I think that is in the context of qualified immunity. The Fifth Circuit I think is telling this Court to submit the question of qualified immunity to the jury when he says Johnson has a right to present that case to the factfinder.

I should point out that, again, remember how this case went [95] through the Fifth Circuit. It was dismissed on a finding of no constitutional fault. It was appealed and the Fifth Circuit was – spoke to several issues.

But no one appealed the question of whether he was entitled to qualified immunity. Well, the Plaintiffs didn't. And since it's the Plaintiff's burden, they would have had to disprove immunity at the trial court.

And the Fifth Circuit did not hold that they disproved immunity at the trial court because they reversed the case on whether there was a constitutional violation.

THE COURT: I guess, if they hadn't met their burden of qualified immunity, why would we be – we wouldn't be here.

MR. HELFAND: Because the trial judge didn't take up the question of qualified immunity, if I recall correctly. He resolved the case on –

THE COURT: I thought he said that he did.

MS. WANG: He did. That's what they argued. That was their entire summary judgment the first time, the second time. We wouldn't be here –

THE COURT: If the issue of qualified immunity would be decided we wouldn't be here.

MR. HELFAND: I beg your pardon. I got it wrong. Judge Hughes found that a reasonable officer could have believed it was appropriate to submit this affidavit. The Fifth Circuit – that's what I was trying to say – the Fifth [96] Circuit said they don't agree with that finding as a matter of law. So that's why they remanded the case to say that Johnson is entitled to submit – present his case to the factfinder of whether he violated clearly established law.

THE COURT: The law is clearly established. I know you disagree, but the law is clearly established.

So whether or not he violated or not, the only fact issue is whether he knowingly, recklessly, intentionally did what the Fifth Circuit said that he did.

MR. HELFAND: No, Judge. The qualified immunity question is whether no – Plaintiff could prove no reasonable officer could have believed it was appropriate even if it was unconstitutional.

THE COURT: Right. That is the – that's the question that is being answered. But the only issue for the jury on that would be whether – the law is clearly

established, the Fifth Circuit has already said that. What you just stated is the law of qualified immunity.

But what is the fact that has to be decided to determine that law?

MR. HELFAND: Whether no reasonable police officer could have believed it was appropriate to submit that affidavit. That's different than what whether affidavit is fatally defective.

THE COURT: Right. But if the jury comes back and [97] finds that he recklessly, knowingly, or intentionally made false statements in an affidavit, how can that – how can qualified immunity apply?

MR. HELFAND: Because there are two different considerations. Let me give you an example.

I don't know the cite, Judge. But there was a case in the Fifth Circuit not long ago, I'll find it, I think was federal agent grabbed somebody by the testicles as a maneuver to supposedly maintain them. Kind of a hold maneuver. The individual sued claiming excessive force. The Fifth Circuit says it is excessive force.

However, we have to decide whether all reasonable officers would have known at the time of that incident that grabbing somebody by the testicles was excessive force as opposed to a restraint maneuver.

The Fifth Circuit said because not all reasonable officers would have known that at the time he's immune, even though he committed an act of excessive force. When we conflate these two things, we lose

immunity. The only officer who needs immunity is the one who actually did violate the constitution. So the answer to whether he violated the constitution being the answer to the question of immunity can't logically be the case.

THE COURT: But we're not answering the question of violation of the constitution. I'm asking him very narrow, specific fact issues that he Fifth Circuit has asked me to have [98] answered. Once I have that, why can't I make the decision as a matter of law? Because the only dispute is the question you just asked.

The only fact issue in that question is whether he knowingly, recklessly, intentionally made a false statement in the affidavit.

Once you decide that and the jury says yes, then – here is my question: The jury says yes to that question, how do you still have qualified immunity?

MR. HELFAND: Sure. Let's say Ranger Huff says – let's say Sheriff Rogers says back in 2006 I had no reason to believe that I had to put information about an informant in to undermine his credibility.

Now, the plaintiffs have failed to prove that no reasonable – that no reasonable officer could have believed that those omissions were permissible under the clearly established law at the time.

THE COURT: Now, let me flip that. Assuming the jury finds there is no – that the information was provided – the Fifth Circuit has already said that the affidavit is false. So that is a given.

The Fifth Circuit says – and then you ask the jury the question whether the officer recklessly, knowingly, intentionally placed false information in an affidavit, and they answer yes.

[99] Once they answer yes, how do you still have qualified immunity? Walk me through that.

If they answer that fact issue yes, that means that – walk me through the analysis of how you still get qualified immunity under that answer.

MR. HELFAND: As to the insertion in the affidavit, which is just the dog scent trail, I don't think you do, because – I don't think there will be any evidence that no reasonable officer could have believed that you can't intentionally, knowingly or recklessly put false information into an affidavit. I don't think any officer would testify to that. I think Johnson has testified that he knows that you wouldn't put false information in.

I'm focused on the other side of the coin, Judge, which is the omissions.

THE COURT: But if I granulate it all, once I've granulated it, then if – you know, if I granulate those – the fact issues that the Fifth Circuit has said for me to rule on, can't I then after granulation make the call on qualified immunity?

