CASE NO. 23-30103

In the United States Court of Appeals for the Fifth Circuit

JULIE NEVAREZ,
INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN
B.N., M.N, AND G.N.; DE'ANDRE WILLIS
Plaintiffs-Appellees,

v.

ANTHONY DORRIS; JUSTIN LEONARD,
Defendants-Appellants.

On Appeal from the January 24, 2023 Order
in the United States District Court for the Eastern District of Louisiana,
Civil Action No. 2:21-cv-01855

RESPONSE BRIEF OF PLAINTIFF-APPELLEE JULIE NEVAREZ

Respectfully submitted,

/s/ Xakema Henderson

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CERTIFICATE OF INTERESTED PERSONS

1. Case no. 23-30103; *Nevarez, et al. v. Coleman, et al.*; United States District Court for the Eastern District of Louisiana, Civil Action No. 2:21-cv-01855.

2. The undesigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

   i. Julie Nevarez, Plaintiff-Appellee;

   ii. Anthony Dorris, Defendant-Appellant;

   iii. Justin Leonard, Defendant-Appellant;

   iv. Louisiana State Police;

   v. Louisiana Department of Safety and Corrections, Office of State Police;

   vi. Counsel for Plaintiff-Appellee Julie Nevarez: Erin Bridget Wheeler and Nora Ahmed of the ACLU Foundation of Louisiana, and Xakema Henderson and Richard G. Leland of Akerman LLP; and

   vii. Counsel for Defendants-Appellants Anthony Dorris and Justin Leonard: Jason P. Wixom, Laura Rodrigue, and Blake J. Arcuri of Rodrigue & Arcuri, LLP.

/s/ Xakema Henderson
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument may be helpful to this Court in resolving the present appeal. Defendants-Appellants appeal the district court's denial of their motion to dismiss, in which they raised a qualified immunity defense in this § 1983 action. In their Statement Regarding Oral Argument, they frame their appeal as raising issues that are "novel in nature and require a context-specific inquiry." But characterizing the issues as novel does not make them so. As the district court properly recognized in denying the Defendants-Appellants' bid for qualified immunity, the issues before this Court are resolved by well-settled law. Because the Defendants-Appellants' brief misconstrues the facts and law, oral argument could likely prove helpful to the Court.

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STATEMENT OF THE ISSUES

1. Whether Anthony Dorris and Justin Leonard violated Julie Nevarez's Fourth Amendment rights when they obtained warrants to search her property based on affidavits that were facially invalid.

2. Whether it is clearly established law that a law enforcement officer's affidavit for a search warrant is facially invalid if it lacks a factual basis to establish probable cause for the search.

STATEMENT OF THE CASE

In this action, plaintiff-appellee Julie Nevarez seeks relief under 42 U.S.C. § 1983 based on unconstitutional searches by Louisiana State Police ("LSP") Troopers Anthony Dorris and Justin Leonard (the "Officers"). Mrs. Nevarez's claim arises out of the October 13, 2020 unlawful fatal shooting of her husband, Miguel, in the front yard of their home. Shortly after Mr. Nevarez was killed, the Officers sought and obtained search warrants for the home, the car in which Mr. Nevarez was sitting when the police officers first approached him, and Mrs. Nevarez's cell phone, falsely stating that they were investigating the crime of aggravated assault against a police officer by Mr. Nevarez. This was, Mrs. Nevarez submits, a subterfuge, as the Officers were investigating whether the policemen who killed Mr. Nevarez had used excessive force in doing so, and the affidavits they submitted to secure the warrants lacked probable cause. These affidavits are the subject of this appeal.

A. Relevant Factual Background

i. HPD and TPSO unlawfully shot and killed Mr. Nevarez in his front yard.

On October 13, 2020, an officer with the Houma Police Department ("HPD") responded to reports of gunshots in Mr. Nevarez's neighborhood. ROA.288. The HPD Officer approached Mr. Nevarez, who was parked in his own driveway and asked Mr. Nevarez to step out of the car. *Id.* When Mr. Nevarez refused, the Officer "drew his service weapon and called for backup." *Id*. Within minutes and based solely on this limited interaction with Mr. Nevarez, HPD unnecessarily escalated the situation into a SWAT scene, blocking off the surrounding streets and dispatching an armored truck and nearly fifty officers from HPD and the Terrebonne Parish Sheriff's Office ("TPSO"). ROA.289-290. When Mrs. Nevarez arrived, she was denied access to her street and shortly thereafter, an HPD officer unlawfully seized Mrs. Nevarez's phone. ROA.290.

