No. _____

In The
Supreme Court of the United States

KAREN JIMERSON, ET AL.,

Petitioners,

v.

MIKE LEWIS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Maryland* v. *Garrison*, this Court addressed the constitutional implications of police officers executing a search warrant at the wrong location. The Court explained that the Fourth Amendment requires officers to make "a reasonable effort to ascertain and identify the place intended to be searched[.]" 480 U.S. 79, 88 (1987). Addressing claims of qualified immunity, three circuits—the Eighth, Ninth, and Eleventh—hold that *Garrison* clearly established the law: Officers violate the Fourth Amendment when they search a house without first checking that it shares the address or conspicuous features of the place they intend to search. But the Fifth Circuit holds below that *Garrison* merely articulates a "general principle" insufficient to clearly establish the law. As Judge Dennis notes in dissent, the Fifth Circuit's cramped reading of *Garrison* created a circuit split. Pet. App. 21a.

The question presented is:

Whether *Maryland* v. *Garrison* clearly established that officers violate the Fourth Amendment when they search the wrong house without checking the address or conspicuous features of the house to be searched.

PARTIES TO THE PROCEEDING

Petitioners are Plaintiffs Karen Jimerson and James Parks, individually and as parents and next friends of minors J.J., J.J., and X.P. Respondent is Defendant Waxahachie, Texas Police Lieutenant Mike Lewis.

RELATED PROCEEDINGS

U.S. District Court for the Northern District of Texas:

Jimerson v. *Lewis*,
No. 3:20-CV-2826 (Apr. 4, 2022)

Jimerson v. *Lewis*,
No. 3:20-CV-2826 (Mar. 31, 2022)

Jimerson v. *Lewis*,
No. 3:20-CV-2826 (Feb. 28, 2022) (R&R)

U.S. Court of Appeals for the Fifth Circuit:

Jimerson v. *Lewis,*
No. 22-10441 (June 26, 2024)

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Petition for a Writ of Certiorari

Karen Jimerson, James Parks, and their minor children J.J., J.J., and X.P., petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

Opinions Below

The revised opinion of the circuit court, Pet. App. 1a, is reported as *Jimerson* v. *Lewis*, 94 F.4th 423 (5th Cir. 2024). The district court's supplemental order, Pet. App. 22a, is unreported but is available electronically as *Jimerson* v. *Lewis*, 2022 WL 1400752 (N.D. Tex. Apr. 4, 2022). The opinion of the district court, adopting in part the magistrate judge's recommendation but denying qualified immunity to Lieutenant Lewis, Pet. App. 25a, is unreported but available electronically as *Jimerson* v. *Lewis*, 2022 WL 986015 (N.D. Tex. Mar. 31, 2022). The magistrate judge's findings, conclusions, and recommendation, Pet. App. 58a, recommending the district court dismiss this case in its entirety, is also unreported but available electronically as *Jimerson* v. *Lewis*, 2022 WL 1518940 (N.D. Tex. Feb. 28, 2022).

Jurisdiction

The Fifth Circuit entered its revised decision below on February 15, 2024, and denied a petition for rehearing en banc on June 26. Justice Alito granted a 30-day extension of the period for filing this petition, making it due on October 24. Petitioners timely file this petition and invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV.

To provide a remedy for violations of this right and others, Congress enacted the Civil Rights Act of 1871. As codified and amended, it provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. 1983.

INTRODUCTION

Although neither its address nor its conspicuous features matched the house described in his warrant, Respondent Lieutenant Lewis ordered his SWAT team to execute a no-knock raid on an innocent family's house. Lewis did not contest that his actions violated the Fourth Amendment, but a divided panel of the Fifth Circuit granted him qualified immunity. According to the panel, it was not clearly established that Lewis had to, for

instance, confirm that the address on the house matched his warrant before commanding his SWAT team to kick in the door. As Judge Dennis noted in dissent, however, the panel created a circuit split over whether this Court's decision in *Maryland* v. *Garrison* clearly established the law for wrong-house searches. Pet. App. 18a–21a (citing, *e.g.*, *Hartsfield* v. *Lemacks*, 50 F.3d 950 (11th Cir. 1995)).

In *Garrison*, the Court held that officers executing a search warrant must make "a reasonable effort to ascertain and identify the place intended to be searched[.]" 480 U.S. 79, 88 (1987). When officers fail to do so—or when they have reason to know they are searching the wrong location—their actions violate the Fourth Amendment. *Id.* at 85, 88 & n.13.

Addressing claims of qualified immunity, three circuits have held that *Garrison* clearly established that a police officer violates the Fourth Amendment when he searches the wrong house without checking the address or conspicuous features of the house to be searched.[1] The Fifth Circuit, however, holds that *Garrison* merely announced a "general principle" insufficient to provide "fair warning" to officers in determining "the necessary reasonable efforts to identify the correct residence" before searching. Pet. App. 9a–11a, 14a.

This case provides an excellent opportunity for the Court to resolve this split. The facts are undisputed. Pet. App. 3a, 15a. It is also "undisputed that Lewis violated the Jimersons' Fourth Amendment rights in executing a SWAT-style entry into their home[.]" Pet. App. 17a

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[1] *Dawkins* v. *Graham*, 50 F.3d 532, 534 (8th Cir. 1995); *Navarro* v. *Barthel*, 952 F.2d 331, 333 (9th Cir. 1991); *Hartsfield* v. *Lemacks*, 50 F.3d 950, 955–956 (11th Cir. 1995).

(Dennis, J., dissenting); see also *id.* at 9a. And the sole issue standing between Petitioners and the remedy Congress provided them through Section 1983 is whether *Maryland* v. *Garrison* clearly established the law. Alternatively, this case is a good candidate for summary reversal because bedrock Fourth Amendment principles apply to Lewis's conduct with obvious clarity: Every reasonable officer would know, if there's an address to check, he must check it before launching a dangerous and destructive raid.

STATEMENT OF THE CASE

I. Lewis ordered a SWAT team to raid an innocent family's house.

One night in March 2019, Waxahachie, Texas Police Lieutenant Mike Lewis gathered a SWAT team to execute a no-knock warrant on a suspected methamphetamine stash house located at 573 8th Street, Lancaster, Texas. The team assembled on the porch of 583 8th Street, however, before Lewis realized they were about to execute the warrant at the wrong address. The house to the officers' *right* was the target house. But rather than double check, Lewis hastily commanded his officers to raid the home to their *left*, 593 8th Street. Inside was an innocent family—Petitioners Karen Jimerson, James Parks, and their three minor children (collectively, the Jimersons)—peacefully preparing for bed. Pet. App. 3a–6a.

Lewis should have known that the Jimersons' house was not his target. The target house was under surveillance, and Lewis was receiving real-time intelligence. He also had a copy of the search warrant, which listed the

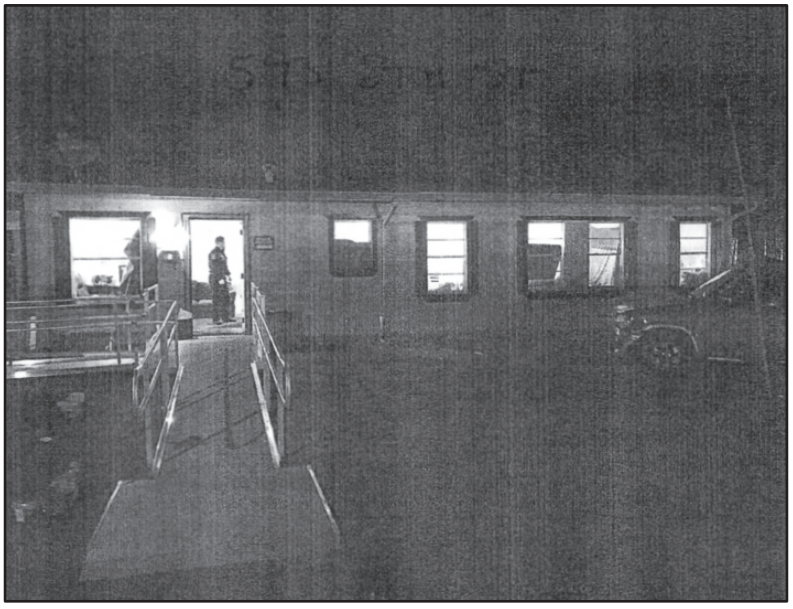
target house number as 573. This address did not match the 593 clearly displayed on the Jimersons' house. Pet. App. 3a–6a. Although he later claimed that he "believed" the Jimersons' address matched the warrant, *id.* at 5a; *id.* at 16a (Dennis, J., dissenting), Lewis conceded he "did not even check the number" before ordering the SWAT team to execute, *id.* at 16a (Dennis, J., dissenting).

Aside from the mismatched addresses, several notable features should have alerted Lewis that his team was—for the second time—at the wrong house. Lewis knew, for instance, the target house had its address painted on the curb and affixed to a pole supporting its porch; the Jimersons' house had its address affixed to the house itself (right next to the front door) and had no porch. Lewis knew the target house was the thirteenth on the block; the Jimersons' house was the fifteenth. And Lewis knew the target house had a perimeter fence; the Jimersons' house had no fence. Instead, it had a substantial wheelchair ramp with waist-high railings that led to its front door. Pet. App. 15a–17a, 20a–21a (Dennis, J., dissenting); *id.* at 52a–53a.

Although they do not capture all the relevant differences, even the grainy black-and-white photographs police took in the immediate aftermath of the raid show that the houses were easily distinguishable. Compare:

The Target House: 573 8th Street

The Jimersons' House: 593 8th Street



Ignoring these and other conspicuous features that would have provided any reasonable officer notice that he was about to raid the wrong house, Lewis inexplicably commanded officers to "break and rake" the Jimersons' house. Pet. App. 16a (Dennis, J., dissenting). On Lewis's orders, the SWAT team moved from one wrong house to another, clambered up a wheelchair ramp that was not supposed to be there, broke down Petitioners' front door, shattered their windows, and detonated a flashbang grenade. Glass from the windows rained on the children as they slept. The officers then held the Jimersons—a half-naked Karen, emerging from a bath; James, who had been fast asleep; and their minor children—at gunpoint until another officer realized Lewis's mistake. *Id.* at 5a–6a, 63a–64a.

In the wake of the botched raid, an internal investigation concluded that Lewis "completely overlooked" his department's "reasonable and normal protocol." Pet. App. 6a. The Waxahachie Police Chief stated that mistakes like Lewis's should never happen and suspended him without pay (for two days). *Id.* at 6a.

II. The district court denied Lewis qualified immunity, but a divided Fifth Circuit panel reversed, creating a circuit split.

The Jimersons sued Lieutenant Lewis and the other officers who raided their home under 42 U.S.C. 1983 for violations of the Fourth Amendment. Pet. App. 6a–7a. The officers moved for summary judgment based on qualified immunity, and the magistrate judge recommended that the district court grant their motion. *Id.* at 7a. The district court adopted the magistrate judge's recommendation in part, granting qualified immunity to all officers

involved in the wrong-house raid, except Lewis. *Id.* at 7a, 46a–54a. Relying on this Court's decision in *Maryland* v. *Garrison*, 480 U.S. 79, 88 (1987), the district court concluded that "this case presents a situation for the jury to decide whether [Lewis] was plainly incompetent in the execution of the search warrant that resulted in an unconstitutional search of [the Jimersons'] residence." Pet. App. 53a–54a; see also *id.* at 49a–50a (citing as "[i]nstructive to the court's analysis" *Rogers* v. *Hooper*, 271 Fed. Appx. 431 (5th Cir. 2008) (table), and *Hartsfield* v. *Lemacks*, 50 F.3d 950, 955 (11th Cir. 1995)).

Lewis filed an interlocutory appeal, and a panel of the Fifth Circuit reversed in a 2-1 published decision. *Jimerson* v. *Lewis*, 94 F.4th 423 (5th Cir. 2024). The panel noted that there were no disputes of material fact and that Lewis did "not challenge the district court's analysis of whether [he] violated the plaintiffs' rights under federal law." Pet. App. 3a, 9a. The only question was whether Lewis was entitled to qualified immunity because the law he admittedly violated was not clearly established. *Id.* at 10a. The panel held that he was. *Id.* at 14a.

Characterizing this Court's holding in *Garrison* as a statement of "general principle" rather than a clear establishment of the law, the majority rejected the district court's reliance on *Garrison* and persuasive authority interpreting it. *Id.* at 11a. And "[e]ven if these two nonprecedential opinions [*Rogers* and *Hartsfield*] were indicative of clearly established law," the panel concluded, they did not provide Lewis "fair warning" that his actions violated the Constitution because he did more than "nothing" to identify the correct house. *Id.* at 13a.

Thus, although Lewis concedes that he violated the Jimersons' Fourth Amendment rights, the panel held he

is nevertheless immune from suit because there is no authority "demonstrating that Lewis's conduct violated clearly established law." Pet. App. 14a.

Judge Dennis dissented. While he agreed that there were "no factual disputes as to Lewis' actions in leading the SWAT team to the wrong residence," he disagreed "that Lewis is entitled to qualified immunity under clearly established law." Pet. App. 15a. "In light of the efforts identified as adequate by the Supreme Court in *Garrison* and elaborated on by circuit courts," Judge Dennis concluded that "Lewis had 'fair notice' of the minimum efforts required to comply with the Fourth Amendment when identifying a house for the purposes of executing a search warrant." *Id.* at 21 (citations omitted). And "[a]s announced in *Garrison* and elucidated in *Rogers* and *Hartsfield*, it is 'beyond debate' that Lewis' efforts were constitutionally deficient." *Ibid.* (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011)). In short, Judge Dennis explained, Lewis "could have easily avoided the mistaken entry by 'simply checking' the house number or using other information at his disposal to identify the correct residence." *Id.* at 20a (quoting *Hartsfield*, 50 F.3d at 955).