MR. HELFAND: No. Here is why, Judge. Again, I'm focused on the omissions. Let's leave co-missions, as Ms. Horn correctly said aside, the co-mission is a false statement.

Now, was that statement made recklessly, knowingly or intentionally to deceive or it was made by mistake? The jury [100] has to decide that fact question. Total agree.

Let's say the jury – Your Honor will instruct the jury however that things that should have been in the affidavit were not included.

Let's say the jury believes that whether it's intentional, reckless or knowing, Deputy Johnson did not put those in.

So the jury says, you should have put in the information that undermined Mr. Campbell's credibility that the Fifth Circuit found. And they've told us what those things are.

The jury says, you should have put those in. His defense of qualified immunity is, I didn't know at the time that the law required me to put information in the affidavit that would have demonstrated some lack of credibility of my informant.

THE COURT: I get that. But the Fifth Circuit has said that it does.

MR. HELFAND: No. I didn't know. The Fifth Circuit hasn't said he knows. The Fifth Circuit has said if he did it that way, he violated the constitution.

The Fifth Circuit can't say that Deputy Johnson did or didn't know whether he was required to do that. They can only say if he didn't do it, because it was intentional, reckless or knowing, then he violated the

constitution. His defense of immunity is no longer I didn't do it.

In fact, he's not defending the case as to omissions that I did put those things in there. Of course that would be absurd. [101] He has a defense, which is I left those things out because it was a mistake. Okay. The jury can decide that question.

But if the jury says no, you left those things out intentionally, he has qualified immunity if he can say and the Plaintiff's cannot disprove, police officers in my jurisdiction or my area of authority did not know back in 2006 that they were required to put information that undermined the credibility of their informant in an arrest warrant affidavit. That's the qualified immunity question. It's a completely different question.

THE COURT: I have trouble believing that that can possibly be true. But, with all due respect, I'll let you argue. We've got to take break now. Because it's noon.

MS. WANG: I want to respond to what Mr. Helfand has said. The qualified immunity question about what a reasonable officer would or would not have done is an objective one.

So it is irrelevant whether Lenard Johnson gets up there and testifies that I did not know that a reasonable person would have done whatever.

THE COURT: That's true.

MS. WANG: So the Fifth Circuit as to the omissions, the Fifth Circuit has already decided as a matter of law that these are material omissions. They are material omissions that would have meant that the affidavit does not have probable cause. Then the only question is the intent level.

[102] And so the fact issue is if – the point is this: A reasonable officer would not have intentionally, recklessly or knowingly put the false statement about Pikett or the omissions about Campbell into the affidavit.

So the fact – and that is a question of law the Fifth Circuit has decided.

So for the jury, the only question is the level of intent. And if the jury makes those findings, then he does not get qualified immunity. That is the only reason we're here for trial because they have raised the qualified immunity question. They have argued this already three times in the Fifth Circuit. And they have lost every time.

MR. HELFAND: No –

MS. WANG: And so we can't go back there. There is not a fact there. The Fifth Circuit has defined the fact issue for this Court to present to the jury.

THE COURT: Okay.

MR. HELFAND: No officer would use excessive force intentionally. But officers who are found to use excessive force have qualified immunity all the

time. Because the question is not whether they can use excessive force, it's what they specifically did would an officer have known they couldn't do that.

THE COURT: I agree with both of you. The question is did the Fifth Circuit answer that question for me. And I [103] thought that it did.

MS. WANG: The Fifth Circuit has answered that question.

THE COURT: So I want to read the opinion again. It is 12 noon. I'm going to tell the jury or ask the jury if we can be back at 1:15 and then we'll get going.

MR. HELFAND: What I will say I think the Fifth Circuit did tell you that at Page 496 of the Winfrey opinion where it says Officer Johnson is entitled to present that to the jury.

THE COURT: Which is to me – well – let me look at the opinion again.

MR. HELFAND: Mr. Giles wanted me to point out all this briefed in document 206 in record and 203-7. And also, I think Mr. Giles wants me to point out the *Mendenhall versus Riser* cited at 213 F.3d 226. It's also referenced in document 206.

But I have the opinion itself here. It talks about the difference between actual probable cause and arguable probable cause.

THE COURT: I want to get the cases and take a look at them. Do you know the cases that he's referring to there in document 206?

MS. WANG: If it's in document 206, their trial brief, we responded to in our memo already. And the case that he [104] cites is not prudent to the issue.

THE COURT: I'll take a look at it again. You guys have definitely provided me with interesting things to think about.

(Court in recess.)

* * *

[223] THE COURT: Let the record reflect the jury is not present. Witness and all counsel are present. And, Mr. Helfand, you can make your bill at this time.

(The following proceedings held outside the presence of the jury.)

MAJOR GROVE HUFF

BILL OF EXCEPTIONS

BY MR. HELFAND:

Q. In your interview with Ms. Winfrey did she talk about controlling other people?

A. Yes.

Q. And can you explain to the Court what generally was the conversation about that?

A. How she said she always had control over the men in her life.

Q. How old was Christopher Hammond at the time of – of these interviews?

A. I believe he was 24.

Q. And Ms. Winfrey was 16?

A. Correct.

Q. Did Winfrey talk about controlling Mr. Murray?

A. I don't specifically remember that.

Q. Did Mr. Winfrey talk about controlling Mr. Hammond?

A. Yes.

Q. Did she say she did or she didn't control Mr. Hammond?

[224] A. She said she had changed him from what he was to a Christian boy or something along those lines.