When Mr. Nevarez finally exited his vehicle, he ran towards his house and *away* from the police officers flanking the front of the house. ROA.291. The Officers allege that as Mr. Nevarez circled the house and was confronted by police officers, he allegedly "raised a gun towards [an HPD Officer]," prompting that officer to fire back and prompting several of his fellow officers to follow suit.

ROA.292. They shot Mr. Nevarez almost 20 times; he died in his front yard. ROA.294.[1]

ii. The Houma Police Administration asked LSP to investigate the circumstances resulting in Mr. Nevarez's death.

A few days after the incident, the Houma Police Administration asked LSP to investigate the officer-involved shooting. ROA.296-297. As part of this investigation, on October 14, 2020, hours after Mr. Nevarez's death, Leonard secured a search warrant for the Nevarez home and the vehicle Mr. Nevarez had been in before he was subsequently shot. *Id*. The warrant, however, was obtained based on Leonard's affidavit certifying that probable cause existed for the searches because the car and house contained evidence of "*aggravated assault upon a peace officer*" in violation of Louisiana Revised Statute § 14:37.2. ROA.297 (emphasis added).

Likewise, on October 19, 2020, five days after Mr. Nevarez's death, Dorris secured a search warrant for Mrs. Nevarez's cell phone that was unlawfully seized the night of her husband's death. *Id*. Dorris submitted an affidavit in which he likewise swore that the warrant was needed "to locate any and all evidence that may aid the Louisiana State Police in their active investigation of *the crime of LRS 14:37.2 Aggravated Assault Upon a Peace Officer*." ROA.297 (emphasis added).

[1] Contrary to the Officers' assertion, Mrs. Nevarez *does* dispute that Mr. Nevarez "possessed a gun while actively fleeing law enforcement officers." Br. at 4.

As the district court explained, both warrant affidavits included the same description of the facts:

> They explain that on October 13, 2020, police officers approached Mr. Nevarez when responding to a complaint of a person illegally discharging a weapon. At the time, Mr. Nevarez was in a car parked in a driveway. The police unsuccessfully attempted to negotiate with Mr. Nevarez, who eventually fled the vehicle. The officers attempted to subdue Mr. Nevarez with "less lethal attempts" before they ultimately "responded to the threat" of Mr. Nevarez raising a firearm toward the police officers by "discharg[ing] their weapons," after which Mr. Nevarez, who "was struck," "succumbed to his injuries." Both affidavits indicate that the police were investigating the felony of aggravated assault upon a peace officer.

ROA.776-777.

Neither affidavit discussed nor mentioned that LSP was tasked with investigating the officer-involved shooting or how the search of the home, cell phone, and car would further the investigation of "aggravated assault upon a peace officer."

B. Relevant Procedural Background

i. After three failed attempts in the district court, the Officers now seek to appeal the district court's order denying their third motion to dismiss.

On October 12, 2021, Mrs. Nevarez and Mr. Nevarez's children sued several parties,[2] including the Officers. The Officers have continued to file baseless motions

[2] The other named defendants include the HPD and TPSO officers who are known to have fired their weapons at Mr. Nevarez; the HPD Chief and TPSO Sheriff who were supervising the shooting officers on scene; and the two custodians of records who refused to respond completely and timely to Mrs. Nevarez's pre-suit requests for public records about the shooting, one of which was voluntarily dismissed.

to dismiss, ROA.160, 365, 581, and are wrong to suggest the district court was somehow generous towards Plaintiffs or even inappropriate in granting leave to amend, Br. at 9, as this suggestion is disingenuous and not consistent with the procedural history in this case.

First, the Officers first motion to dismiss was meritless. There, they argued: (1) Mrs. Nevarez could not assert a § 1983 claim on behalf of a decedent—even though she brought that claim on her own behalf; and (2) Mrs. Nevarez did not have the affidavits to make her claims plausible, ROA.160, 163—even though she didn't have the affidavits because LSP refused to produce them to her after multiple public records requests. ROA.160, 161.