The Fifth Circuit denied rehearing, and this petition follows.

REASONS FOR GRANTING THE PETITION

Nearly four decades ago, the Court explained that officers executing a search warrant must make "a reasonable effort to ascertain and identify the place intended to be searched[.]" *Garrison*, 480 U.S. at 88. Since then, three circuits have held that *Garrison* clearly established that officers violate the Fourth Amendment by executing a search warrant at the wrong house without checking the

address or conspicuous features of the house to be searched.

Lieutenant Lewis's actions fit this description of a Fourth Amendment violation to a tee. He "completely overlooked" his department's "reasonable and normal protocol" by ordering a SWAT team to raid a house full of innocent people. Pet. App. 6a. Lewis could have easily avoided the mistaken entry by, for example, reading the house number posted right beside the Jimersons' front door,[2] observing a giant wheelchair ramp,[3] or taking a moment to reassess the situation given that his "SWAT team had [already] assembled at" another wrong house.[4] Despite these (and other) warning signs, Lewis ordered his team to raid the Jimersons' house without verifying that its address or conspicuous features matched his target. *Id.* at 5a–6a.

Although Lewis did not challenge the district court's conclusion that he violated the Fourth Amendment, Pet. App. 9a, 17a, 54a, a divided Fifth Circuit panel granted Lewis qualified immunity. It held that the law was not clearly established because *Garrison* merely articulated a "general principle." *Id.* at 11a, 14a. Judge Dennis dissented. According to him—and published decisions from three other circuit courts—*Garrison* clearly established that qualified immunity does not shield an officer who has

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[2] Pet. App. 19a (Dennis, J., dissenting) (citing *Hartsfield*, 50 F.3d at 955).

[3] Pet. App. 48a–49a (district court noting that the ramp "should have been readily apparent to any reasonably competent officer").

[4] Pet. App. 5a.

reason to know he is executing a search warrant at the wrong house and does so anyway.

The Court should grant this petition and settle the split over whether *Garrison* clearly established this crucially important aspect of Fourth Amendment law. Alternatively, the Court could summarily reverse the decision below because the constitutional principles apply with obvious clarity to Lewis's conduct. See *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). For either option, this case is a good vehicle.

On the facts, it is undisputed that Lewis and his SWAT team conducted a dangerous and preventable no-knock raid on the wrong house. Pet. App. 3a (observing that Lewis's efforts to "identify the correct residence" were "deficient"). And it is undisputed that Lewis violated the Jimersons' Fourth Amendment rights in the process. *Id.* at 9a (noting that "Lewis does not challenge the district court's analysis of whether defendants violated the [Jimersons'] rights under federal law"), 17a (Dennis, J., dissenting) ("[I]t is undisputed that Lewis violated the Jimersons' Fourth Amendment rights[.]"), 54a (district court holding that Lewis's actions "resulted in an unconstitutional search").

On the law, the constitutional question is important—going to the very heart of whether the Fourth Amendment truly guarantees the right of the people to be secure in their houses against unreasonable searches. U.S. Const. amend. IV. And its application is simple. The dispositive issue—for both the circuit split and the outcome of this case—is whether *Maryland* v. *Garrison* clearly established the law.

I. The circuits are split over whether *Maryland* v. *Garrison* clearly established the law.

In *Maryland* v. *Garrison*, Baltimore police officers executed a search warrant at the wrong apartment because they mistakenly believed that a building's third floor contained one unit, rather than two. 480 U.S. at 80. Before executing the warrant, the officers attempted to identify their target, but none of their efforts alerted them to the fact that the third floor contained two apartments.[5] *Id.* at 88. Even the suspect—who met the police outside the complex and gave them the key to the third floor—did not mention that he had a neighbor. *Id.* at 81 & n.2. So when the officers executed the warrant, they "reasonably believed [the suspect] was the only tenant on that floor." *Id.* at 85 n.10.

Because "[t]he objective facts available to the officers at the time suggested no distinction between" the apartments, *Garrison* held that the search complied with the Fourth Amendment. *Id.* at 88 (Stevens, J., joined by Rehnquist, C.J., and White, Powell, O'Connor, and Scalia, JJ.). If the officers "had known, or should have known, that the third floor contained two apartments[,]" however, *Garrison* explained that the search of the wrong apartment would have been unconstitutional. *Id.* at 86–87. The inquiry boils down to diligence: Before executing a warrant, officers must make "a reasonable effort to

[5] For instance, the officers (1) reviewed the warrant, which authorized a search of the entire third floor; (2) traveled to the complex before executing the warrant to confirm that it matched the confidential informant's (and the warrant's) description; (3) confirmed with the utility company that only one customer resided on the third floor; and (4) verified through police records that the suspect lived at the address. *Garrison*, 480 U.S. at 80–82, 85 n.10.

ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id.* at 88. In *Garrison*, they did, and none of their efforts revealed they were about to search the wrong place—even though they were. *Ibid.*

Three circuits have held that *Garrison* clearly established the law for wrong-house searches: Officers must make "a reasonable effort" to ensure that they don't search the wrong house by confirming the address or conspicuous features of the house to be searched. If officers fail in this basic constitutional requirement, they cannot claim qualified immunity. But by characterizing *Garrison* as a mere statement of "general principle," rather than a clear establishment of the law, Pet. App. 11a, the decision below splits the Fifth Circuit from its sisters over whether and how *Garrison* applies to wrong-house raids.

A. *Garrison* clearly establishes the law in three circuits.

Over a span of more than two decades, three circuits have held that *Garrison* provides fair warning of the law governing wrong-house raids. In the Eighth, Ninth, and Eleventh Circuits, *Garrison* clearly established in 1987 that officers violate the Fourth Amendment when they search a house without first checking that it shares the address or conspicuous features of the place they intend to search. But the Fifth Circuit has now broken from this consensus.

As Judge Dennis observed in his dissent below, for example, the panel's decision splits the Fifth Circuit from the Eleventh Circuit's opinion in *Hartsfield* v. *Lemacks*, 50 F.3d 950 (11th Cir. 1995). Pet. App. 20a ("In light of *Hartsfield*'s guidance interpreting the clearly established

law in *Garrison*, the Jimersons rebutted Lewis' assertion of qualified immunity."). In *Hartsfield*, an officer "had the warrant in his possession" but "did not check to make sure that he was leading the other officers to the correct address." *Id.* at 955. At the officer's command, police raided 5128 Middlebrooks Drive, rather than 5108. *Id.* at 951–952. Just as here, the correct house was at least two doors down, the house numbers were clearly marked, and only one house had a fence around it. *Ibid.*

The Eleventh Circuit denied qualified immunity. It explained that *Garrison* clearly established that "a warrantless search of a residence violates the Fourth Amendment, unless the officers engage in reasonable efforts to avoid error." *Id.* at 955. The officer's failure to recognize differences between the houses—paired with his failure to verify the address—violated this clearly established law.[6] *Ibid.*

In *Dawkins* v. *Graham*, the Eighth Circuit held it was clearly established "under *Garrison*, [that] the execution of a valid warrant on the wrong premises violates the Fourth Amendment if the officers should know the

[6] The panel attempted to reconcile its decision below with *Hartsfield* by claiming that Lewis "was far more careful" than the officer there. Pet. App. 14a. But in both cases, the officers "could have easily avoided the mistaken entry by 'simply checking' the house number or using other information at [their] disposal to identify the correct residence." *Id.* at 19a–20a (Dennis, J., dissenting) (quoting *Hartsfield*, 50 F.3d at 955). Despite Lewis's preparation before he left the office that day, he failed to employ any of the information he learned about the target residence when it came time to identify the place to be searched. As Judge Dennis pointed out, doing so would have been easy. *Ibid.* And, if anything, Lewis's repeated confirmation that he was supposed to search 573 8th Street makes his search of 593 8th Street more unreasonable—not less.

premises searched are not the premises described in the warrant[.]" 50 F.3d 532, 534 (8th Cir. 1995). Under this standard, the court denied qualified immunity to the officers who entered 611 Adam Street instead of 611 Byrd Street (one block away) because the streets were clearly marked and the houses were different colors. *Id.* at 533–534.

The Ninth Circuit similarly held that *Garrison* clearly established that an officer must "act[] reasonably, based on information about the * * * premises that he knew or should have known, to assure that the wrong place was not searched." *Navarro* v. *Barthel*, 952 F.2d 331, 333 (9th Cir. 1991) (per curiam). In *Navarro*, a warrant authorized the search of "the second house on the right," but an officer directed others to search the third house, counting the one on the corner. *Ibid.* When the homeowners sued, the court held that qualified immunity did not shield the officer. *Ibid.*

All three of these cases stand for a common proposition: *Garrison* clearly established that an officer violates the Fourth Amendment when he searches a house without checking the address or conspicuous features of the house to be searched.

Until now, the Fifth Circuit also shared this understanding of *Garrison*. In *Sampson* v. *Regional Controlled Substance Apprehension Program*, 48 F.3d 531 (5th Cir. 1995) (precedential summary calendar opinion),[7] the court denied qualified immunity to officers who executed a warrant at the wrong apartment, despite discovering two apartments in the building once they arrived. *Id.* at

[7] In the Fifth Circuit, "[u]npublished opinions issued before January 1, 1996, are precedent." 5th Cir. R. 47.5.3.

*3. Because the officers were "on notice of the risk that they might search the wrong residence[,]" their failure to "mak[e] any attempt to more definitively ascertain which was the correct apartment" before they "busted in[]" violated clearly established law. More pointedly, *Sampson* held that the officers violated "the rule of *Garrison*." *Ibid.*

B. *Garrison* does not clearly establish the law in the Fifth Circuit.

Through its decision below, the Fifth Circuit splits from its sisters and now disclaims its prior understanding that there is a "rule of *Garrison*" at all.[8] Rather than clearly establishing the law, the Fifth Circuit holds, *Garrison* merely announced a "general principle" insufficient to provide "fair warning" for qualified immunity.[9] Pet.

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[8] Although this petition only relies on precedential circuit decisions in describing the split, unpublished decisions stand on both sides as well. Compare, *e.g.*, *Gomez* v. *Feissner*, 474 Fed. Appx. 53, 55–56 (3d Cir. 2012) (holding that *Garrison* staked out "a clearly established right to be free from a search of one's home by officers who know or should know that such a search is unauthorized" and denying qualified immunity to an officer who searched 9 West Monroe Avenue while executing a warrant for 11 West Monroe Avenue), with, *e.g.*, *Velasco* v. *Fairall*, 134 F.3d 365, *1–2 (4th Cir. 1998) (table) (suggesting without clearly holding that *Garrison* provides only the general principle that the Fourth Amendment safeguards "a right to privacy in [one's] own home and to be secure in it" and granting immunity to an officer who executed a warrant for 14827 Belle Ami Drive at 14823 Belle Ami Drive because he "misunderst[ood] [his team leader's] response to his verification request as confirmation that 14823 was the correct residence").

[9] Cf. *Mazuz* v. *Maryland*, 442 F.3d 217, 227–229 (4th Cir. 2006) (quoting *Garrison*, 480 U.S. at 87, for the proposition that courts "need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants" and finding no Fourth Amendment violation when

App. 11a, 14a (citations omitted). So according to the decision below, there is "no[] cited authority demonstrating that Lewis's conduct violated clearly established law." As a result, in the Fifth Circuit, an officer can now evade accountability for breaking down an innocent family's door and holding them at gunpoint so long as he takes *some* preparatory steps—even if these steps would lead any reasonable officer to conclude that his warrant authorizes the search of a different house.

Had the panel concluded that *Garrison* clearly established the law, it would have had to deny qualified immunity. Indeed, as the panel noted, the district court found that Lewis's "actions were '[in]consistent with a reasonable effort to ascertain and identify the place intended to be searched,' quoting *Maryland* v. *Garrison*[.]" Pet. App. 7a; see also Pet. App. 53.[10] But the panel decided that

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a police officer with a warrant for dorm room 5110 searched room 5108 instead because the "room number 5110 * * * was on the wall between [the] rooms").

[10] Before explaining why Lewis's actions failed the meet the *Garrison* rule, the district court summarized that Lewis (1) reviewed the search warrant, which listed the address to be searched as 573 8th Street (not 593); (2) looked up the target residence (again, 573, not 593) through a city appraisal website; (3) ran a computerized criminal history search of the occupant of 573 8th Street (who was not one of the Jimersons); (4) was briefed by federal agents; (5) considered "real-time intelligence" about vehicle movement in front of 573 8th Street (not 593); (6) observed 593 8th Street and took note of the front windows, driveway, and the numbers on the front of the house (which read "593," not "573"). Pet. App. 51.

The district court explained that these efforts were insufficient under *Garrison* because there were several things "a reasonable police officer" in Lewis's position "could have reasonably done or noticed" to avoid raiding the wrong house: (1) "Simply checking the warrant and looking down at the curb would have avoided [the] mistaken order to

neither *Garrison* nor *Hartsfield* were sufficient to "demonstrat[e] that Lewis's conduct violated clearly established law." Pet. App. 14a.