Q. Other things I wanted to ask you about now that the Court – now that we're outside the presence of the jury in light of the Court's rulings, your training, I take it, is TCOLE approved training. Is that correct?

A. Yes.

Q. You do TCOLE approved continuing education as well?

A. Yes.

Q. Thinking back to 2006, had you ever been trained that you needed to include in an arrest warrant affidavit information that suggested the lack of reliability of an informant upon whose information you were relying to seek an arrest warrant?

A. I don't know such requirement.

Q. And did you ever make a practice of doing that back in 2006 to put in the things that the witness – that the informant provided that was not reliable?

A. It would be on a case-by-case basis if I thought it was needed to be in there, it would be in there, if I didn't or if the attorney didn't believe it needed to anybody there it wouldn't.

Q. And that's what I'm getting at. Was that at the discretion of the writer or were you under some obligation to include it that you were aware of?

A. I don't believe there is any obligation to do that.

[225] MR. HELFAND: That's my bill. In light of that, I'd ask that the Court allow me to ask those questions in front of the jury.

THE COURT: Respectfully, I'm declining the request.

MR. HELFAND: Thank you, Judge. Appreciate the opportunity.

THE COURT: Not a problem. Can this witness be excused?

MS. HORN: Yes, Your Honor.

THE COURT: Thank you, Major. Really appreciate it, sir.

THE WITNESS: Am I excused?

THE COURT: You're excused. You're done.

Okay. Susan, if you let the jury know that we're recessing for day. And then we'll be back at 9:00.

Is there anything else we need to take care of?

MS. HORN: Not from Plaintiff.

MR. HELFAND: No for Defendant.

THE COURT: I'm still looking at cases, but I'm – respectfully, I don't think I've changed my mind. I want to take a look at some more, the most recent cases you gave me. At this point, what I believe is that if there are factual issues that need to be decided, we need to submit those facts to the jury.

Based on what I'm aware of, the only factual issues that [226] are going to the jury are the factual issues indicated by the Fifth Circuit.

What I'm planning to do at this point, it's a work in progress, is that I've granulated the omissions and alleged – the alleged omissions and factual inaccuracies in the affidavit, so the jury gets to decide each one, and then the Court makes the call on the law based on those facts. I think that is in my opinion what the Fifth Circuit has asked us to do.

MR. HELFAND: If I may. You're not obligated to tell me, is it your present position that you read the Fifth Circuit opinion to say qualified immunity is already decided against my client? Or that the Court will take the jury's answers to questions and decide qualified immunity yourself as a matter of law?

THE COURT: I'm not quite sure on that issue right now. Based on the Fifth Circuit's opinion, the Fifth Circuit appears to have said we've ruled on qualified immunity. It was an issue to be decided in pretrial in this case. There is no factual issues to be decided. Here is the only factual issues.

I think that that is correct because I respectfully believe that once you answer the questions that the Fifth Circuit has posed that are factual issues, the qualified immunity issues either exist or doesn't exist. If the jury answers the questions that the Fifth Circuit has indicated are in dispute [227] between the parties, I think that resolves the issue of qualified immunity.

MR. HELFAND: The important thing for me, Your Honor, will decide between those two at some point. But for now, the Court is excluding any evidence that might go to the question of qualified immunity.

THE COURT: Yes. But the question of qualified immunity, however, if they are facts that need to be resolved that are necessary to resolve the issue of qualified immunity, we will talk about those facts.

But so far, I'm not aware of them. I mean, the testimony, like, for example, this witness was trying to get

out before the jury, which I did not allow, which is the ultimate issue of whether or not it was reasonable for someone to do or not do what the Fifth Circuit says was unlawful.

MR. HELFAND: I understand.

THE COURT: I understand the parties' position. But the Fifth Circuit has already ruled that the affidavits contain either false statements or false submissions and that those submissions were material and that had those omissions been submitted in the affidavit there would be no probable cause.

MR. HELFAND: I'm not going to argue any further, unless the Court wants me to.

THE COURT: And I appreciate the argument. And I appreciate the case law that the parties have submitted.

[228] However, I'm pretty confident based on reading this opinion a number of times, that that's the only issue before the Fifth Circuit.

Now, I'll look at the cases that you cited to see if there's anything that's persuasive that would change my mind. But at this point in time I've not seen it.

MR. HELFAND: That's all we could ask. Thank you very much for doing that.

MS. WANG: I'll only add, I'm pretty certain, I don't know off the top of my head the date of the *Wesby* case, I'm pretty sure it was decided after the Fifth Circuit – at least after the most recent Fifth

Circuit opinion in this case from my memory. That's what I thought.

MR. HELFAND: The issue, to be clear, in *Wesby* is the Supreme Court explains what is and has been the law of the qualified immunity.

It didn't change the law of qualified immunity. So it has no bearing when it was decided.