The Officers also fail to mention that they filed their second motion to dismiss before the district court had even ruled on their first one. ROA.365. There, the Officers argued: (1) Mrs. Nevarez allegedly did not plead the existence of any false statements and material omissions in the search warrant affidavits, and (2) the Officers were entitled to qualified immunity because Mrs. Nevarez allegedly "confirm[ed]" Mr. Nevarez "pointed a gun at law enforcement . . . and that evidence was sought by Mov[ants] in connection with the investigation into that action." ROA.405. The district court resolved both motions in July 2022. ROA.494. The court, in relevant part, denied the Officers' first motion to dismiss in part on the merits, and in part on the grounds of mootness but granted the second motion to

dismiss with leave to amend. ROA.531-532. The district court's order did not consider whether probable cause could exist where the Officers were truly investigating the shooting officers' use-of-force rather than the alleged aggravated assault by Mr. Nevarez. Plaintiffs subsequently amended their pleading, filing their Second Amended Complaint, the live pleading. *See* ROA.533-580.

ii. The district court's Order denying the Officers' third motion to dismiss correctly found that the warrant affidavits did not support a finding of probable cause.

The Officers filed a third motion to dismiss—the denial of which they are now appealing—in which they argued that Mrs. Nevarez's Second Amended Complaint contained no new allegations that warranted revisiting the district court's conclusion in its July 2022 Order. ROA.588.

After briefing on the motion was completed, the district court requested supplemental briefing on the question of "whether the Fourth Amendment permits law enforcement officers to seek a warrant to investigate a crime for which the alleged perpetrator cannot be convicted because the alleged perpetrator whose conduct was the focus of the warrant was dead at the time the warrant was sought." ROA.749. Despite the Officers' representations to this Court, however, the district court's Order denying the Officers' third motion to dismiss did not hinge merely on whether Mr. Nevarez was deceased at the time the Officers sought the warrants. ROA.772-786.

Rather, the district court soundly held that where Mr. Nevarez was deceased, *and* the affidavits do not include any information that suggests that others may have been involved with the alleged assault on a peace officer, do not indicate that the crime could be ongoing, and were obtained because the Officers were investigating their own use of force rather than pursuing an active criminal investigation for aggravated assault on a peace officer as they claimed, a reasonable officer would understand there was no probable cause to support the search warrants. ROA.780.

SUMMARY OF THE ARGUMENTS

The district court properly denied the Officers' motion to dismiss, and, for the reasons set forth in this brief, this Court should affirm the district court's order. As will be detailed below, the affidavits supporting the application for the search warrants did not contain any facts describing or alleging any nexus between the subjects of the requested warrants and the crime of aggravated assault against a police officer, which, according to the affidavits constituted an alleged singular and self-contained occurrence—Mr. Nevarez having allegedly pointed a gun at a police officer when he moved from his car in his own driveway to his front yard. There was no allegation that he entered the house during the alleged commission of the crime or that there was any belief that there were any items in the house or information in Mrs. Nevarez's cell phone that were fruits, instrumentalities, or evidence of a crime. Moreover, the alleged crime that the Officers were supposedly

investigating was one that could not possibly be prosecuted, as the alleged perpetrator was deceased at the time of the application for the warrant.

In their brief, the Officers divert this Court's attention from the real reason they were seeking a warrant (to justify the actions of the HPD and TPSO officers who killed Mr. Nevarez) by referring only to the alleged aggravated assault charge that could never have been brought. This key fact—along with the fact that the affidavits failed to include any indicia of probable cause to search property belonging to Mr. Nevarez's wife—contributed to the district court's proper holding that Mrs. Nevarez plead sufficient facts to defeat the Officers' qualified immunity claim.

Under the governing two-part test to defeat a qualified immunity defense—whether: (1) the official violated a constitutional right, and (2) that right was clearly established at the time of the challenged conduct—the Officers aren't entitled to qualified immunity.

First, the Officers violated Mrs. Nevarez's Fourth Amendment right to be free from a search pursuant to a warrant void of probable cause because they submitted sworn warrant affidavits that were facially invalid. The affidavits contained no indicia of probable cause to search Mrs. Nevarez's house, car, and cell phone for evidence of the aggravated assault against a peace officer that Mr. Nevarez was accused of committing. One, the alleged assault occurred outdoors; and, two, the

Officers do not allege it involved any other civilians aside from Mr. Nevarez, including Mrs. Nevarez, who was indisputably not present or on her cell phone with Mr. Nevarez when the alleged assault occurred. There is simply no nexus in the affidavits that links them to the need to search property belonging to Mrs. Nevarez.