Under *Garrison*, the Fifth Circuit should have had no trouble concluding that Lewis's actions violated clearly established law. Lewis knew the warrant authorized officers to search 573 8th Street. He knew what the target house looked like, and he knew where it displayed its address. And if he forgot, there was no time pressure preventing him from double-checking the warrant. See Pet. App. 54a. Thus, as soon as Lewis realized that the officers mistakenly gathered at 583 8th Street—the wrong house—he was "on notice of the risk" that he might be in the wrong place. See *Garrison*, 480 U.S. at 87. At that point, any reasonable officer would have taken a moment to ensure that he redirected the SWAT team to the correct house.[11] Instead, Lewis hastily ordered the officers to raid the Jimersons' house at 593 8th Street without confirming the address or noticing the obvious physical

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enter the wrong house"; (2) Lewis "had the option to count the houses as he * * * proceeded down 8th Street" because he knew 573 8th Street was the thirteenth house; (3) "the undisputed evidence shows a glaring difference between [Petitioners'] residence and the target location," specifically a large wheelchair ramp; and (4) "the target residence and [Petitioners'] residence were separated by one other residence, which the SWAT team first approached before being directed away by" Lewis. Pet. App. 52–54a.

But, block-quoting the same six examples "the district court summarized" (and deemed constitutionally insufficient), the panel concluded that "Lewis erred, but he made significant efforts to identify the correct residence." Pet. App. 13a–14a.

[11] See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982) ("Where an official could be expected to know that certain conduct would violate * * * constitutional rights, he should be made to hesitate[.]").

differences between the houses—including the impossible-to-miss wheelchair ramp that officers had to ascend to breach the Jimersons' door.[12] Pet. App. 52a (district court finding that "the undisputed evidence shows a glaring difference between [the Jimersons'] residence and the target location"). And perhaps most importantly, "Lewis did not even check the number of the house before instructing the SWAT team to execute the warrant on the Jimersons' home[.]" *Id.* at 16a (Dennis, J., dissenting) (citation omitted).

None of Lewis's actions reflected a "reasonable effort to ascertain and identify the place intended to be searched" that this Court required of the officers in *Garrison*. Indeed, Lewis's actions match the example that *Garrison* specifically distinguished from its finding of reasonableness—"a situation in which police know there are two apartments on a certain floor of a building, and have probable cause to believe that drugs are being sold out of that floor, but do not know in which of the two apartments the illegal transactions are taking place." 480 U.S. at 88 n.13. Lewis did not confront two apartments on the same floor, but two houses on the same block. His actions were, therefore, more unreasonable than those outlined in *Garrison*'s footnote.

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[12] As the district court noted, even the after-action photos, *supra* p. 6, are "of major significance because the photograph of Plaintiffs' residence included an attachment [the wheelchair ramp] that was markedly different from the target residence * * * that should have been readily apparent to any reasonably competent officer." Pet. App. 48a–49a. Simply put, "[t]he presence of the ramps should have been a 'dead giveaway' that [Petitioners'] house was not the target location." *Id.* at 53a.

Through the decision below, the Fifth Circuit discarded the rule of *Garrison* and created a circuit split on an issue of Fourth Amendment law that goes to the very foundation of Americans' security in their houses from unreasonable searches—indeed, dangerous and destructive raids. See, *e.g.*, *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). Had the Jimersons' home been located in Georgia, Minnesota, or California, *Garrison* would clearly establish the law. But in Texas it does not.

Only this Court's intervention can ensure the uniform interpretation of *Garrison* and, with it, the Fourth Amendment's uniform protection of American homes.

* * *

Alternatively, the Fifth Circuit's grant of qualified immunity is appropriate for summary reversal because conducting a preventable SWAT raid on the wrong house without confirming its address obviously violates the Constitution.[13] The Court has explained that qualified immunity is unavailable to "the plainly incompetent," "those who knowingly violate the law," *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986), and those who commit obvious constitutional violations, *Hope*, 536 U.S. at 741–742. On the latter point, *Hope* instructs that "a general constitutional rule already identified in the decisional law may apply with

[13] See, *e.g.*, *Shoop* v. *Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting from denial of certiorari) (noting that summary reversal is appropriate when an appellate decision is "obviously wrong and squarely foreclosed by [Supreme Court] precedent" and "particularly appropriate" when the appeals court committed a "fundamental erro[r] that this Court has repeatedly admonished [it] to avoid." (quotations omitted)).

obvious clarity to the specific conduct in question[.]" *Id.* at 741. Thus, even if the decision below is correct that the rule of *Garrison* is merely a "general principle," Pet. App. 11a, it is one that applies with obvious clarity here.

To begin, the unconstitutionality of Lewis's actions is not only obvious, but uncontested. The Fourth Amendment guarantees Americans the right "to be secure in their houses against unreasonable searches." U.S. Const. amend. IV (cleaned up). Here, "Lewis does not challenge" that he violated the Jimersons' rights. Pet. App. 9a. That should have resolved the matter, but the Fifth Circuit sidestepped this necessary conclusion by reasoning that Lewis could not have known that his unreasonable efforts were constitutionally deficient under *Garrison* (or other clearly established law).[14]

But even if Lewis had defended the constitutionality of his actions, they defy basic Fourth Amendment principles. *Garrison*'s rule of reasonableness, after all, derives from the Fourth Amendment's prohibition on unreasonable searches. And this Court has long held that the core of the Fourth Amendment protects "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). When an officer has detailed information describing the place to be searched—including photos and an address—but fails to confirm that information matches the house he's about to search,

[14] In the same way that *Hope* relied on "an Alabama Department of Corrections (ADOC) regulation[] and a DOJ report informing the ADOC of the constitutional infirmity of" the actions at issue, 536 U.S. at 741–742, the fact that Lewis's actions "completely overlooked" his department's "reasonable and normal protocol," Pet. App. 6a, provides yet another basis to deny him qualified immunity.

despite having the opportunity to do so, breaking into the wrong house obviously violates the Fourth Amendment. Here, "Lewis did not even check the number of the house before instructing the SWAT team to execute the warrant on the Jimersons' home[.]" Pet. App. 16a (Dennis, J., dissenting). This, standing alone, should defeat his claim to qualified immunity: Every reasonable officer would know, if there is an address to check, he must check it before launching a raid.

The Fifth Circuit should have denied Lewis qualified immunity. Applying these principles, this Court has summarily reversed the Fifth Circuit twice in recent years for granting qualified immunity to shield obvious constitutional violations. See *Taylor* v. *Riojas*, 592 U.S. 7, 7–10 (2020) (per curiam); *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021) (mem.). If the Court does not grant the petition to address the question presented, summary reversal is an appropriate alternative.

II. This case is a good vehicle because the facts are undisputed, the issue is important, and the application is simple.

This case is a good vehicle to address the question presented because the facts are straightforward and undisputed; the issue is important; and the question presented can be answered by the application of a single decision of this Court. As the Fifth Circuit noted, there are "no genuine disputes of material fact," and Lieutenant Lewis did "not challenge [the finding that he] violated [Petitioners'] rights under" the Fourth Amendment. Pet. App. 3a (facts), 9a (concession). Thus, this case hinges solely on whether *Maryland* v. *Garrison* clearly established the Jimersons' Fourth Amendment rights. Holding that it did

not, the decision below created a circuit split and wrongly extended immunity to an officer who directed a SWAT team to raid an innocent family's home without even checking the address posted next to the front door.

Facts. The material facts here are not in question: Led by Lewis, a SWAT team gathered on the front porch of the wrong house to execute a search warrant. Once Lewis realized that they were at the wrong house, he quickly ordered the officers to move in the opposite direction from their target and execute the warrant at *another* wrong house—the Jimersons'. At the time, Lewis knew the target address and the physical features of the target house. And although he could have done so, Lewis failed to confirm or otherwise ascertain these critical details before ordering the SWAT team to "break and rake" the Jimersons' house. No factual disputes cloud the question presented or its application to this case.

Importance. This case illustrates the confusion surrounding and inconsistent application of the clearly-established-law test. All agree that Lewis violated the Fourth Amendment. Pet. App. 9a. This means that all agree Lewis's raid was unconstitutional and unreasonable. See *ibid.* And all agree that this Court has held that officers executing a search warrant must make "reasonable effort[s] to ascertain and identify the place intended to be searched." *Id.* at 11a (citing *Garrison*, 480 U.S. at 88). So Lewis knew from *Garrison* that he had to make a reasonable effort to ascertain the place he intended to search, and he concedes that he did not.

To grant Lewis qualified immunity anyway, the Fifth Circuit insists that *Garrison* could not put Lewis on notice of the efforts constitutionally required for identifying the correct house. Pet. App. 14a. The Fifth Circuit then

envisions a category of efforts that are "significant" but still unreasonable (as it must, given Lewis's concession on the merits). Pet. App. 13a ("Lewis erred, but he made significant efforts[.]"). Yet none of the efforts Lewis took included verifying the address posted on the Jimersons' house or confirming other conspicuous features. What more could *Garrison* have said to put Lewis on notice that a reasonable officer must check the address or other characteristics of the house he planned to search? The Fifth Circuit's approach to clearly established law creates huge swaths of unconstitutional conduct that is reasonably unreasonable, and thus shielded from liability—if not common sense. If searches can be reasonably unreasonable, there is little security left in the Fourth Amendment.

Simplicity. The question of clearly established law often implicates multiple decisions from multiple courts. See, *e.g.*, *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1, 6–7 (2021) (per curiam) ("assuming that Circuit precedent can clearly establish law for purposes of § 1983," holding that a Ninth Circuit case was "materially distinguishable and thus does not govern the facts of this case"). But this case rises or falls on the application of a single decision by this Court: *Maryland* v. *Garrison*. Either *Garrison* clearly established that officers violate the Fourth Amendment when they search the wrong house without checking the address or conspicuous features of the house to be searched, or it did not. The answer is dispositive of a circuit split and the outcome of this case.

CONCLUSION

The Court should grant the petition. If it does not, it should summarily reverse the decision below.

Respectfully submitted on October 24, 2024,

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APPENDIX

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Appendix A

Appendix A

Revised Opinion of the United States
Court of Appeals for the Fifth Circuit

February 15, 2024

Appendix A

REVISED FEBRUARY 15, 2024

United States Court of Appeals
For the Fifth Circuit

No. 22-10441

KAREN JIMERSON; JJ; JJ; XP; JP,

Plaintiffs–Appellees,

versus

MIKE LEWIS, LT,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-2826

Before STEWART, DENNIS, AND SOUTHWICK, *Circuit Judges*. LESLIE H. SOUTHWICK, *Circuit Judge*:

A search warrant showed the correct address for the target house, but police officers executed the warrant at an incorrect address. The homeowner brought suit against the officers under Section 1983. When

denying summary judgment on the issue of qualified immunity for the officer who led the search, the district court held that fact questions prevented deciding the issue. We find no genuine disputes of material fact. The disputed issue is one of law. We conclude that this officer's efforts to identify the correct residence, though deficient, did not violate clearly established law. REVERSED and REMANDED for dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2019, at approximately 7:15 p.m., Waxahachie Police Department ("WPD") SWAT Team Commander Mike Lewis received a call from a Drug Enforcement Administration ("DEA") officer. The DEA officer needed assistance executing a search warrant that night on a suspected methamphetamine "stash" house located at 573 8th Street, Lancaster, Texas ("target house"). The officer provided Commander Lewis with information about a drug deal involving the target house. Lewis requested further information, including pictures of the target house, whether "the location was fortified," whether "it appeared to have surveillance equipment," and whether "there were any exterior indicators on the property that children may be present." He also "requested identifying information on the [methamphetamine] seller, as well as prior law enforcement history at that address" involving the Lancaster Police Department ("LPD").

In response, Lewis received pictures showing the front of the house and was told there was "surveillance

established at the location." DEA agents told Lewis that they saw no fortification or surveillance cameras at the property or any evidence of children. The agents had no description of the people occupying the target house.

Lewis entered the information into the WPD SWAT's risk analysis assessment worksheet, which scored the incident within the range for "optional SWAT deployment." Consequently, Lewis contacted the WPD Chief and received approval to activate the SWAT team. He also gathered information on the target house from the Dallas Central Appraisal District website, including that the house was 744 square feet, was built in 1952, and had a "large, deeply extending backyard."

Lewis then briefed SWAT officers at the WPD. The group decided to have a six-member team enter the target house and a three-member team enter the detached garage and backyard. Thereafter, Lewis received "real-time intelligence that surveillance officers at the scene reported a truck pulling a white box trailer [had] pulled up in front of the target location."[1] When Lewis received a copy of the warrant, he confirmed the address of the target house. The officers then finalized their preparations. LPD Officer Zachary Beauchamp led the SWAT team to the target house. Beauchamp was followed by the SWAT team vehicle, then Lewis in his marked patrol unit, then the Waxahachie K9, and

[1] The record indicates that this intelligence was not accurate. Later investigation revealed that the white trailer was in front of 583 8th Street — not the target house.

then several unmarked DEA vehicles. Beauchamp was directed "to stop about a house before the target location, so SWAT officers could make an approach on foot."