In fact, what the Supreme Court said was the DC Circuit, I think before even this case was decided by the Fifth Circuit, did exactly what we're warning this Court about on the issue of qualified immunity.

That is why I gave you *Wesby*. The time that it was decided is not meaningful because it didn't change the law. It made clear that has been the law for a very long time.

[229] MS. WANG: What I'm pretty certain was, I don't have the opinion in front of me, the *Wesby* opinion, but I'm pretty certain they cited that defense to the Fifth Circuit in discussing this very issue. And they have lost.

And so the Fifth Circuit applies Supreme Court law consistently and that is what the Fifth Circuit has said and that is law of the case.

THE COURT: You're free to argue what the case is. I've got them. I'll read them. I'll make the call on what the cases say or don't say and decide what issues need to be submitted to the jury.

MR. HELFAND: I won't belabor it.

THE COURT: All of you have been very respectful and very professional in making your arguments.

Please continue to do that. I appreciate it. They're very thoughtful arguments. And the Court will consider them in due course.

MR. HELFAND: Thank you.

(Court in recess.)

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[230] CERTIFICATE

I hereby certify that pursuant to Title 28, Section 753 United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings in the above matter.

Certified on November 8, 2020.

/s/ Nichole Forrest
Nichole Forrest, RDR, CRR, CRC

APPENDIX W

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., ET AL	§	**4:10-CV-01896**
V.	§	**10:37 A.M. TO 4:24 P.M.**
SAN JACINTO COUNTY, ET AL	§	**FEBRUARY 18, 2020**

JURY QUESTIONS and VERDICT
BEFORE THE HONORABLE
GEORGE C. HANKS, JR.
AND A JURY
DAY 10

APPEARANCES:

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FOUR THE DEFENDANTS, SAN JACINTO COUNTY, FORMER SAN JACINTO COUNTY SHERIFF LACY ROGERS, FORMER SAN JACINTO COUNTY SHERIFF'S DEPARTMENT DEPUTY LENARD JOHNSON:
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ALSO IN ATTENDANCE:
Ms. Megan Winfrey
Mr. Richard Winfrey
Mr. Lenard Johnson

Court Reporter:
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Proceedings recorded by mechanical stenography. Transcript produced by computer-assisted transcription.

[2] **PROCEEDINGS**

THE COURT: Okay. Good morning everyone. We are back on the record. This morning we have four jury notes. Not one but four. And I'll read all those out to you and give you my – the answers that I'm proposing.

Jury Note Number 5 is, "May we access any public records (in the law library) on police training?"

And the answer to that one is, obviously, no. I'm going to respond, "No. You are only to consider the evidence admitted during the trial."

Any discussion about that one or –

MS. WANG: No objection, Your Honor.

MR. GILES: No objection, Your Honor.

THE COURT: – any objection from either side?

MR. GILES: No objection, Your Honor.

MS. WANG: No objection.

THE COURT: Okay.

The – oh, I'm sorry. I took them out of order. That was Jury Note Number 5. We actually – let me start with Jury Note Number 3.

So Jury Note Number 3 is, "What is the legal definition of 'reckless'?"

And my proposed answer is, "You are only to consider the definition of 'reckless' contained in the charge on Page 4."

[3] Any objections from either side?

MS. WANG: No, Your Honor.

MR. GILES: No objection, Your Honor.

THE COURT: And then Jury Note Number 4 is, "What is the Webster definition of 'reckless'?"

And I plan on giving the same instruction. "You are only to consider the definition of 'reckless' contained in the charge on Page 4."

Any objections from either side?

MS. WANG: No, Your Honor.

MR. GILES: No, Your Honor.

THE COURT: Okay. And Jury Note Number 6 – and you'll probably want to take a look at this one because it's – you need to read it to see if it means – what it means to each of you. But it says, "Does the jury charge for omission only address omitted info?"

Counsel, if you could take a look at this.

From reading this, Counsel, I think they are confused about whether or not they are to consider any omissions or misstatements that are not contained within the jury charge.

And my proposed answer is, "The jury charge addresses one alleged material misstatement and three alleged material omissions."

And I will entertain your thoughts and objections.

[4] MR. GILES: I'm sorry, Your Honor. Could you please repeat it.

THE COURT: Sure. "The jury charge addresses one alleged material misstatement and three alleged material omissions."

And could I see the – thank you.

MS. WANG: Your Honor, could you read again what your proposal is?

THE COURT: "The jury charge addresses one alleged material misstatement and three alleged material omissions."

MS. WANG: Okay.

THE COURT: Okay. And objections?

MS. WANG: So as far as the Court's proposed response, we think that they are not – if Your Honor is going to give that interpretation from –

(Jury room door opened and closed.)

MS. WANG: So my first comment is that the question is ambiguous, but if Your Honor were to give this response, a response along these lines, it should not include the words "alleged" because the instructions do state on Page 4 that the material misstatements of fact and omitted material information are, as follows, and they are to accept those as the material misstatements and misstatement of fact and omitted material information. I [5] mean –

THE COURT: That's true. You are right. You are right.

And response.