Second, it is clearly established law that search warrant affidavits that fail to supply a factual basis to support a showing of probable cause are facially invalid. As the district court noted, "[t]he thrust of plaintiffs' claims is that defendants obtained warrants to search for information 'supporting a defensive narrative to retroactively justify the excessive use of force' that resulted in Mr. Nevarez's death and to intimidate his family rather than to seek evidence of Mr. Nevarez's alleged crime." ROA.768 (quoting Sec. Am. Compl. at ROA.535, ¶ 5). Given the clear, knowing absence of probable cause, it was objectively unreasonable for the Officers to submit affidavits for warrants to search Mrs. Nevarez's house, phone, and car.

Accordingly, the Court should affirm the district court's ruling.

STANDARD OF REVIEW

The Court reviews *de novo* the district court's grant of a motion to dismiss. *McLin v. Ard*, 866 F.3d 682, 688 (5th Cir. 2017) (citations omitted). To survive a motion to dismiss, a complaint need only contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is facially plausible when the plaintiff

pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Iqbal*, 556 U.S. at 678). In reviewing the complaint, the Court "draw[s] all inferences in favor of the nonmoving party, and view[s] all facts and inferences in the light most favorable to the nonmoving party." *Id.* (citing *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009)).

When the motion to dismiss asserts the qualified immunity defense, as is the case here, the plaintiff must plead specific facts that allow the court to draw the reasonable inference that the defendant is liable for the harm alleged and that defeat a qualified immunity defense. *Id.* (citing *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014) (citation omitted)). Though the doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal," *id.* at 688-89 (citation omitted), it does not protect "the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, the plaintiff can show the defense's inapplicability by satisfying a two-part test, which the court can consider in any order: "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *McLin*, 866 F.3d at 689 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

ARGUMENT

I. THE OFFICERS VIOLATED MRS. NEVAREZ'S FOURTH AMENDMENT RIGHT TO BE FREE FROM A SEARCH PURSUANT TO A WARRANT VOID OF PROBABLE CAUSE.

A. The Officers mischaracterize the "primary" issue.

As a preliminary matter, the Officers mischaracterize what the "primary issue" is before this Court, describing it as whether an officer violates the Fourth Amendment "when he seeks a search warrant relative to a dead criminal suspect who cannot be prosecuted *when that death has been communicated to the issuing judge*."[3] Br. at 16 (emphasis in original). This framing ignores the United States Supreme Court's holding in *Malley*, which rejected a police officer's argument that he was entitled to absolute immunity simply because an independent magistrate issued the warrant. 475 U.S. at 343-44.

The Officers have, from the case's inception, tried to make the fact of Mr. Nevarez's death dispositive of the probable cause inquiry. Initially, they argued they could not have violated *Mr. Nevarez's* constitutional rights because under *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979), one has no rights to be deprived of after death. The district court rejected this argument because Mrs. Nevarez's § 1983 claim against the Officers has always been based on their violation

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[3] Mrs. Nevarez notes that in their Reply in support of their third motion to dismiss, the Officers took the opposite position, stating: "Mr. Nevarez's death was disclosed to the magistrate and is irrelevant." ROA.682.

of *her* rights, not her late husband's.[4] ROA.504. The Officers' present framing of the issue has the same problem as it did when it was tethered to *Whitehurst* because it still fails to recognize how Mrs. Nevarez's rights factor into the probable cause inquiry.

Mr. Nevarez's death is relevant to the probable cause inquiry, but even accepting as true that probable cause can exist to support a search warrant for evidence of a crime that cannot lead to a prosecution because the suspect is deceased, the probable cause analysis isn't complete. The question remains of whether the affidavits included facts, or a "nexus," to supply probable cause to justify warrants to search Mrs. Nevarez's house, car, and cell phone. *See Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006). *This* is the primary issue before the Court.

B. Affidavits that fail to include a factual basis to show probable cause exists are facially invalid.

This Court recognizes two alternative kinds of claims against government agents for alleged Fourth Amendment violations in connection with a search or arrest warrant: (1) claims under *Franks v. Delaware*, 438 U.S. 154 (1978), and (2) claims under *Malley*, 475 U.S. 335. ROA.774 (citing *Melton v. Phillips*, 875 F.3d 256, 270 (5th Cir. 2017) (en banc) (J. Dennis dissenting)).

[4] The Officers state that Mrs. Nevarez "clarified" that she brought the claim on her behalf instead of her husband's, Br. at 8, but since her Original Complaint, Mrs. Nevarez has asserted this claim on her own behalf. ROA.43-44.