When they arrived at the area, the SWAT team vehicle's driver saw Beauchamp's vehicle stop abruptly, "causing him to believe [Beauchamp] may have driven too far and stopped them too close to the target location." As the officers exited their vehicles, Beauchamp pointed to the house with the truck and white trailer in front of it, and officers began their approach. As the SWAT team began gathering on the front porch, however, Lewis realized that the house did not look like the house from intelligence photos. The SWAT team had assembled at 583 8th Street, not at the target house at 573 8th Street.

When Lewis looked one house to the left, he decided the layout of the front of that house matched the one in the intel photos. Lewis noticed that "[f]rom left to right, it had one large window, followed by the front entry door, followed by a small window and then [four] larger windows." He also noticed that "[t]he driveway was . . . on the left side of the property," and he believed numbers on the front of the house read "573," though the porch light obscured his view. This house, it turns out, was *also* the wrong house. The house Lewis identified was 593 8th Street, two doors down from the target house.

Nevertheless, Lewis told the team that they were at the wrong house and instructed them to "go to the

house just to the left of the house where they were." That house was the home of plaintiffs Karen Jimerson, James Parks, and their two young sons and daughter. Officers ran to the front of the plaintiffs' house, deployed a flashbang, broke the front windows, and breached the door. The officers began a protective sweep and checked for occupants. They "encountered two females" whom they told to get on the ground. The officers then encountered an adult male, but before they could direct him to get down, SWAT team members yelled "Wrong House!"

The SWAT team left the plaintiffs' home and proceeded to the target house. After the target house was secured, Lewis returned to the plaintiffs' house, where he joined other DEA agents who were already checking on the plaintiffs' welfare. Plaintiff Karen Jimerson reported some pain in her side. Lewis called an ambulance and she was taken to the hospital. Lewis also coordinated with a glass company to make repairs and remained on the scene until 1:30 a.m.

A WPD internal investigation determined that "reasonable and normal protocol was completely overlooked" and the WPD Chief of Police stated that these kinds of mistakes should not happen. Lewis was suspended for two days without pay.

In September 2020, the plaintiffs brought this action under 42 U.S.C. § 1983. They alleged violations of the Fourth Amendment and several state laws against 20 John Doe defendants. They later amended their complaint, naming each of the individuals in the WPD

SWAT team who executed the warrant, including Lewis. Shortly thereafter, the plaintiffs' state-law tort claims were dismissed. The defendants moved for summary judgment based on qualified immunity, and the matter was referred to a magistrate judge for pretrial management.

The magistrate judge recommended the district court grant qualified immunity to all the officers, whether they entered the house or not. The magistrate judge also concluded the plaintiffs failed to show that Lewis did not make reasonable efforts to identify the target house.

The district court agreed with the magistrate judge's analysis on qualified immunity except with respect to whether Lewis made reasonable efforts to identify the target house. The court found "a genuine dispute of material fact regarding whether [Lewis] made the necessary reasonable effort to identify the correct residence and whether his actions were '[in]consistent with a reasonable effort to ascertain and identify the place intended to be searched,'" quoting *Maryland v. Garrison*, 480 U.S. 79, 88 (1987). The court denied Lewis qualified immunity. Lewis timely appealed.

DISCUSSION

Federal and state officials may be entitled to qualified immunity from claims for money damages for their actions. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). To overcome this defense, a plaintiff needs to plead plausible facts "(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." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

If the district court denies qualified immunity either on a motion to dismiss or on summary judgment, the defendant official may immediately appeal under the collateral order doctrine. *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996). Here, summary judgment was denied, and our review is *de novo*. *Joseph ex rel. Joseph v. Bartlett*, 981 F.3d 319, 331 (5th Cir. 2020). Review is limited to considering issues of law, including the legal significance of factual disputes identified by the district court. *Id.* at 331. That means "we may evaluate whether a factual dispute is *material* (*i.e.*, legally significant), but we may not evaluate whether it is *genuine* (*i.e.*, exists)." *Id.* (emphasis in original). "Because the plaintiff is the non-moving party, we construe all facts and inferences in the light most favorable to the plaintiff." *Melton*, 875 F.3d at 261.

As a preliminary matter, Lewis argues the plaintiffs failed to plead and argue that his efforts to identify the correct house were unreasonable. A plaintiff seeking to overcome qualified immunity "must specifically identify each defendant's personal involvement in the alleged wrongdoing." *Thomas v. Humfield*, 32 F.3d 566, 1994 WL 442484, at *5 (5th Cir. 1994). The plaintiffs complied with the need for specificity by alleging in the complaint that Lewis "was the person in charge" of the mistaken raid on their home, and in their summary judgment arguments that Lewis was the "overall lead-

er of [the] misconduct" and that he overlooked "reasonable and normal protocol."

As to the merits, Lewis does not challenge the district court's analysis of whether defendants violated the plaintiffs' rights under federal law. The Fourth Amendment provides that individuals have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The Supreme Court has held that officers must make "reasonable effort[s] to ascertain and identify the place intended to be searched" in order to comply with the Fourth Amendment. *Garrison*, 480 U.S. at 88. To be clear about an occasional irrelevant addition to the proper analysis, we do not consider whether the officer's actions were "objectively unreasonable." That quoted standard is a "vestige of older caselaw that predates the Supreme Court's current test." *Parker v. LeBlanc*, 73 F.4th 400, 406 n.1 (5th Cir. 2023). In another precedential rejection of an "objectively unreasonable" component of qualified immunity, we held there is no "standalone 'objective reasonableness' element to the Supreme Court's two-pronged test for qualified immunity." *Baker v. Coburn*, 68 F.4th 240, 251 n.10 (5th Cir. 2023).

We evaluate the reasonableness of Lewis's actions because the plaintiffs' claims arise under the Fourth Amendment. The district court denied qualified immunity because the court found a "genuine dispute of material fact regarding whether [Lewis] made the necessary reasonable efforts to identify the correct residence." As we stated earlier, we cannot review a dis-

trict court's determination that a factual dispute is genuine. *Bartlett*, 981 F.3d at 331. We are to decide, though, legal significance, *i.e.*, whether disputed facts are material to resolution of the case. *Id.*

The district court did not find evidentiary disputes about what Lewis and others did before entering the incorrect house. The court stated that the central dispute was whether those actions constituted "necessary reasonable efforts." Certainly, unlike here, exactly what an officer did may sometimes be factually unclear. A court's determination of reasonableness under the Fourth Amendment, though, "'is predominantly an objective inquiry.'" *al-Kidd*, 563 U.S. at 736 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000)). The circumstances are to be "viewed objectively" and a determination made of whether they "justify" the search. *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

Consequently, as a legal issue for our *de novo* review, we consider whether Lewis's conduct violated clearly established law. *See id.* at 325–26. Clearly established law is determined by reference to "controlling authority[,] or a robust consensus of persuasive authority." *Delaughter v. Woodall*, 909 F.3d 130, 139 (5th Cir. 2018) (citation omitted). The keystone in this analysis is fair warning. *Id.* at 139–40. To overcome qualified immunity, plaintiffs must cite "a body of relevant case law [] in which an officer acting under similar circumstances . . . was held to have violated" a defendant's constitutional rights. *Bartlett*, 981 F.3d at 330 (quotation marks and citations omitted). "While there

need not be 'a case directly on point,' the unlawfulness of the challenged conduct must be 'beyond debate.'" *Id.* (quoting *al–Kidd*, 563 U.S. at 741).

Compliance with the Fourth Amendment requires a law enforcement officer's "reasonable effort[s] to ascertain and identify the place intended to be searched." *Garrison*, 480 U.S. at 88. In applying that general principle, the district court relied on two opinions. One was a nonprecedential opinion of this court. *Rogers v. Hooper*, 271 F. App'x 431 (5th Cir. 2008). The other was nonprecedential in the Fifth Circuit because it was issued by a different circuit court of appeals. *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995).[2] The plaintiffs do not cite any other authority.

In *Rogers*, we affirmed a grant of qualified immunity. *Rogers*, 271 F. App'x at 436. Officers secured a warrant to search a suspected drug house. *Id.* at 432. Before executing the warrant, officers drove by the target house to confirm its location. *Id.* They saw a maroon vehicle parked in front of the target house. *Id.* The officers then briefed their team on the location of the

[2] A nonprecedential opinion "cannot be the source of clearly established law for qualified immunity analysis." *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019). Nevertheless, such opinions may be used to illustrate clearly established law. *Bartlett*, 981 F.3d at 341 n.105; *see also Cooper v. Brown*, 844 F.3d 517, 525 n.8 (5th Cir. 2016). As for *Hartsfield*, "[w]e have not previously identified the level of out-of-circuit consensus necessary to put the relevant question 'beyond debate'" and to constitute clearly established law. *Morrow v. Meachum*, 917 F.3d 870, 879 (5th Cir. 2019) (quoting *al-Kidd*, 563 U.S. at 741). It is unlikely that one out-of-circuit case is sufficient.

home and developed a plan for executing the warrant. *Id.* The night of the warrant's execution, however, the maroon vehicle was parked in front of the house next door to the target house. *Id.* Officers broke into that house before ultimately realizing their mistake. *Id.*

We emphasized that the officers made several efforts to identify the correct residence, including conducting "initial surveillance of the house shortly before the warrant was executed, though [the officers] increased the chance for mistake by approaching the house in the opposite direction than they would use later." *Id.* at 435. There were differences in appearance between the mistaken house and target house, but "those differences were less noticeable at night." *Id.* Further, we acknowledged the confusion that arose from the fact that "a car that earlier had been thought to be in front of the house to be searched was instead in front of the [p]laintiffs' home when the search began." *Id.* "[T]he officers made reasonable efforts, though obviously insufficient ones, to identify the correct house." *Id.*

In *Hartsfield*, the Eleventh Circuit determined that an officer was not entitled to qualified immunity when he executed a warrant at the wrong residence. 50 F.3d at 956. The officer had been to the proper residence the day before. *Id.* at 951. On the day of the raid, though, he did little to ensure he was leading officers to the correct address:

> As it is uncontroverted that the numbers on the houses are clearly marked, and that the raid

> took place during daylight hours, simply checking the warrant would have avoided the mistaken entry. Moreover, evidence before the court showed that the houses were located on different parts of the street, separated by at least one other residence, and that their appearances were distinguishable.

Id. at 955. "[S]earching the wrong residence when [the officer] had done nothing to make sure he was searching the house described in the warrant" violated clearly established law. *Id.*

The dissent argues *Hartsfield* and *Rogers* constitute clearly established law that distinguishes Lewis's actions as objectively unreasonable under the fair warning analysis. Even if these two nonprecedential opinions were indicative of clearly established law, they would not support that Lewis violated that law. Lewis erred, but he made significant efforts to identify the correct residence. As the district court summarized, Lewis

> (1) reviewed the search warrant; (2) conducted additional searches on the target residence through the Dallas Central Appraisal District website; (3) ran a computerized criminal history search of the occupant of the target residence; (4) debriefed with DEA agents twice; (5) was provided with "real-time intelligence that surveillance officers at the scene reported a truck pulling a white box trailer just pulled up in front of the target location and stopped;" and (6) ob-

> served the home and took note of the front windows, driveway, and the numbers on the front of the home in an attempt to confirm the residence as being the target location.

To elaborate on that final point, Lewis was careful to confirm the house had the proper arrangement and size of windows, but only later became aware that those window features were shared by the plaintiffs' home. Moreover, Lewis's confusion was compounded by misleading intelligence. When officers arrived, the white trailer was not parked in front of the target house. Lewis correctly identified that fact, but then erred in redirecting the officers. Lewis was far more careful than the officers in the two opinions cited to us as showing he violated clearly established law.

The "central concern" when evaluating the immunity question "is whether the official has fair warning that his conduct violates a constitutional right." *Delaughter*, 909 F.3d at 140. That means the "dispositive question is whether the violative nature of *particular* conduct is clearly established." *Morrow*, 917 F.3d at 875 (emphasis in original) (quotation marks and citation omitted). Here, the plaintiffs have not cited authority demonstrating that Lewis's conduct violated clearly established law.

We REVERSE the district court's denial of summary judgment to Lewis and REMAND in order for the district court to dismiss this suit.

JAMES L. DENNIS, *Circuit Judge*, dissenting:

I respectfully dissent from the majority opinion. The district court properly denied qualified immunity to Lieutenant Mike Lewis, commander of the Waxahachie Police Department (WPD) SWAT team. The Jimersons' Fourth Amendment claim against Lewis is based on his failure to take sufficient steps to ensure that his team executed a no-knock warrant at the correct address. The district court found that factual disputes as to the reasonableness of Lewis' efforts to identify the target house precluded granting qualified immunity to Lewis. While I agree with the majority's finding that there are no factual disputes as to Lewis' actions in leading the SWAT team to the wrong residence, I disagree that Lewis is entitled to qualified immunity[1] under clearly established law.