MR. GILES: Certainly, with that change, then I certainly would object. But I will apologize to the Court but my brain is a little slow and the question "Does the jury charge for omission only address omitted information?" is something I really don't claim to grasp. So I'm wondering if I might have just a few moments to think about what the appropriate response would be to that kind of question because it's so ambiguous.

THE COURT: Sure. I mean, I – when I first read it, it didn't jump out at me. Now that I'm reading

it again, it seems like they are asking, to me, whether or not does it – does the charge address anything other than the omitted information, and that's not true. It doesn't. It addresses one material misstatement and three alleged omissions.

Anything else – to say anything else seems to me to either confuse the jury and you stray into telling them something that they are not supposed to consider.

MR. GILES: Well, from – at this point, though, I can say if the information that they are proposing -the plaintiffs are proposing is already contained within [6] the charge, I believe it's inappropriate for the Court to comment and draw attention to that information in the charge for the reasons I submitted yesterday in my filing. So they have already been instructed as to that issue, if that's the answer that they want to give to that. So I would say that would be unnecessary.

As to what other thing that might potentially be necessary, I'd just ask for a few more minutes to think about that.

THE COURT: Sure. Not a problem. I'll be right back. Counsel, please remain seated.

MR. GILES: May I step out for one moment?

THE COURT: Sure. Sure.

(Recess from 10:47 a.m. to 10:50 a.m.)

THE COURT: Okay. Mr. Giles, your objections.

MR. GILES: Yes. The Court's interpretation and comment may be accurate, but I don't – I don't claim to know what the interpretation of the comment is, and I believe that the appropriate response is to just direct the jury back to the jury instructions. I would object to anything other than that.

THE COURT: Respectfully, the objection is overruled. I'm going to give the instruction that, "The jury charge addresses one material misstatement and three material omissions."

[7] MS. WANG: And just for the record, Judge, after looking at it further we –

THE COURT: Do you have an objection? State it.

MS. WANG: We also think that it would be - because of the ambiguity of the question it would be appropriate for the Court to simply refer the jury back to – you could refer them back specifically to Pages 3 and 4, which is the elements charge. That's our – that's our position.

THE COURT: Okay. So do you want me to instead of giving – so you don't want me to give the instruction. You just want me to refer them back to the instructions given in the charge, which is basically what you want as well?

MR. GILES: Yes, Your Honor.

MS. WANG: I think so, Your Honor.

THE COURT: Okay. Then that way there is no point on appeal if you all agree.

MR. GILES: As I understand it, you are not going to refer them to any particular instruction in the charge. You are going to refer them only to the instructions in the charge, Your Honor.

THE COURT: Okay.

MS. WANG: Well, our position is that you should at least refer them to – I mean, it's not that lengthy of [8] a charge. You should at least refer them to Pages 3 and 4, which is the elements charge.

MR. GILES: Well, Your Honor, I believe they should actually be reading the burden of proof portion of the charge. And so I would object to directing them to any particular portion of the charge.

THE COURT: Well, both of your objections, respectfully, are overruled. I'm going to say, "The jury charge addresses one material misstatement and three material omissions." But your objections are noted for the record.

MS. WANG: Thank you.

MR. GILES: Thank you, Your Honor.

THE COURT: I'll be right back.

(Recess from 10:53 a.m. to 10:54 a.m.)

THE COURT: Please be seated. Okay, everyone. I am giving this back to the lawyers at this time to review; and then, subject to your objections, I'm submitting those back to the jury.

MR. GILES: Your Honor, just very quickly. May I just make sure I've clarified on the record what my objections are?

THE COURT: Sure.

MR. GILES: I'm objecting for all the reasons that I wrote in my response yesterday, including that the

* * *

[23] Magistrate Judge Edison? I don't know if you have met him before. This is Judge Edison. He and I are paired together, along with Judge Brown in Galveston. He just wanted to come in and observe. And, hopefully, you'll get a chance. Certainly, Mr. Giles, I'm sure you have worked with Judge Edison before.

MR. GILES: Yes, Your Honor.

THE COURT: I wanted you to meet Judge Edison and him to get to know y'all. I'll be right back.

COURT SECURITY OFFICER: All rise.

(Proceedings concluded at 4:24 p.m.)

Date: October 2, 2020

COURT REPORTER'S CERTIFICATE

I, Laura Wells, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Laura Wells
Laura Wells, CRR, RDR

APPENDIX X

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER 1

QUESTION ONE/TWO – BULLET FOUR

WE NEED FURTHER CLARIFICATION OF THE USE OF THE WORDS "INSTEAD OF", IN LIEU OF, FOR EXAMPLE, "IN ADDITION TO".

2-13-2020 /s/ [Illegible]
Date Foreperson

****

Please refer to the instructions you have previously been given.

2/13/2020 /s/ George C. Hanks, Jr.
Date George C. Hanks, Jr.
United States District Judge

Jury notes should be used in numerical order.
Jury notes are a permanent part of the record.
Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER 2

JUDGE HANKS,
SORRY, WE NEED FURTHER CLARIFICATION OF QUESTION ONE/TWO, SUB-PART FOUR. IS THE CHARGE? A. OMITTING THE COUSIN AS A PARTICIPANT -OR- B. REPLACING MEGAN and RICHARD WITH THE COUSIN AS A PARTICIPANT.