A *Franks* claim arises against officers who deliberately or recklessly provide false, material information for use in an affidavit or who make knowing and intentional omissions that result in a warrant being issued without probable cause. 438 U.S. at 172. Whereas, "[t]he *Malley* wrong is . . . the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant." *Blake v. Lambert*, 921 F.3d 215, 220 (5th Cir. 2019) (citation omitted). The district court concluded *Malley* applies.[5] *See* ROA.776 (quoting *Kohler*, 470 F.3d at 1114 ("The principles of *Franks* have never been applied to facially invalid warrants.")).

Malley holds that under the Fourth Amendment, individuals have the right to be free from searches pursuant to a warrant that, on its face, is "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." 475 U.S. at 345. That is, affidavits are facially invalid under *Malley* when the affidavit is barebones, conclusory, and/or does not include any factual basis to support a probable cause finding because there's no nexus, i.e., explanation of the relevance of the facts, to the person or place to be searched or the items to be seized. *See Blake*, 921 F.3d at 220 (holding that a school attendance officer's affidavit was facially

[5] In her opposition to the Officers' motion to dismiss, Mrs. Nevarez invoked both *Malley* and *Franks*, arguing the doctrines in the alternative. ROA.614-624. Under *Franks*, she argued the Officers knowingly or with reckless disregard for the truth provided material misstatements or omitted material facts in their warrant affidavits. ROA.615-617. Because the district court denied the Officers' motion based on *Malley*, Mrs. Nevarez focuses her argument on a *Malley* analysis.

invalid under *Malley* because it contained no factual basis to establish probable cause); *see also Spencer v. Staton*, 489 F.3d 658, 661-62 (5th Cir. 2007), *opinion withdrawn in part on reh'g on other grounds* (July 26, 2007) (same).

Just any facts in a warrant affidavit will not suffice. Those facts must indicate a *nexus* to the criminal activity being investigated:

> Probable cause exists when there are reasonably trustworthy facts which, *given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of a crime. The officer's supporting affidavit must make it apparent, therefore, that there is some nexus between the items to be seized and the criminal activity being investigated*.

Kohler, 470 F.3d at 1109 (citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)) (emphasis added). The required nexus is that which establishes "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (citing *Gates*, 462 U.S. at 214).

In *Kohler*, this Court held that the facts set forth in an affidavit in support of a warrant for a suspect's DNA in a murder investigation failed to provide the requisite nexus to show probable cause. There, the affidavit (like the affidavits here) included several paragraphs-worth of facts, including that Kohler had a 20-year-old burglary conviction, was unemployed, and used to work on the same street where a victim's belongings were later found. *Id.* at 1111. This Court held that none of these facts provided a nexus between his DNA and the murders. *Id.* That is, the facts

failed to establish a fair probability that Kohler was a murderer because the affidavit contained no explanations linking the facts to the murders Kohler was suspected of committing. *Id.* (citing *Gates*, 462 U.S. at 214).

In the end, it is not enough for an affidavit to provide only *possible* cause of a crime. *See id.* at 1110. The belief of guilt must be particularized *with respect to the person or place to be searched. Terwilliger v. Reyna*, 4 F.4th 270, 282 (5th Cir. 2021) (emphasis added) (quotation and citation omitted). Consequently, while courts generally defer to a magistrate's determination of probable cause, courts *cannot* "defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Kohler*, 470 F.3d at 1109 (quoting *Gates*, 462 U.S. at 239) (citation omitted); U.S. Const. amend. IV ("[N]o Warrants shall issue, *but upon probable cause*….") (emphasis added)). In other words, qualified immunity is not afforded "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley*, 475 U.S. at 341.

C. The affidavits are facially invalid under *Malley* because they lack probable cause.

Under the Fourth Amendment, Mrs. Nevarez had the right to be free from searches pursuant to warrants that, on their faces, were "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley*,

475 U.S. at 345. The district court correctly held that the search warrant affidavits violate *Malley* because they do not support a finding of probable cause.

As the district court noted, the affidavits here include the same factual description:

- They explain that on October 13, 2020, police officers approached Mr. Nevarez when responding to a complaint of a person illegally discharging a weapon.
- At the time, Mr. Nevarez was in a car parked in a driveway.
- The police unsuccessfully attempted to negotiate with Mr. Nevarez, who eventually fled the vehicle.
- The officers attempted to subdue Mr. Nevarez with "less lethal attempts" before they ultimately "responded to the threat" of Mr. Nevarez raising a firearm toward the police officers by "discharg[ing] their weapons," after which Mr. Nevarez, who "was struck," "succumbed to his injuries."
- Both affidavits indicate that the police were investigating the felony of aggravated assault upon a peace officer [citing La. R.S. 14:37.2].