Based on the undisputed facts in this case, Lewis failed to use the intelligence he received from the Drug Enforcement Administration (DEA) that would have

[1] It's worth noting that one of our colleagues recently suggested that "the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*." *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring); *see also* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 207–08 (2023) (arguing that "the problem with current qualified immunity doctrine is not just that it departs from the common law immunity that existed when Section 1983 was enacted," but also that "no qualified immunity doctrine at all should apply in Section 1983 actions, if courts stay true to the text adopted by the enacting Congress and other evidence of legislative intent").

easily allowed him to direct the SWAT team to the target house. The DEA alerted Lewis that the house number was painted on the curb and affixed to a wooden pole on the deck, and that the target house was the thirteenth one on the block. Despite having this information, Lewis did not even check the number of the house before instructing the SWAT team to execute the warrant on the Jimersons' home—separated from the target house by more than one[2] residence—by deploying a flash bang, breaking all their front windows using the "break and rake" technique, and forcing open the front door. Lewis wrote in an incident report that he "believed" the numbers on the Jimersons' home to be that of the target house, despite the fact that he admitted his view was obscured because the Jimersons "had a brightly glowing porch light directly above them that was causing a reflection on the siding of the house." Regardless of Lewis' ability to see the numbers on the home, the search warrant alerted him that the target house number was written on the curb in front of the house and on a wooden pole supporting the house—not on the front of the house like at the Jimerson residence. Even more glaring are the notable physical distinctions between the two houses: while there is a prominent wheelchair ramp that protrudes from the Jimerson house with railings that appear to be waist-high, the target house had no such ramp and featured a

[2] As the majority opinion acknowledges, the SWAT team initially assembled on the front porch of the wrong house. After Lewis recognized that the SWAT team was at the wrong house, he instructed the SWAT team to execute the warrant on the Jimerson residence, which was in the *opposite* direction of the target residence.

chain-link fence around the perimeter of the property—differences evident from the photographs of the target house provided to Lewis before the execution of the warrant.

Though it is undisputed that Lewis violated the Jimersons' Fourth Amendment rights in executing a SWAT-style entry into their home without a warrant, the majority finds that the Jimersons' claim fails because the unlawfulness of Lewis' actions were not clearly established law.[3] Specifically, the majority concludes that there is not enough legal authority supporting the Jimersons' contention that Lewis' efforts to locate the target residence were constitutionally deficient. While the majority is certainly correct that "[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right," *Mullenix v. Luna*, 577 U.S. 7, 11 (2015), they nonetheless unfairly limit the legal authority the Jimersons may rely on in rebutting Lewis' assertion of qualified immunity. The "focus" of the qualified immunity analysis is whether

[3] We have sometimes described the second prong of the qualified immunity analysis as an inquiry into whether an official's "actions were objectively unreasonable in light of clearly established law." *See, e.g.*, *Roque v. Harvel*, 993 F.3d 325, 334 (5th Cir. 2021) (Willett, J.). The different phrasing is of no moment because, of course, violating a clearly established right *is* objectively unreasonable. *See Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017); *see also Anderson v. Creighton*, 483 U.S. 635, 653 (1987) ("Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law[.]"); *Horvath v. City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring) (quoting *Pearson v. Callahan*, 555 U.S. 222, 232 (2009)).

the officer had "fair notice" that his conduct was unlawful, and here the clearly established law gave Lewis ample warning of the constitutionally sufficient efforts required to ensure he directed the SWAT team to the correct residence. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (noting that the "focus" of qualified immunity analysis is "whether the officer had fair notice that her conduct was unlawful").

Contrary to the majority's assertion that there is no clearly established law that would have put Lewis on notice of the unlawfulness of his actions, the Supreme Court has stated that officers must make "a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Maryland v. Garrison*, 480 U.S. 79, 88 (1987). In *Garrison*, officers mistakenly executed a search warrant on the wrong apartment because they believed that the third floor of an apartment complex contained only one rather than two apartments. *Id.* There, the Supreme Court found that the officers made a reasonable effort to identify the correct apartment because "[t]he objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises." *Id.* Specifically, those officers made a "reasonable effort" to identify the target residence where they: (1) went to the premises to see if it matched the description given by an informant; (2) checked with the Baltimore Gas and Electric Company to ascertain in whose name the third floor apartment was listed; and (3) checked with the Baltimore Police Department to make sure that the description and address of the suspect matched the in-

formation provided by the informant. *Id.* at 81–82, 85–86 n.10.

Moreover, *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995) "aptly illustrates the established right" at issue in the Jimersons' claim against Lewis. *See id.* at 955 (recognizing as "clearly established law" that "absent probable cause and exigent circumstances, a warrantless search of a residence violates the Fourth Amendment, unless the officers engage in reasonable efforts to avoid error"); *see also Cooper v. Brown*, 844 F.3d 517, 525 (5th Cir. 2016) (explaining that where a case "does not constitute clearly established law for purposes of QI" it may still "aptly illustrates the established right"). In *Hartsfield*, the Eleventh Circuit denied qualified immunity where an officer "had the warrant in his possession" yet "did not check to make sure he was leading the other officers to the correct address" *Hartsfield*, 50 F.3d at 955. There, the officers' efforts to identify the target of the search warrant were insufficient where: (1) the numbers were clearly marked on the houses; (2) the houses were separated by at least one other residence; and (3) the houses were physically distinguishable; (4) there were no exigent circumstances; and (5) the raid occurred during the daytime. *Id.* at 952–55. Here, similarly, the numbers on the houses were clearly marked (despite it being nighttime), the houses were separated by at least one residence and were physically distinguishable, and there were no exigent circumstances. While Lewis arguably did more to identify the correct residence than the officer in *Hartsfield*, who "did nothing to make sure he was leading the officers to the correct residence,"

Lewis nonetheless could have easily avoided the mistaken entry by "simply checking" the house number or using other information at his disposal to identify the correct residence. *Id.* at 955. In light of *Hartsfield*'s guidance interpreting the clearly established law in *Garrison*, the Jimersons rebutted Lewis' assertion of qualified immunity.

Our unpublished decision in *Rogers v. Hooper*, 271 F. App'x 431 (5th Cir. 2008) also supports the denial of qualified immunity to Lewis. In *Rogers*, we affirmed a grant of qualified immunity to an officer who mistakenly led his team to the wrong house where: (1) the two houses were next to each other; (2) the officer had previously been at the correct house twice; and (3) the minor differences between the houses were "less noticeable at night." Here, in contrast, the houses were not next to each other, and Lewis could have easily checked the number of the target house that was painted on the curb and affixed to a wooden beam supporting the home's porch. Moreover, the obvious physical distinctions between the houses would have been noticeable even at night; while the target house had a chain-link fence around it, the Jimerson house did not have any fence and featured a wheelchair ramp with waist-high railings along it. Because Lewis did not take the same steps[4] as the officer in *Rogers* to identify the

[4] Notably, the officers in *Rogers* and *Garrison* each previously visited the correct houses as part of their efforts to identify the target of the search warrant, whereas here Lewis made no such attempts. *See Rogers*, 271 F. App'x at 433–43 (noting that the officers "had been at the correct house at least twice before"); *Garrison*, 480 U.S. at 86 n.10 ("The officer went to [the target residence]

correct residence, our nonprecedential case law supports the denial of qualified immunity.

In light of the efforts identified as adequate by the Supreme Court in *Garrison* and elaborated on by circuit courts, Lewis had "fair notice" of the minimum efforts required to comply with the Fourth Amendment when identifying a house for the purposes of executing a search warrant. *Brosseau*, 543 U.S. at 198; *see also Hope v. Pelzer*, 536 U.S. 730, 731 (2002) ("Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful."). As announced in *Garrison* and elucidated in *Rogers* and *Hartsfield*, it is "beyond debate" that Lewis' efforts to identify the target house were constitutionally deficient. *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011). The panel should affirm the district court's denial of Lewis' assertion of qualified immunity.

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and found that it matched the description given by the informant."). WPD Police Chief Wade Goolsby even testified that after this incident, the WPD implemented additional procedures requiring officers to "get[] eyes on the location so that [the officer] not only sees the target, but the surrounding homes" before executing a search warrant.

Appendix B

Appendix B

Supplemental Order of the United States District Court for the Northern District of Texas

April 4, 2022

Appendix B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JIMERSON, *et al.,*	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:20-CV-2826-L-BH
	§	
LT. MIKE LEWIS, *et al.,*	§	
Defendants.	§	

SUPPLEMENTAL ORDER

On March 31, 2022, the court filed a Memorandum Opinion and Order (Doc. 194), addressing the Findings, Conclusions, and Recommendation of the United States Magistrate Judge (Doc. 188) ("Report"), filed on February 28, 2022. The Report recommended that the court grant in part and deny in part Defendants' Motion for Summary Judgment (Doc. 167), filed on June 23, 2021. In its Memorandum Opinion and Order, the court rejected the magistrate judge's findings and conclusions that Defendant Lt. Mike Lewis should be entitled to qualified immunity. Although the court's Memorandum Opinion and Order did not include that the magistrate judge's findings of fact were clearly erroneous or that the conclusions were contrary to law, it is clear from the court's Memorandum Opinion and Order that such was the case

when it rejected the magistrate judge's findings of fact and conclusions of law as to whether Defendant Lt. Mike Lewis was entitled to qualified immunity.

To the extent that one has any doubt about the court's Memorandum Opinion and Order, the court expressly determines that the magistrate judge's findings of fact and conclusions of law were clearly erroneous and contrary to law, respectively. Accordingly, the court **issues** this order *nunc pro tunc*, as one that is effective as of March 31, 2022, on the same date and time as its Memorandum Opinion and Opinion was filed.

It is so ordered this 4th day of April, 2022.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District
Judge

Appendix C

Appendix C

Memorandum Opinion and Order of the United States District Court for the Northern District of Texas

March 31, 2022

Appendix C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JIMERSON, *et al.,*	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:20-CV-2826-L-BH
	§	
LT. MIKE LEWIS, *et al.,*	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the court is Named Defendants' Motion for Summary Judgment (Doc. 167), filed on June 23, 2021 ("Motion"). The case was referred to Magistrate Judge Irma Carrillo Ramirez, who entered the Findings, Conclusions, and Recommendation of the United States Magistrate Judge (Doc. 188) ("Report") on February 28, 2022, recommending that the court grant in part and deny in part the Motion. Specifically, the Report recommends that:

> All claims for Fourth Amendment violations against Dunn, Glidewell, J. Lewis, Taylor, and K9 Officer should be **DISMISSED** with prejudice on grounds of qualified immunity under the constitutional violation prong, and [Plaintiffs'] claims

> for unlawful entry and for unlawful search against Gonzales, Young, Fuller, Koch, Leader, and Commander should be **DISMISSED** with prejudice on grounds of qualified immunity under the objective reasonableness prong. Because no Fourteenth Amendment claims were asserted against them, Defendants' motion for summary judgment on the Fourteenth Amendment claims should be **DENIED** as moot. This action should be dismissed with prejudice as to Defendants.

Report 27.

On March 14, 2022, Plaintiffs filed objections to the Report (Doc. 192), contending that: (1) they did not agree to transfer this case to the magistrate, nor did the court authorize such transfer; (2) the magistrate judge erred by failing to follow summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure; (3) the magistrate judge erred by improperly conducting a "mini-trial" and acting as a "fact finder"; (4) the magistrate judge erred by failing to view the summary judgment evidence in the light most favorable to Plaintiffs; and (5) the magistrate judge improperly struck Plaintiffs' expert, Mr. Gill. *Id.* Named Defendants filed their response on March 24, 2022 (Doc. 193), agreeing with the findings, conclusions, and the recommendation in the Report. The court addresses each objection in turn, and for the reasons stated herein overrules Plaintiffs' objections.

Appendix C

I. Procedural Background

On September 11, 2020, Karen Jimerson, James Parks, Jyden Jimerson, Xavien Parks, and Jasamea Jimerson ("Plaintiffs") sued Lt. Mike Lewis of the Waxahachie Police Department ("WPD") SWAT team and 20 John Does alleging Fourth Amendment violations stemming from an execution of a search warrant at Plaintiffs' residence on March 27, 2019. Plaintiffs' First Amended Complaint likewise asserts claims against unidentified John Does 1 through 20 ("John Does"). It also names the following members of the WPD in their individual capacities as Defendants: Lt. Mike Lewis, Brent Dunn, Dustin Koch, Andrew Gonzales, Derrick Young, Brian Fuller, Stephen Sanders, James Lewis, O.T. Glidewell, James Taylor, Derek Berringer ("Named Defendants"). In addition, Zach Beauchamp was named as a Defendant, but he was previously dismissed with prejudice from the action pursuant to a joint stipulation (Doc. 151). On April 21, 2021, the court dismissed with prejudice Plaintiffs' state tort claims against the Named Defendants (Doc. 160).

II. Discussion

A. Objections to the Report

1. Alleged Transfer of Case to Magistrate Judge

Plaintiffs contend that this case was transferred to the magistrate judge, and they object to this alleged transfer. Doc. 192 at 1. This case was not transferred to the magistrate judge. Plaintiffs' objection shows their

lack of appreciation for the rules that allow a district judge to refer cases to a magistrate judge. Pursuant to 28 U.S.C. § 636(b)(1)(B), a district judge may "designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any [dispositive motion.]" Rule 72 of the Federal Rules of Civil Procedure also provides that a magistrate judge "must enter a recommended disposition, including, if appropriate, proposed findings of fact" for dispositive motions. Fed. R. Civ. P. 72. Additionally, the court issued a Standing Order of Reference (Doc. 159) on April 20, 2021, which stated:

> This case is hereby referred to United States Magistrate Judge Irma Carrillo Ramirez for pretrial management. All nondispositive motions, pending or prospective, are referred to the magistrate judge for determination. All dispositive motions, pending or prospective, are referred to the magistrate judge for findings of fact and recommendations. All other pretrial matters, including scheduling and alternative dispute resolution, are referred to the magistrate judge for appropriate action consistent with applicable law. Magistrate Judge Ramirez is to notify the court when the case is ready for a trial setting.