2-13-2020 /s/ [Illegible]
Date No apologies needed. Foreperson

****

Please refer to the instructions and questions as written
Thank you so much for your service.

2-13-2020 /s/ George C. Hanks, Jr.
Date George C. Hanks, Jr.
United States District Judge

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Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER 3

WHAT IS THE LEGAL DEFINITION OF RECKLESS?

2-18-2020 /s/ [Illegible]
Date Foreperson

****

You are only to consider the definition of reckless contained in the charge on page 4.

2/18/2020 /s/ George C. Hanks, Jr.
Date George C. Hanks, Jr.
United States District Judge

Jury notes should be used in numerical order.
Jury notes are a permanent part of the record.
Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER 4

WHAT IS THE WEBSTER DEFINITION OF RECKLESS?

2-18-2020 /s/ [Illegible]
Date Foreperson

****

You are only to consider the definition of reckless contained in the charge on page 4.

2/18/2020 /s/ George C. Hanks, Jr.
Date George C. Hanks, Jr.
United States District Judge

Jury notes should be used in numerical order.
Jury notes are a permanent part of the record.
Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER 5

MAY WE ACCESS ANY PUBLIC RECORDS (IN THE LAW LIBRARY) ON POLICE TRAINING?

2-18-2020 /s/ [Illegible]
Date Foreperson

****

No. You are only to consider the evidence admitted during trial.

2/18/2020 /s/ George C. Hanks, Jr.
Date George C. Hanks, Jr.
United States District Judge

Jury notes should be used in numerical order.
Jury notes are a permanent part of the record.
Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER 6

DOES THE JURY CHARGE FOR OMISSION ONLY ADDRESS OMITTED INFO?

2-18-2020 /s/ [Illegible]
Date Foreperson

****

The jury charge addresses 1 material misstatement and 3 material omissions.

2/18/2020 /s/ George C. Hanks, Jr.
Date George C. Hanks, Jr.
United States District Judge

Jury notes should be used in numerical order.
Jury notes are a permanent part of the record.
Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER 7

DOES THE JURY NEED TO BE UNANIMOUS ON ALL ~~FOUR~~ EIGHT SUB-PARTS?

2-18-2020 /s/ [Illegible]
Date Foreperson

****

The jury's answer to each subpart must be unanimous.

2/18/2020 /s/ George C. Hanks, Jr.
Date George C. Hanks, Jr.
United States District Judge

Jury notes should be used in numerical order.
Jury notes are a permanent part of the record.
Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., Plaintiff, VS. SAN JACINTO COUNTY, *et al*, Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 4:10-CV-1896

JURY NOTE NUMBER ~~10~~ 8

THE JURY HAS REACHED A VERDICT.

2-18-2020 /s/ [Illegible]
Date Foreperson

****

Date George C. Hanks, Jr.
United States District Judge

Jury notes should be used in numerical order.
Jury notes are a permanent part of the record.
Jury notes should be retained and given to the Court
with the case at the conclusion of deliberations.

APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD WINFREY, JR., AND MEGAN WINFREY	§	CIVIL ACTION NOs. 10-1896 and 14-cv-448 (consolidated)
VS.	§	
LENARD JOHNSON	§	

CHARGE OF THE COURT

MEMBERS OF THE JURY:

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

You should consider all of the instructions about the law as a whole and regard each instruction in light of

the others, without isolating a particular statement or paragraph.

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence; they are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for the plaintiff or the defendant in arriving at your verdict. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

A. Evidence

The evidence you are to consider consists of the testimony of the witnesses, the documents and other exhibits admitted into evidence, and any fair inferences and

reasonable conclusions you can draw from the facts and circumstances that have been proven.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude another fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

When testimony or an exhibit is admitted for a limited purpose, you may consider that testimony or exhibit only for the specific limited purpose for which it was admitted.

B. Witnesses

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness's manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness

stand? You must give the testimony of each witness the credibility that you think it deserves.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.

In determining the weight to give to the testimony of a witness, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at the trial.

A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an innocent mistake. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely on it.

You are required to evaluate the testimony of each witness as you would the testimony of any other witness. No special weight may be given to his or her testimony because of his or her occupation or profession.

C. No Inference from Filing Suit

The fact that a person brought a lawsuit and is in court seeking damages creates no inference that the person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

D. Burden of Proof

Plaintiffs Richard Winfrey, Jr. and Megan Winfrey have the burden of proving their cases by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that one of the Plaintiffs has failed to prove any element of his or her claim by a preponderance of the evidence, then he or she may not recover on that claim.

E. Probable Cause/Fourth Amendment Claim

You are instructed that the affidavits for the arrest warrants signed by Defendant Lenard Johnson in this case contained a material misstatement of fact and omitted material information. A misstatement or omission of fact is material if, without the misstatement or the omission, the affidavit would have been insufficient to establish probable cause to arrest anyone.