ROA.776-777. Nothing here explains the relevance of these alleged facts to the places to be searched—Mrs. Nevarez's house, phone, and car—given the nature of the alleged crime or how the searches would reveal any fruits, instrumentalities, or evidence of the crime of aggravated assault against a peace officer, or any other ongoing criminal activity. No nexus is articulated.

The Officers, citing *Kohler*, contend in conclusory fashion that their affidavits satisfied the nexus requirement "by stating, with exacting specificity, what was to be searched and how those searches correlated with Decedent's having committed

the crime of Aggravated Assault upon a Peace Officer." Br. at 21-22. That's not true. The Officers' brief does not bother to set out examples of this "exacting specificity," and their conclusory statement is belied by the affidavits themselves, which do not explain with *any* specificity how the searches correlated with Mr. Nevarez having allegedly committed aggravated assault on a peace officer. Nor do the affidavits suggest a fair probability that evidence of the alleged assault could or would be found in Mrs. Nevarez's house, cell phone, or car or how these places might contain items that constituted any fruits, instrumentalities, or evidence of that alleged assault. The affidavits do not rise to even the level of possible cause.

Instead, the affidavits allege a self-contained crime such that there could be no probable cause to suspect other past or ongoing criminal activity that would justify the Officers' invasive searches of Mrs. Nevarez's house, cell phone, and car. Specifically, the affidavits claim Mr. Nevarez raised a gun towards one or more officers from HPD and/or TPSO in violation of La. R.S. 14:37.2 (aggravated assault upon a peace officer with a firearm). This crime is defined as "an assault committed upon a peace officer who is acting in the course and scope of his duties with a firearm," La. R.S. 14:37.2(A), and includes "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery," La. R.S. 14:36, "with a dangerous weapon," La. R.S. 14:37(A).

By definition, and by the Officers' account, the entirety of the crime they allege—that Mr. Nevarez intentionally raised a firearm towards a police officer—occurred outdoors, it involved only Mr. Nevarez and no other civilians, and Mrs. Nevarez was not present or on the phone with Mr. Nevarez when the alleged assault occurred. Given the elements of the crime alleged, the affidavits obviously could not—and did not—contain information indicating any past or ongoing criminal activity connecting the alleged aggravated assault on a peace officer to Mrs. Nevarez or her home, cell phone, or car. ROA.780. To conclude otherwise lacks credulity, particularly in light of the Officers having been tasked with investigating the shooting itself.

Finally, because the Officers do not accept that the affidavits were invalid on their face, they misapprehend the district court's reliance on *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). They contend the district court should have relied on *Gates*, 462 U.S. 213, 214 (1983), because that case states "the purpose of a search warrant affidavit is simply to establish that there is a fair probability that contraband or evidence of a crime will be found in a particular place." Br. at 26. But this position is tenuous for at least three reasons.

One, the district court cites to *Gates* in the same paragraph that it cites to *Hayden*. *See* ROA.781. Two, neither the U.S. Supreme Court nor this Court has held that *Hayden* has been overruled or is somehow inconsistent with *Gates*. *See,*

e.g., *U.S. v. Pena*, 418 F.App'x. 335, 346 (5th Cir. 2011) (citing to *Hayden* with approval of the proposition that the nexus requirement is satisfied when the agents had probable cause "to believe that the evidence sought will aid in a particular apprehension or conviction"). *Hayden* merely carries the reasoning in *Gates* to its logical end to explain the implied purpose of collecting evidence in the first place: to obtain evidence that would aid in apprehending and convicting criminals. *Hayden*, 387 U.S. at 306. The Officers *must* argue *Hayden* is inapt where, as the district court noted, they "concede[d] in their motion to dismiss that they applied for the warrants to "investigat[e] the events which unfolded on the night of the incident which necessitated the use of force," and they did not dispute that Mr. Nevarez could not be prosecuted posthumously. ROA.780 (citing ROA.595).

II. IT IS HAS LONG BEEN CLEARLY ESTABLISHED LAW THAT WARRANT AFFIDAVITS LACKING ANY INDICIA OF PROBABLE CAUSE ARE FACIALLY INVALID.