Doc. 159.

Consistent with 28 U.S.C. § 636, Rule 72, and the court's order, the magistrate judge issued the Report that made *recommendations* to the court concerning the disposition of the Motion. Because the magistrate judge acted consistent with the controlling statute and the court's orders, the court **overrules** Plaintiffs' first objection. Moreover, the magistrate judge did not dispose of the Motion; she merely made recommendations to the court through the Report. Accordingly, the court also **overrules** Plaintiffs' third objection that the magistrate judge conducted a "mini-trial" and was acting as a "fact finder." The magistrate judge may not make the final decision regarding the Motion. That is expressly reserved for this court.

2. Summary Judgment Standard and Application

Plaintiffs next contend that the magistrate judge erred by (1) failing to follow summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure; and (2) failing to view the summary judgment evidence in the light most favorable to Plaintiffs. Doc. 192 at 3-8. The court disagrees, except to the extent that it rejects the magistrate judge's findings as to the second prong of the qualified immunity test with respect to Defendant Lt. Mike Lewis.

Appendix C

a. Legal Standard for Summary Judgment

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all facts and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005). Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine dispute of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). On the other hand, "if the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative

defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original). "[When] the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine [dispute] for trial.'" *Matsushita*, 475 U.S. at 587. [sic] (citation omitted). Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*; *see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial,

summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

b. Analysis

The magistrate judge outlined the correct legal standard for summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure and proceeded to analyze the facts consistent with Rule 56 and controlling precedent.[1] In particular, the court agrees

[1] The court, similar to the Report, finds that Plaintiffs have not asserted a violation of the Fourteenth Amendment against the Named Defendants. Because Plaintiffs have only asserted allegations of unlawful searches and seizures, such claims fall under the Fourth Amendment, not the Fourteenth. *See Graham v.* Connor, 490 U.S. 386, 396 (1989) (holding that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a "substantive due process' approach.") (emphasis in original). Additionally, the court finds that Plaintiffs have not asserted an excessive force claim. The elements of an excessive force claim are: "(1) an injury; (2) which resulted directly and only from a use of force that was clearly excessive; and (3) the excessiveness of which was clearly unreasonable." *Ratliff v. Aransas County, Tex.*, 948 F.3d 281, 287 (5th Cir. 2020); *see Hanks v. Rogers*, 853 F.3d 738, 744 (5th Cir. 2017) (reciting that the second element of an excessive force claim requires that the force be "clearly excessive"); *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 727 (5th Cir. 2018) (same); *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000) (same); *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999) (same). Even if the court liberally construes Plaintiffs' allegations as having alleged an excessive force claim, they fail to raise a genuine dispute of material fact as to elements two and three. This is so because there is no evidence in the record that the use of force used on Plaintiffs was clearly

with the Report with respect to finding that the police officers who provided unchallenged declarations that they did not enter Plaintiffs' home are entitled to qualified immunity. *See Simmons v. City of Paris*, 378 F.3d 476, 481 (5th Cir. 2004) (finding officers were entitled to qualified immunity because there was no evidence that they entered the residence with the other officers). The court also agrees that when viewing the evidence in the light most favorable to Plaintiffs, the officers who did enter Plaintiffs' home immediately stopped searching the home upon learning it was the wrong residence. Moreover, Plaintiffs' summary judgment evidence does not identify which officers they assert remained in the residence after realizing their mistake. As such, those officers who entered Plaintiffs' residence are entitled to qualified immunity. *See id.* at 481. The court, therefore, **overrules** these objections. To the extent the court disagrees with the Report, the reasoning for the disagreement is analyzed below.

3. Striking of Plaintiffs' Expert Witness Under Rule 702

Plaintiffs next assert the magistrate judge erred by improperly striking Plaintiffs' expert, Mr. Gill. *See* Doc. 192 at 8-10. The court disagrees. For the reasons stated below, the court overrules this objection.

On March 8, 2021, Plaintiffs filed their expert disclosures under Federal Rule of Civil Procedure 26(a)(2) (Doc. 150). Plaintiffs listed Robert "Bob" Gill, currently

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excessive and that the excessiveness was clearly unreasonable. *See id.*

a practicing attorney in Fort Worth, Tarrant County, Texas, as a retained expert, and his report purports to address the unreasonableness of the Named Defendants' actions on March 27, 2019. *Id.* In their response to the Motion, Plaintiffs attach a declaration by Mr. Gill. Doc. 183, Exhibit 9. Named Defendants object and move to strike Mr. Gill and his declaration as inadmissible under Rule 702 of the Federal Rules of Evidence. Doc. 187 at 5. The Report recommends striking Mr. Gill and his declaration after finding his opinions were unreliable under Rule 702. Doc. 188 at 10.

a. Legal Standard for Expert Testimony

The admissibility of evidence is a procedural issue governed by federal law. *See Reed v. General Motors Corp.*, 773 F.2d 660, 663 (5th Cir. 1985). Federal Rule of Evidence 702 governs the admissibility of expert testimony and provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

The trial court acts as a "gatekeeper" to ensure that "any and all scientific evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms.*, Inc., 509 U.S. 579, 589 (1993). "*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge" that is non-scientific in nature. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). In *Kumho Tire*, the Supreme Court resolved a split among the circuits and held that *Daubert*'s "gatekeeping" function applied to all expert opinion testimony based on specialized knowledge, not merely scientific expert testimony.

As part of its gatekeeping role, the court determines the admissibility of expert testimony based on Rule 702, and *Daubert* and its progeny. The amendments to Federal Rule of Evidence 702, effective December 1, 2000, essentially codify *Daubert* and *Kumho Tire.* The Advisory Committee's Notes to Rule 702 state that the determination of whether an expert's opinions are reliable is based upon sufficient facts or data that calls for a "quantitative rather than qualitative analysis." In addressing this issue, the "question is whether the expert considered enough information to make the proffered opinion reliable. . . . The expert must base [his or her] opinion on at least the amount of data that a reliable methodology demands." 29 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 6268

(2d ed. 1987). Further, in reviewing a *Daubert* challenge, the court makes no credibility determinations; it only decides whether the threshold reliability standards have been satisfied. *See* Fed. R. Evid. 702 Advisory Committee's Notes (2000 Amendments).

"The court may admit proffered expert testimony only if the proponent . . . demonstrates that (1) the expert is qualified, (2) the evidence is relevant to the suit, and (3) the evidence is reliable." *E.E.O.C. v. S & B Indus., Inc.*, No. 3:15-CV-641-D, 2017 WL 345641, at *2 (N.D. Tex. Jan. 24, 2017) (citing *Kumho Tire Co.*, 526 U.S. at 147) (internal quotation marks omitted). The burden is on the proponent of the expert testimony to establish its admissibility by a preponderance of the evidence. *See Daubert*, 509 U.S. at 592 n.10; *Johnson v. Arkema, Inc.*, 685 F.3d 452, 459 (5th Cir. 2012). The court's inquiry is flexible in that "[t]he relevance and reliability of expert testimony turn[] upon its nature and the purpose for which its proponent offers it." *United States v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010) (citation omitted). To be relevant, "expert testimony [must] 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002) (quoting *Daubert*, 509 U.S. at 591). "Relevance depends upon 'whether [the expert's] reasoning or methodology properly can be applied to the facts in issue.'" *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 352 (5th Cir. 2007) (quoting *Daubert*, 509 U.S. at 593); *see also* Fed. R. Evid. 702(d) (requiring that an "expert has reliably applied the principles and methods to the facts of the case").

"Reliability is determined by assessing 'whether the reasoning or methodology underlying the testimony is scientifically valid.'" *Knight*, 482 F.3d at 352 (quoting *Daubert*, 509 U.S. at 592-93); *see also* Fed. R. Evid. 702(c) (requiring that "testimony [be] the product of reliable principles and methods"). "The reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, et alia." *Knight*, 482 F.3d at 355 (citation and internal quotation marks omitted). "The reliability prong mandates that expert opinion be grounded in the methods and procedures of science and . . . be more than unsupported speculation or subjective belief," *Johnson*, 685 F.3d at 459 (internal quotation marks omitted); however, "there is no requirement that an expert derive his opinion from firsthand knowledge or observation." *Deshotel v. Wal-Mart La., L.L.C.*, 850 F.3d 742, 746 (5th Cir. 2017) (internal quotation marks omitted).

"The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595; *Williams v. Manitowoc Cranes, L.L.C.*, 898 F.3d 607, 623 (5th Cir. 2018) (quoting *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004)). "The proponent need not prove to the judge that the expert's testimony is correct, but [it] must prove by a preponderance of the evidence that the testimony is reliable." *Johnson*, 685 F.3d at 459 (internal quotation marks omitted). On the other hand, if "there is simply too great an analytical gap between the [basis for the expert opinion] and the opinion proffered," the court may exclude the testimony as unreliable, as "nothing in

either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

"[C]ourts consider the following non-exclusive list of factors when conducting the reliability inquiry: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or method has been generally accepted by the scientific community." *Johnson*, 685 F.3d at 459 (internal quotation marks omitted). These factors, however, are not definitive or exhaustive. The reliability inquiry is flexible, and the district court conducting the *Daubert* analysis has discretion in determining which factors are most germane in light of the nature of the issue, the particular expertise, and the subject of the expert's testimony. *Daubert*, 509 U.S. at 593-95; *Kumho Tire Co.*, 526 U.S. at 142.

The Advisory Committee's Notes to Rule 702 contemplate that expert testimony may be based on experience, training, or both:

> Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the

> text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g.*, *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F. Supp. 1241, 1248 (M.D. La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

Fed. R. Evid. 702 Advisory Committee's Notes (2000 Amendments).

The Advisory Committee's Notes to Rule 702 further explain: "If the witness is relying solely or primarily on experience, then [he or she] must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.* This is because the "trial court's gatekeeping function requires

more than simply taking the expert's word for it" that the claimed basis supports the opinion. *Id.* (citation and internal quotation marks omitted); *Pipitone*, 288 F.3d at 245-47 (finding expert testimony reliable when the expert explained how his experience in the field led him to opine that an absence of contamination of some samples did not undermine his conclusion that the plaintiff's infection came from the same drug). Overall, the trial court must strive to ensure that the expert, "whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. at 152. As stated earlier, the relevance and reliability of expert testimony turn upon its nature and the purpose for which its proponent offers the testimony. *See, e.g., Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 195 (5th Cir. 2006) ("Of course, whether a proposed expert should be permitted to testify is case, and fact, specific.") (citing *Kumho Tire*, 526 U.S. at 150-51).

b. Analysis

The court does not find that Mr. Gill is qualified to offer opinions under Rule 702 on police and tactical procedures. Mr. Gill acknowledges that he has *some familiarity* with how SWAT teams operate. Some familiarity alone, however, is enough to disqualify him as an expert under Rule 702 because definitionally, having some familiarity does not meet the test under Rule 702. To qualify under Rule 702, a person has to have scientific or some otherwise specialized knowledge of the subject matter of which he or she intends to testify. *See* Fed. R.

Evid. 702. Nowhere in his CV or his report does Mr. Gill state he has specialized training, skill, or knowledge in police practices, particularly in areas of SWAT operations. Moreover, the court agrees with the magistrate judge that his opinions are conclusory, and that Mr. Gill fails to support his contentions. *See Pipitone*, 288 F.3d at 245-47 (5th Cir. 2002) (finding expert testimony reliable when the expert explained how his experience in the field led him to his opinions). Accordingly, the court determines that Plaintiffs have not met their burden of showing that Mr. Gill's expert testimony is reliable under Rule 702. In light of the standard enunciated by the court for the admission of expert testimony and in light of the court's findings, Mr. Gill is not qualified to testify as to tactical procedures with respect to execution of search warrants. Further, his opinions are neither relevant nor reliable. For these reasons, the court **strikes** his purported testimony and will not consider it in ruling on the issues presented.

B. Qualified Immunity

1. Legal Standard for Qualified Immunity

Government officials who perform discretionary functions are entitled to the defense of qualified immunity, which shields them from suit as well as liability for civil damages, if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A defendant official must affirmatively plead the defense of qualified immunity. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Named

Defendants asserted this defense in their motion for summary judgment.

In deciding a dispositive motion that raises the defense of qualified immunity, the Supreme Court initially set forth a mandatory two-part inquiry for determining whether a government official was entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under *Saucier*, a court must determine first whether the facts alleged or shown are sufficient to make out a violation of a constitutional or federal statutory right. If the record sets forth or establishes no violation, no further inquiry is necessary. On the other hand, if the plaintiff sufficiently pleads or establishes that a violation could be made out, the court must determine whether the right at issue was clearly established at the time of the government official's alleged misconduct. *Id.* The Court relaxed this mandatory sequence in *Pearson v. Callahan*, 555 U.S. 223 (2009), and stated, "[W]hile the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory," and judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236. The second prong of the test "is better understood as two separate inquiries: whether the allegedly violated constitutional right[] [was] clearly established at the time of the incident; and if so, whether the conduct of the defendant[] [official] was objectively unreasonable in light of that then clearly established law." *Hanks v. Rogers*, 853 F.3d 738, 744 (5th Cir. 2017*)* (quoting *Tarver v. City*

of Edna, 410 F.3d 745, 750 (5th Cir. 2005) (internal quotation marks and citations omitted)).