The material misstatement of fact and omitted material information are as follows:

- Misstating that Keith Pikett's drop trail from Murray Burr's house to the Winfrey house used the scent of Richard Winfrey, Jr. when the drop trail actually used the scent of Christopher Hammond.
- Omitting David Campbell's statement that Burr was both stabbed and shot, although he was only stabbed.
- Omitting David Campbell's statement that Richard Winfrey, Sr., had cut off Burr's body part, which was contradicted by the physical evidence.
- Omitting that David Campbell identified a cousin as participating in the murder with Richard Winfrey, Sr., instead of Megan Winfrey and Richard Winfrey, Jr.

A corrected affidavit would have deleted the material misstatement and included the material omitted information. You are instructed that a reasonable magistrate judge would not have issued a warrant on the

basis of a corrected affidavit that deleted the material misstatement and included the material omitted information, because a corrected affidavit would not have established probable cause. Probable cause does not require proof beyond a reasonable doubt, but only a showing of a fair probability of criminal activity. It must be more than bare suspicion, but need not reach the 50% mark.

You are instructed that some of the facts omitted from the arrest-warrant affidavits were not material. That is, there are certain facts which, if included in the affidavit, would not have changed whether the affidavit established probable cause. Those facts are:

1. The absence of a match between Junior's and Megan's blood with evidence from the scene.
2. A single female hair found at the scene that was not Megan's.

Recklessness requires proof that the defendant in fact entertained serious doubts as to the truth of the statement.

QUESTION ONE

Did Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, make the following misstatements of fact or omit the following information in the arrest-warrant affidavit for Megan Winfrey's arrest?

- Misstating that Keith Pikett's drop trail from Murray Burr's house to the Winfrey house

used the scent of Richard Winfrey, Jr. when the drop trail actually used the scent of Christopher Hammond.

Answer "Yes" or "No": _____

- Omitting David Campbell's statement that Burr was both stabbed and shot, although he was only stabbed.

  Answer "Yes" or "No": _____

- Omitting David Campbell's statement that Richard Winfrey, Sr., had cut off Burr's body part, which was contradicted by the physical evidence.

  Answer "Yes" or "No": _____

- Omitting that David Campbell identified a cousin as participating in the murder with Richard Winfrey, Sr., instead of Megan Winfrey and Richard Winfrey, Jr.

  Answer "Yes" or "No": _____

Go on to Question Two.

QUESTION TWO

Did Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, make the following misstatements of fact or omit the following information in the arrest-warrant affidavit for Richard Winfrey, Jr.'s arrest?

- Misstating that Keith Pikett's drop trail from Murray Burr's house to the Winfrey house

used the scent of Richard Winfrey, Jr. when the drop trail actually used the scent of Christopher Hammond.

Answer "Yes" or "No": _____

- Omitting David Campbell's statement that Burr was both stabbed and shot, although he was only stabbed.

  Answer "Yes" or "No": _____

- Omitting David Campbell's statement that Richard Winfrey, Sr., had cut off Burr's body part, which was contradicted by the physical evidence.

  Answer "Yes" or "No": _____

- Omitting that David Campbell identified a cousin as participating in the murder with Richard Winfrey, Sr., instead of Megan Winfrey and Richard Winfrey, Jr.

  Answer "Yes" or "No": _____

If you answered "Yes" to any of the sub-parts of Question One, then answer Question Three. Otherwise, do not answer Question Three.

If you answered "Yes" to any of the sub-parts of Question Two, then answer Question Four. Otherwise, do not answer Question Four.

F. Damages

If you find that Defendant Lenard Johnson is liable to Plaintiff Megan Winfrey or Richard Winfrey, Jr., then

you must determine an amount that is fair compensation for all of their damages. These damages are called compensatory damages. The purpose of compensatory damages is to make Plaintiffs whole–that is, to compensate each Plaintiff for the damage that he or she has suffered. Compensatory damages are not limited to expenses that Plaintiffs may have incurred because of his or her injury. If Plaintiff Megan Winfrey or Richard Winfrey, Jr. win, he or she is entitled to compensatory damages for the physical injury, pain and suffering, and mental anguish that he or she has suffered because of Defendant Johnson's wrongful conduct.

You may award compensatory damages only for injuries that Plaintiff Megan Winfrey or Richard Winfrey, Jr. prove were proximately caused by Defendant Johnson's allegedly wrongful conduct. The damages that you award must be fair compensation for all of Plaintiffs' damages, no more and no less. You should not award compensatory damages for speculative injuries, but only for those injuries that Plaintiffs have actually suffered or that Plaintiffs are reasonably likely to suffer, in the future.

If you decide to award compensatory damages you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Plaintiffs prove the amount of his or her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence.

You may award damages for any pain and suffering, mental anguish, and/or loss of capacity of enjoyment of life that Plaintiff Megan Winfrey or Richard Winfrey, Jr. experienced in the past or will experience in the future. If you award damages to Megan Winfrey, they must be for Johnson's conduct that occurred prior to December 13, 2007 that has impacted her or will continue to impact her in the future. If you award damages to Richard Winfrey, Jr., they must be for Johnson's conduct that occurred prior to June 12, 2009 that has impacted him or will continue to impact him in the future.

No evidence of the value of intangible things, such as mental or physical pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate Plaintiff Megan Winfrey and Richard Winfrey, Jr. for the damages he or she has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make must be fair in light of the evidence.