Despite the Officers' attempts to suggest the applicable law before the Court is novel, it is not. The law at issue here simply concerns whether the Officers' warrant affidavits supplied a factual basis, i.e. a nexus, to show probable cause to search property belonging to Mrs. Nevarez. As the district court properly held, the law setting the standard for what a law enforcement officer must include in a sworn warrant application is clearly established under *Malley* and its progeny.

"To be 'clearly established' for purposes of qualified immunity, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Terwilliger*, 4 F.4th at 284-85 (quoting *Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004) (en banc)). Because its "key purpose" is to create "fair warning," the clearly established prong can be satisfied "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 285 (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). The clearly established prong is also established in cases where even if no prior decision provides reasonable warning, a reasonable officer would know from the obvious nature of the circumstances that the conduct violated constitutional rights. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020).

A. The district court did not frame the applicable law "too broadly."

First, the Officers argue the district court framed the applicable law too broadly, but they mischaracterize that law as "the *general* right to be free from unreasonable searches and seizures." Br. at 30 (emphasis in original). This law is not the clearly established law the district court identified. The district court, relying on *Malley*, properly zeroed in on warrant affidavit precedent and held that to be free from a search pursuant to a warrant that, on its face, was "so lacking in indicia of

probable cause as to render official belief in its existence unreasonable" was "clearly established" at the time of the Officers' actions. ROA.783 (citing *Malley*, 475 U.S. at 344-45). Accordingly, the emphasis the Officers place on *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), cert. denied, 213 L. Ed. 2d 1123, 142 S. Ct. 2573 (2022), and the requirement to frame the constitutional question with specificity starts from an incorrect premise. In *Cope*, this Court expressly rejected the Officers' argument, explaining that "an exact case on point is not required" to show a law is clearly established; instead, "the confines of the officers' violation" need only be "beyond debate." *Id.* at 205.

The law is clearly established that a warrant affidavit is invalid if "on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue under the circumstances." *Blake*, 921 F.3d at 220 (quoting *Spencer*, 489 F.3d at 661 (quoting *Malley*, 475 U.S. at 341)). Shortly after the United States Supreme Court issued its ruling in *Malley*, this Court explained that *Malley* applied the common law rule precluding immunity for those who procured the issuance of a warrant without probable cause to police officers:

> Complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. *Relying on this common law rule, the Supreme Court recently held that a police officer who seeks an arrest warrant by submitting a complaint and supporting affidavit to a judge is not entitled to absolute immunity.*

Austin v. Borel, 830 F.2d 1356, 1361 (5th Cir. 1987) (citing *Malley*, 475 U.S. at 343-44).

Then more recently in *Blake*, this Court reiterated that the law is clearly established that an officer cannot submit a warrant affidavit that so lacks in factual support that it is facially invalid for want of probable cause. 921 F.3d at 221. In reaching this conclusion, the Court explained: "The general *Malley* rule dates from the 1980s. And [the Court's] 2007 decision in *Spencer* shows [the officer's] affidavit violated that [clearly established] rule." *Id.* What *Malley* and its progeny have clearly established for *40 years* is that the facts contained in a warrant affidavit *must* provide a basis establishing the probable cause necessary to justify the issuance of warrant to search the places identified therein. The affidavits here failed to do so.

B. The Officers' conduct was objectively unreasonable under the law at the time they submitted their sworn warrant affidavits.

If the plaintiff has alleged a violation of a clearly established right, as Mrs. Nevarez has done, the next step is to determine if the official's conduct was objectively reasonable under the law at the time of the incident. *Blake*, 921 F.3d at 219. The Officers argue wrongly that "the intent of the search is a conclusory allegation which the district court should not have considered." Br. at 26. The U.S. Supreme Court rejected this argument in *Malley*, holding that the objective reasonableness inquiry turns on if "a reasonably well-trained officer in [the officer's]

position *would have known* that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 346 (emphasis added). *See also Floyd v. City of Kenner, La.*, 351 F.App'x. 890, 895-96 (5th Cir. 2009) (unpublished). Among the purposes of the clearly established prong is that qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Though *Floyd* is unpublished, it is instructive.[6] There, the plaintiff similarly alleged a § 1983 action against several defendants, including several law enforcement officers. The officers moved to dismiss, asserting qualified immunity, which the district court granted. *Floyd*, 351 F.App'x at 891. This Court reversed as to warrant affidavit allegations. *Id.* at 894-96. Floyd claimed the officer who applied for the search and arrest warrants included false statements and omitted material information in his affidavit that would have "undermined the validity of the warrants." *Id.* This Court explained: "[M]otive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation." *Id.* This Court held that Floyd's allegations, "viewed in their entirety" and "[t]aken as true," supported his claims and were "sufficient at least to survive Rule 12(b)(6) dismissal" because "if true, would show