Ordinarily, one who pleads an affirmative defense must establish his entitlement to such defense. In the context of qualified immunity, however, this burden varies from the norm. In this circuit, the rule is as follows:

> Where . . . [a] defendant pleads qualified immunity and shows he is a governmental official whose position involves the exercise of discretion, the plaintiff then has the burden to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law. We do not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs.

Pierce v. Smith, 117 F.3d 866, 871-72 (5th Cir. 1997) (internal quotations and citations omitted); *see also Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

A right is "clearly established" only when its contours are sufficiently clear that a reasonable public official would have realized or understood that his conduct violated the right in issue, not merely that the conduct was otherwise improper. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Foster v. City of Lake Jackson*, 28 F.3d 425, 429 (5th Cir. 1994). Thus, the right must not only be clearly established in an abstract sense but in a more particularized sense so that it is apparent to the official that his actions [what he is doing] are unlawful in light of pre-existing law. *Anderson v. Creighton*, 483

U.S. at 640; *Stefanoff v. Hays County*, 154 F.3d 523, 525 (5th Cir. 1998); and *Pierce v. Smith*, 117 F.3d at 871.

In *Anderson*, 483 U.S. at 641, the Court refined the qualified immunity standard and held that the relevant question is whether a reasonable officer or public official *could have believed* that his conduct was lawful in light of clearly established law and the information possessed by him. If public officials or officers of "reasonable competence could disagree [on whether the conduct is legal], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995) (*citing Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994)). Qualified immunity is designed to protect from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. at 341. Conversely, an official's conduct is not protected by qualified immunity if, in light of clearly established pre-existing law, it was apparent the conduct, when undertaken, would be a violation of the right at issue. *Foster*, 28 F.3d at 429. To preclude qualified immunity, it is not necessary for a plaintiff to establish that "the [specific] action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640. For an official, however, to surrender qualified immunity, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what the defendant is doing violates federal law *in the circumstances*." *Pierce v. Smith*, 117 F.3d at 882 (emphasis in original and citation omitted); and *Stefanoff v. Hays County*, 154 F.3d at 525. Stated differently, while the law does not require a case directly on point, "existing

precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (citations omitted).

In analyzing qualified immunity claims, the Supreme Court has "repeatedly told courts . . . to not define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted). Pursuant to *Mullenix*, courts must consider "whether the violative nature of *particular* conduct is clearly established" and must undertake this inquiry "in light of the specific context of the case, not as a broad general proposition." *Id.* (citations and internal quotations marks omitted).

2. Analysis

The court agrees with the magistrate judge's analysis in the Report regarding qualified immunity and its application to the Named Defendants, except for the analysis of the second prong of the test of qualified immunity with respect to whether Defendant Lt. Mike Lewis ("Commander") acted objectively reasonable in his efforts to identify the correct house. The record in this case contains ample evidence for a reasonable jury to conclude that Commander acted objectively unreasonable prior to the execution of the search warrant. The court first focuses on the facts relevant to Commander's efforts to identify the correct home. In support of his efforts, Commander provides the following:

> I was put in contact with Ruben Felan via Tommy Hale. Ruben is an agent with the Drug Enforcement Agency and he gave me some basic

information on what they had [regarding the request for assistant in executing a search warrant at a house located at 573 8th St., Lancaster, Texas]

. . . .

I requested additional information from their team, including pictures of the target location, whether or not the location was fortified, whether or not it appeared to have surveillance equipment, whether or not children were present, and whether or not there were any exterior indicators on the property that children may be present.

. . . .

DEA agents provided me with pictures of the front of the residence, and advised me they currently had surveillance established at the location. They believed there were 4-6 adult males currently occupying the target location. They advised they had never seen any children coming or going from the residence during their entire investigation into the target location. They saw no fortification, no surveillance cameras, and no evidence on the exterior of the property that indicated children would be present.

. . . .

I was able to gather information on the target location through the Dallas Central Appraisal

> District website, including the square footage and year built.
>
> . . . .
>
> Agents also provided real-time intelligence that surveillance officers at the scene reported a truck pulling a white box trailer just pulled up in front of the target location and stopped.
>
> Agents provided me with a copy of their search warrant and I confirmed the details of the warrant including the address of the target location and that it included the outbuilding. The warrant included a no-knock authorization by the signing judge.
>
> . . . .
>
> Upon arrival to the area, SWAT . . . made an approach toward the residence with the truck and box trailer in front of it.

Defs.' App. 0015-17. Commander states that he was provided photographs of the target location by the DEA; however, he did not include any of those particular photographs as part of the record. *See id.* The summary judgment evidence, however, includes copies of black and white photographs of the target home and Plaintiffs' residence that were taken after the execution of the search warrant. See Defs.' App. 0026-27. This is of major significance because the photograph of Plaintiffs' residence included an attachment to Plaintiffs' residence that was markedly different from the target residence,

which the court discusses below, that should have been readily apparent to any reasonably competent officer.

The record further reflects that the truck pulling a white box trailer was parked in front of 583 8th Street. Defs.' App. 0002. Based upon information provided by the DEA, the SWAT Team began approaching the home. *Id.* On approach, Commander noticed that the residence did not appear to be the one in the photographs provided by the DEA, and he then directed his team to the house located to the left of them—Plaintiffs' residence located at 593 8th Street. *Id.* at 0018. Shortly after SWAT Team members entered Plaintiffs' residence, "SWAT Team officers began yelling out, 'Wrong house!'" *Id.* at 0002. The SWAT Team thereafter left Plaintiffs' residence and proceeded to the correct target location—573 8th Street. *Id.* Instructive to the court's analysis are the Fifth Circuit's reasoning in *Rogers v. Hooper*, 271 F. App'x 431 (5th Cir. 2008) (unpublished table decision), and the Eleventh Circuit's analysis in *Hartsfield v. Lemacks,* 50 F.3d 950 (11th Cir. 1995), which was relied on by the Fifth Circuit in *Rogers*.

In *Rogers*, the Fifth Circuit affirmed the lower court's entry of summary judgment based on qualified immunity after finding the actions of two officers, who guided the team serving a warrant on a wrong location, to be "consistent with a reasonable effort to ascertain and identify the place intended to be searched." *Rogers*, 271 F. App'x at 435 (quoting *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (internal quotations omitted). The officers performed various actions prior to executing the warrant during the night: obtained the search warrant;

drove by the target house; and identified a vehicle parked in front of the target residence to serve as a cue to the officers. *Id.* Despite these precautions, the wrong residence was entered into before the officer could inform the team they were at the wrong location. *Id.* at 432. This court agrees that the officers in *Rogers* were entitled to qualified immunity because their pre-execution efforts were reasonable. The court cannot say the same for Commander, as his efforts and lack of alertness do not rise to the level of the two officers in *Rogers*.

The Eleventh Circuit in *Hartsfield* had a different issue. 50 F.3d 950. There, the leading officer, who obtained the search warrant, led his team to execute the warrant on the wrong residence during daylight. *Id.* at 952. The Eleventh Circuit reversed the lower court's granting of summary judgment with respect to the lead officer being entitled to qualified immunity because "he did not check to make sure that he was leading the other officers to the correct address, let alone perform any precautionary measures." The Eleventh Circuit goes on to state:

> As it is uncontroverted that the numbers on the houses are clearly marked, and that the raid took place during daylight hours, simply checking the warrant would have avoided the mistaken entry. Moreover, evidence before the court showed that the houses were located on different parts of the street, separated by at least one other residence, and that their appearances were distinguishable.
>
> Because [the commanding officer] did nothing to make sure that he was leading the other officers

> to the correct residence, we conclude that the district court erred in holding that he was protected by qualified immunity.

Id. at 955.

Here, Commander took more precautionary measures than the defendant in *Hartsfield,* but he did not take the same level of competent measures outlined in *Rogers*. The undisputed evidence before the court reveals the SWAT Team was approaching 583 8th Street—the wrong address—when Commander directed them to 593 8th Street—*also the wrong address*. Prior to directing officers to the wrong home, Commander (1) reviewed the search warrant; (2) conducted additional searches on the target residence through the Dallas Central Appraisal District website; (3) ran a computerized criminal history search of the occupant of the target residence; (4) debriefed with DEA agents twice; (5) was provided with "real-time intelligence that surveillance officers at the scene reported a truck pulling a white box trailer just pulled up in front of the target location and stopped;" and (6) observed the home and took note of the front windows, driveway, and the numbers on the front of the home in an attempt to confirm the residence as being the target location. Defs.' App. at 0015-24. The court finds that while Commander took some precautionary measures to lead the SWAT team to the correct house, such measures were not sufficient to be "consistent with [] reasonable effort[s] to ascertain and identify the place intended to be searched." *Rogers*, 271 F. App'x at 435.

First, the undisputed evidence before the court reveals the search warrant noted that "the numbers '573' [were] painted on the curb directly in front of the [target] residence and [also] affixed to a wooden post that supports the front porch." Defs.' App. 0011. Simply checking the warrant and looking down at the curb would have avoided Commander's mistaken order to enter the wrong house. Second, the search warrant further noted that the target residence "is the thirteenth residence west from Elm Street." *Id.* at 0010. Commander, prior to the execution of the warrant, also had the option to count the houses as he and his team proceeded down 8th Street. The record does not reveal that Commander took any of these precautionary measures.

Third, while there are a few similarities between the target house and Plaintiffs' residence, the undisputed evidence shows a glaring difference between Plaintiffs' residence and the target location. Most notable is the uncontroverted evidence that Plaintiffs' residence had two wheelchair ramps in front of it, complete with handrails, and the target location did not. *See* Doc. at 175; *and compare* Defs.' App. 0027 *with* Defs.' App. 0026. This handicap structure had ramps projecting from the front door of the house towards the sidewalk in the front and to the side towards the driveway. Defs.' App. 00027. Commander does not address, or even mention in passing, that Plaintiffs' residence had a protruding handicap ramp when he observed the home before directing his team to execute the search warrant on it. To breach the front door of Plaintiffs' house, the entry team necessarily had to navigate those ramps, and Commander, who remained outside of the house, offers no explanation

why he did not see those ramps that his officers had to use to reach the front door of Plaintiffs' residence. The presence of the ramps should have been a "dead giveaway" that Plaintiffs' house was not the target location. Even assuming this difference was less noticeable at night, "because the search was to occur at night, the chance for a mistake was greater and the need for precautions proportionately were increased." *Rogers*, 271 F. App'x at 435. Additionally, the target residence and Plaintiffs' residence were separated by one other residence, which the SWAT team first approached before being directed away by Commander. *Id.* at 0002.

Despite Commander's efforts, the record does not reveal he performed the most basic precaution prior to executing the search warrant: driving by the target location or having a person under his command do so. Nothing is in the record that a drive-by was impossible or would jeopardize officer safety. The court, for all of these reasons, determines there is a genuine dispute of material fact regarding whether Commander made the necessary reasonable effort to identify the correct residence and whether his actions were "[in]consistent with a reasonable effort to ascertain and identify the place intended to be searched." *Garrison*, 480 U.S. at 88. A jury could return a verdict in Commander's favor; however, this is a classic dispute regarding a material fact that should proceed to the jury for final determination. A jury, *not this court*, should determine whether Commander was plainly incompetent.

So that there is no misapprehension of the court's ruling, this is not a situation in which the court is

applying 20/20 hindsight to a situation that went awry or second-guessing what Commander did or failed to do prior to the execution of the warrant. The court's focus is on what steps a reasonable police officer in his position should have done prior to the execution of the search on Plaintiffs' residence. The court has included a number of things that Commander easily could have reasonably done or noticed. He was the person in charge of the tactical operation, and "the buck stopped" with him. The failure to observe and follow some basic and fundamental steps regarding police procedure was a recipe for disaster. The pre-planning did not involve a tense, fast-moving, or a set of quickly-unfolding facts or circumstances. As stated before, this case presents a situation for the jury to decide whether Commander was plainly incompetent in the execution of the search warrant that resulted in an unconstitutional search of Plaintiffs' residence.

C. Discovery Requests

Plaintiffs also contend that they were denied opportunities to conduct discovery except for the deposition of WPD Chief Goolsby, and the denial hampered their ability to respond to the Motion and further prevents them from identifying more John Does. *See* Doc. 192 at 2; Doc. 190. After the Motion was filed, Plaintiffs filed a motion for discovery (Doc. 170) seeking permission to serve specific interrogatories and requests for production, which sought the production of certain documents and recordings, upon the Named Defendants in their individual capacities to assist their response to the Motion. Named Defendants argue in their response that

Plaintiffs have "obtained documents in this case by sending multiple Open Records Requests to the City of Waxahachie." Doc. 174 at 2. They further argue that the discovery sought is not narrowly tailored to the issue of qualified immunity. *Id.* The magistrate judge held a hearing on July 27, 2021, to discuss the pending motion and ultimately denied Plaintiffs' requested discovery relief but allowed the deposition of Chief Goolsby. *See* Doc. 177.

After reviewing the record, the court determines that Plaintiffs were allowed to depose Chief Goolsby and that they failed to identify what additional documents or information they could not have obtained or requested from Chief Goolsby or other public sources. Additionally, the court finds that the specific discovery sought to be served upon Named Defendants by Plaintiffs were not narrowly tailored to the issue of qualified immunity. Moreover, Plaintiffs did not appeal or file any objections within 14 days of the the magistrate's ruling regarding their efforts to seek additional discovery to this court. *See* Fed. R. Civ. P. 72. Plaintiffs have therefore waived these objections. Accordingly, to the extent Plaintiffs raised an objection regarding their previous attempts to obtain additional discovery, the court **overrules** such objection.