A person who claims damages resulting from the wrongful act of another has a duty under the law to

use reasonable diligence to mitigate his/her damages, that is, to avoid or to minimize those damages.

If you find the defendant is liable and the plaintiff has suffered damages, the plaintiff may not recover for any item of damage which he or she could have avoided through reasonable effort. If you find that the defendant proved by a preponderance of the evidence the plaintiff unreasonably failed to take advantage of an opportunity to lessen his or her damages, you should deny him or her recovery for those damages that he or she would have avoided had he or she taken advantage of the opportunity.

You are the sole judge of whether the plaintiff acted reasonably in avoiding or minimizing his or her damages. An injured plaintiff may not sit idly by when presented with an 'opportunity to reduce his or her damages. However, he or she is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages.

The defendant has the burden of proving the damages that the plaintiff could have mitigated. In deciding whether to reduce the plaintiffs damages because of his or her failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied his burden of proving that the plaintiffs conduct was not reasonable.

QUESTION THREE

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff Megan Winfrey for damages, if any, you have found Defendant Lenard Johnson's wrongful conduct caused Plaintiff Megan Winfrey?

Answer in dollars and cents. $_____

QUESTION FOUR

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff Richard Winfrey, Jr. for damages, if any, you have found Defendant Lenard Johnson's wrongful conduct caused Plaintiff Richard Winfrey, Jr.?

Answer in dollars and cents. $_____

G. Duty to Deliberate; Notes

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Remember at all times, you are the judges of the facts. You have been allowed to take notes during this trial.

Any notes that you took during this trial are only aids to memory. If your memory differs from your notes, you should rely on your memory and not on the notes. The notes are not evidence. If you did not take notes, rely on your independent recollection of the evidence and do not be unduly influenced by the notes of other jurors. Notes are not entitled to greater weight than the recollection or impression of each juror about the testimony.

When you go into the jury room to deliberate, you may take with you a copy of this charge, the exhibits that I have admitted into evidence, and your notes. You must select a jury foreperson to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have reached a unanimous verdict, your jury foreperson must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the jury foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

You may now proceed to the jury room to begin your deliberations.

/s/ George C. Hanks, Jr.
2/12/2020

QUESTION ONE

Did Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, make the following misstatements of fact or omit the following information in the arrest-warrant affidavit for Megan Winfrey's arrest?

- Misstating that Keith Pikett's drop trail from Murray Burr's house to the Winfrey house used the scent of Richard Winfrey, Jr. when the drop trail actually used the scent of Christopher Hammond.

  Answer "Yes" or "No": No

- Omitting David Campbell's statement that Burr was both stabbed and shot, although he was only stabbed.

  Answer "Yes" or "No": Yes

- Omitting David Campbell's statement that Richard Winfrey, Sr., had cut off Burr's body part, which was contradicted by the physical evidence.

  Answer "Yes" or "No": Yes

- Omitting that David Campbell identified a cousin as participating in the murder with

Richard Winfrey, Sr., instead of Megan Winfrey and Richard Winfrey, Jr.

Answer "Yes" or "No": Yes

Go on to Question Two.

QUESTION TWO

Did Defendant Lenard Johnson knowingly and intentionally, or with reckless disregard for the truth, make the following misstatements of fact or omit the following information in the arrest-warrant affidavit for Richard Winfrey, Jr.'s arrest?

- Misstating that Keith Pikett's drop trail from Murray Burr's house to the Winfrey house used the scent of Richard Winfrey, Jr. when the drop trail actually used the scent of Christopher Hammond.

  Answer "Yes" or "No": No

- Omitting David Campbell's statement that Burr was both stabbed and shot, although he was only stabbed.

  Answer "Yes" or "No": Yes

- Omitting David Campbell's statement that Richard Winfrey, Sr., had cut off Burr's body part, which was contradicted by the physical evidence.

  Answer "Yes" or "No": Yes

- Omitting that David Campbell identified a cousin as participating in the murder with

Richard Winfrey, Sr., instead of Megan Winfrey and Richard Winfrey, Jr.

Answer "Yes" or "No": Yes

If you answered "Yes" to any of the sub-parts of Question One, then answer Question Three. Otherwise, do not answer Question Three.

If you answered "Yes" to any of the sub-parts of Question Two, then answer Question Four. Otherwise, do not answer Question Four.

QUESTION THREE

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff Megan Winfrey for damages, if any, you have found Defendant Lenard Johnson's wrongful conduct caused Plaintiff Megan Winfrey?

Answer in dollars and cents. $ 250.000[00]

QUESTION FOUR

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff Richard Winfrey, Jr. for damages, if any, you have found Defendant Lenard Johnson's wrongful conduct caused Plaintiff Richard Winfrey, Jr.?

Answer in dollars and cents. $ 750.000[00]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MEGAN WINFREY and RICHARD WINFREY, JR.,	§	
Plaintiffs,	§	CIVIL ACTION NOs.
VS.	§	4:10-cv-1896, and
LENARD JOHNSON,	§	4:14-cv-0448
Defendant.	§	

VERDICT

We, the jury, return the foregoing as our unanimous verdict.

2-18-2020
Date

[redacted]
Foreperson
[redacted]