[6] "An unpublished opinion issued after January 1, 1996 is not controlling precedent, but may be persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

a clear violation of Floyd's constitutional rights, and constitute objectively unreasonable behavior by the defendant. *Id.* at 897. It was "the type of conflict that warrants discovery." *Id.*

Here, there is simply no question that the applicable law was sufficiently clear when the Officers submitted their affidavits in late 2020. A reasonable official would have been well aware that submitting facially invalid warrants violates an individual's Fourth Amendment right to be free from being subjected to search warrants that were obtained with affidavits that failed to supply indicia of probable cause. That the circumstances here involved a deceased suspect is of no moment. At best, the Officers had fair warning under this law that they would be violating a person's Fourth Amendment rights if there was a clear absence of facts in their warrant applications to show probable cause. At worst, it was obvious this conduct would violate a person's Fourth Amendment rights.

The Officers desperately seek to avoid any analyses that raise questions about their intent for obtaining the warrants. But what the district court recognized that the Officers conveniently don't acknowledge in their Opening Brief is that they obtained the warrants to assist with investigating *their fellow officers' use of force* against Mr. Nevarez, a fact they also conceded in their motion to dismiss, ROA.595, stating that another "justification for seeking the evidence sought" was "an investigation into the events which unfolded on the night of incident which

necessitated the use of force." This key fact informs the objective reasonableness inquiry and explains why the Officers flounder in their attempt to overstate the district court's reliance on *Coopshaw v. Figurski*, 2008 WL 324103, at *1 (E.D. Mich. Feb. 6, 2008). *See* Br. at 33.

The district court did not hold—and Mrs. Nevarez has never argued—that *Coopshaw* is binding, controlling, or dispositive here. *Coopshaw* is merely illustrative of the points Mrs. Nevarez has repeatedly made at other junctures of this case:

> Just as in *Coopshaw*, the fundamental fact question is whether probable cause existed for the warrants here under the circumstances Mrs. Nevarez has alleged. Here, like in *Coopshaw*, Mrs. Nevarez has similarly alleged an improper fishing expedition of her home, phone, and car. As support for her theory, she further alleged, among other allegations, that: (1) Movants (Louisiana State Police) were asked to investigate the lawfulness of the officer-involved shooting death of Mr. Nevarez, …; and (2) that despite this assignment, Movants procured search warrants of Mrs. Nevarez's home, phone, and car to discover evidence of Mr. Nevarez's mental state, including whether he was suicidal, so as to uphold their suicide-by-cop narrative…. At this procedural stage, the circumstances of the search warrant affidavits support Mrs. Nevarez's theory that Movants used the warrants as a fishing expedition and were not predicated on probable cause of aggravated assault against an officer because Mr. Nevarez could never be prosecuted for that crime.

ROA.758-759 (citations omitted).

The district court agreed, holding Mrs. Nevarez plausibly alleged that the Officers acted in an objectively unreasonable manner in applying for warrants where "[a] reasonable officer would understand that there is no probable cause to support

a search warrant where, as here, the police were investigating their own use of force rather than pursuing an active criminal investigation." ROA.784. With or without *Coopshaw*, the district court could have reached the same conclusion because it is undisputed the Officers were investigating their own use of force.

To say it was not clearly established law that the Officers could not submit warrant affidavits lacking in probable cause or the fact that they did so is somehow objectively reasonable is specious.

Mrs. Nevarez's allegations, viewed in their entirety and taken as true, are sufficient at least to survive Rule 12(b)(6) dismissal because if true, they would show a clear, knowing violation of her constitutional rights and constitute objectively unreasonable behavior by the Officers. This is precisely the type of conflict that warrants discovery.

RELIEF SOUGHT

Defendants-Appellants Anthony Dorris and Justin Leonard are not entitled to qualified immunity. The district court therefore properly denied their motion to dismiss raising that defense. Accordingly, Plaintiff-Appellee Julie Nevarez respectfully prays that this Court affirm that ruling.

Respectfully submitted,

/s/ Xakema Henderson

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served via the Court's electronic filing system to all counsel of record on May 11, 2023.

/s/ Xakema Henderson

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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