III. Conclusion

Having considered the pleadings, Report, Objection, file, and record in this case, and having conducted a de novo review of that portion of the Report to which objection was made, the court, for the reasons explained,

determines that the magistrate judge's findings and conclusions in Sec. II and IV.A., are correct, and **accepts** them as those of the court. Accordingly, the court **overrules** Named Defendants' objection to Plaintiffs' response, brief, and exhibits as non-compliant with the Local Rules; **overrules as moot** Defendants' objection to Plaintiffs' use of pleadings to serve as summary judgment evidence; **grants** Named Defendants' motion to exclude and strike Plaintiffs' expert testimony; and **grants** Named Defendants' Motion for Summary Judgment (Doc. 167) as to Plaintiffs' claims against Brent Dunn, O.T. Glidewell, James Lewis, James Taylor, and Derek Behringer, and **dismisses with prejudice** the Fourth Amendment violations against them. The court also **denies as moot** Named Defendants' Motion for Summary Judgment (Doc. 167) on any Fourteenth Amendment violation because Fourteenth Amendment claims cannot be made when a person is seized or detained.

The court further determines that the magistrate judge's findings and conclusions in Sec.IV.B. are correct as they relate to Andrew Gonzales, Derrick Young, Brian Fuller, Dustin Koch, and Stephen Sanders; and **accepts** them as those of the court. Accordingly, the court **grants** Named Defendants' Motion for Summary Judgment (Doc. 167) as to Plaintiffs' claims against Andrew Gonzales, Derrick Young, Brian Fuller, Dustin Koch, and Stephen Sanders and **dismisses with prejudice** the Fourth Amendment violations against them.

The court **rejects** the magistrate judge's findings and conclusions in Sec. IV.B. relating to Defendant Lt.

Mike Lewis. Accordingly, the court **denies** Named Defendants' Motion for Summary Judgment (Doc. 167) as to Plaintiffs' claims against Defendant Lt. Mike Lewis.

Further, the court considered the magistrate judge's order on February 28, 2022, requiring Plaintiffs to provide proof that they have served the John Does by March 14, 2022, or show cause in writing why service cannot be made on them (Doc. 189); Plaintiffs' Objection stating additional discovery is needed to identify the John Does (Doc. 190); and Named Defendants' Response to Plaintiffs' Objection (Doc. 191). After careful review, the court finds that Plaintiffs failed to show good cause why the John Does cannot be identified and why service cannot then be made on them.

Accordingly, pursuant to Federal Rule of Civil Procedure 4(m), the court **dismisses without prejudice** Plaintiffs' claims against the remaining John Doe Defendants, which the court shows to be John Does 1-9.[2] The only claim that remains for trial or other resolution is Plaintiffs' claim for a Fourth Amendment violation against Defendant Lt. Mike Lewis.

It is so ordered this 31st day of March, 2022.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District
Judge

[2] The court previously dismissed with prejudice Plaintiffs' claims against John Does 10-20 in its order dated April 21, 2021 (Doc. 160).

Appendix D

Appendix D

Findings, Conclusions, and Recommendation
of the United States Magistrate Judge,
United States District Court for the
Northern District of Texas

February 28, 2022

Appendix D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JIMERSON, et al., Plaintiffs,	§	
v.	§	Civil Action No. 3:20-CV-2826-L-BH
LT. MIKE LEWIS, et al., Defendants.	§	Referred to U.S. Magistrate Judge[1]

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

Defendants' Motion for Summary Judgment, filed June 23, 2021 (doc. 167), should be **GRANTED in part**, and this action against them should be dismissed with prejudice.

I. BACKGROUND

This civil rights action arises from the execution of a "no knock" search warrant at the wrong address by the Waxahachie Police Department (WPD). Karen Jimerson (Mother) and James Parks (Father), individually and as

[1] By *Standing Order of Reference* dated April 20, 2021 (doc. 159), this case was referred for full case management.

next friend of their young sons, Jyden Jimerson and Xavien Parks (Sons), and Mother as next friend of her minor daughter, Jasamea Jimerson (Daughter), (collectively Plaintiffs), sue the members of the WPD's SWAT team who executed the warrant, including its commander, Lieutenant Mike Lewis (Commander), team leader Stephen Sanders (Leader), canine officer Derek Behringer (K9 Officer), and officers Brian Fuller, Andrew Gonzales, Derrick Young, Brent Dunn, Dustin Koch, O.T. Glidewell, James Lewis, and James Taylor (collectively Defendants), in their individual capacities. (*See* doc. 16 at 41.)[2] Plaintiffs seek compensatory and punitive damages, declaratory relief, attorney's fees, and costs. (*Id.* at 45-48.)

A. Factual Background

On March 27, 2019, at approximately 7:15 p.m., an agent with the Drug Enforcement Agency's (DEA) Dallas Office contacted Commander and requested the WPD SWAT team's assistance with the execution of a search warrant at a suspected methamphetamine "stash house" located at 573 8th Street, Lancaster, Texas (Target House). (doc. 169-1 at 1, 15.) The agent stated that the DEA had established surveillance at the location, and he provided Commander pictures of the front of Target House. (*Id.*) Commander's after-incident report states that DEA agents did not see any fortification or surveillance cameras at the property, or any evidence indicating the presence of children. (*Id.* at 15.) They

[2] Citations to the record refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

believed that large quantities of drugs were being kept at Target House, that there were four to six adult males on the property, and that the property had a "deeply extending backyard." (*Id.* at 17.) Commander obtained information about the property's primary residence, detached garage, and yard from the Dallas County Central Appraisal District's website. (*Id.* at 16.) Based on the information from the DEA, Commander determined that SWAT deployment was appropriate and obtained approval from the Chief of the WPD to activate the SWAT team. (*Id.*)

Commander met with members of the SWAT team at WPD headquarters and briefed them on the intelligence from the DEA. (*Id.* at 17.) They developed a plan for a six-member team consisting of Fuller, Gonzales, Young, Dunn, Koch, and Leader (Entry Team) to deploy a flashbang diversionary device in the front yard and then enter the primary residence. (*Id.*) As an additional distractionary measure, and to provide cover for the other Entry Team members, Leader was tasked with breaking the front windows until entry was made. (*Id.*) A three-person team consisting of Glidewell, Lewis, and Taylor (Perimeter Team) would secure the detached garage and backyard and detain any people found outside the target location with "zip-tie style cuffs" before deploying a flashbang diversionary device in the backyard. (*Id.*) K9 Officer and officers with the Lancaster Police Department (LPD) were to stage in the front driveway until the flashbangs were deployed, and then proceed to the backyard to establish a rear perimeter. (*Id.*) Commander was to remain outside in a "command and control status." (*Id.*)

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Defendants gathered and prepared their equipment and proceeded to LPD headquarters for a final briefing with the DEA. (*Id.*) Commander received a copy of the search warrant; he confirmed that the warrant included no-knock authorization, and that the address of Target House was "573 8th Street." (*Id.*) "DEA agents provided real-time intelligence that surveillance officers at the scene reported a truck pulling a white box trailer had pulled up and stopped in front of the target location." (*Id.* at 1.) It was decided that an officer with LPD (LPD Officer) would lead the SWAT team to the location and "stop his vehicle about a house before the target location so SWAT members could make an approach on foot." (*Id.* at 2, 18.)

After the final briefing, LPD Officer drove to the target location, followed by the SWAT team, Commander, K9 Officer, and DEA agents in separate vehicles. (*Id.*) Upon arrival, the SWAT team exited the vehicle, and LPD Officer pointed the team to the house with the truck and trailer in front of it, which was actually "583 8th Street". (*See id.*) As the team approached it, Commander noticed that it did not look like the house in the DEA's photos. (*Id.*) He believed that Plaintiffs' house, which was to the left of it, looked like the house in the photos, and that the house number on it was "573", although the reflection from the porch light made it difficult to read. (*Id.*) Plaintiffs' house address was "593 8th Street". (*Id.*) Commander notified the SWAT team that they were approaching the wrong house and directed them to Plaintiffs' house instead. (*Id.*)

Entry Team ran to the front of Plaintiffs' house, a flashbang was deployed in the front yard, and Leader began breaking the front windows using a "break-and-rake" technique. (*Id.* at 18, 46-47.) After Gonzales, Fuller, and Young breached the front door and entered the house, they "began a protective sweep, checking for occupants." (*Id.* at 36, 38, 40.) They encountered two females and ordered them to get on the ground, and both complied. (*Id.*) They then encountered an adult male, but before they could instruct him to get on the ground, they heard several team members yelling "Wrong house!", and they left Plaintiffs' house. (*Id.*) They estimate they were in Plaintiffs' house "no more than 30 seconds." (*Id.* at 37, 39, 41.) According to Koch, he entered Plaintiffs' house after the initial entry but only made it to the hallway when he heard "Wrong house!"; he then left the house. (*Id.* at 42-43.) According to Leader, he followed Entry Team to the front of the house but did not enter with the other officers. (*Id.* at 46-47.) After he broke out the front windows, he heard someone yell that it was the wrong house, and he proceeded with Entry Team to Target House. (*Id.*)

According to Plaintiffs, at the time of entry, Mother was taking a bath, Daughter was in bed in her room, and Father was putting Sons to bed in another bedroom. (doc. 183 at 22, 26-27.) Police officers met Mother in the hallway near the bathroom and "made [her] lay down on the floor" "for at least 15 minutes." (*Id.* at 33, 35.) She was undressed from the waist down, but the officers did not allow her to put on clothes. (*Id.*) The officers went into Daughter's room, grabbed her from her bed, and threw her down on the glass-covered floor, injuring her

knee. (*Id.* at 22.) They zip-tied her hands behind her back and made her stay on the ground for "more than 20 minutes." (*Id.*) They searched her room without her permission and made a mess tossing things around her room. (*Id.*) The officers entered the other bedroom with Father and Sons, made them leave the bedroom, and then searched the bedroom. (*Id.* at 27.) Pieces of glass from the broken windows got into Sons' eyes. (*Id.*) Officers roamed around the house, moved some things around, and searched the rooms without their permission. (*Id.* at 22, 27-28, 33-35.)

According to a neighbor who lived across the street from Plaintiffs, she looked out her window after hearing a loud "boom." (*Id.* at 18.) She saw the front door of Plaintiffs' house "busted open" and officers walking around the yard with "A-K's." (*Id.*) Twenty minutes after the boom, she approached an officer outside of Plaintiffs' house and obtained permission to enter and check on the children. (*Id.*) There was "broken glass all over the house," and Mother was sitting on a sofa "with glass on her shoulders and arms", "bleeding from cuts that were on her body." (*Id.* at 18-19.) When she left five minutes later, "police officers" were still in the house. (*Id.* at 19.)

After the warrant was executed on Target House, Commander returned to Plaintiffs' house, "where several DEA agents were checking on [their] welfare and making arrangements for an after-hours glass company to make repairs to the damaged windows and door." (doc. 169-1 at 2.) He asked Plaintiffs if they required medical attention, which they declined. (*Id.* at 3, 19.) Ten

minutes later, Mother told him that her side was hurting, and he called for an ambulance at 11:28 p.m. (*Id.*) According to an ambulance report, the ambulance arrived at 11:36 p.m., and departed for the hospital with Mother and Daughter at 11:50 p.m. (doc. 183 at 52.) Commander avers that while he was in their home, Plaintiffs never asked him to leave. (doc. 169-1 at 3.) According to the after-incident report, members of the SWAT team "were cleared from scene security" at 12:45 a.m., and Commander "cleared the scene" at 1:30 a.m. (*Id.* at 19-20.)

A WPD internal investigation of the incident found that "reasonable and normal protocol was completely overlooked." (doc. 183 at 16, 166-68, 173-74, 190.)

B. Procedural History

On September 11, 2020, Plaintiffs sued Commander and twenty John Doe defendants in their individual capacities under 42 U.S.C. § 1983, alleging violations of their Fourth Amendment rights,[3] as well as state law tort claims for assault, negligence per se, gross negligence, criminal trespass, criminal assault, aggravated assault, and official oppression.[4] (*See* doc. 1 at 2, 35.)

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[3] Despite references to the Fourteenth Amendment, the first amended complaint does not appear to assert a separate [sic] under it, but to only reference the fact that the Fourth Amendment's protections against wrongful search and seizure were made applicable to the actions of state actors through the Fourteenth Amendment. (doc. 16 at 16 n.8.)

[4] Although the First Amendment is also mentioned, there are no allegations of First Amendment violations. (*See* doc. 16 at 41.)

After obtaining leave, they filed their first amended complaint on December 15, 2020, reasserting their federal and state law claims, and naming Defendants in place of the John Doe defendants.[5] (*See* docs. 14; 15; 16 at 2, 41-42.) On April 21, 2021, Plaintiffs' state law tort claims against Defendants in their individual capacities were dismissed with prejudice under § 101.106(f) of the Texas Tort Claims Act (TTCA). (*See* doc. 160.)

On June 23, 2021, Defendants moved for summary judgment on the basis of qualified immunity. (*See* doc. 167.) Plaintiffs responded on August 26, 2021, and Defendants replied on September 9, 2021. (*See* docs. 181-183, 187.)

II. DEFENDANTS' OBJECTIONS

Defendants object to Plaintiffs' response, brief, and exhibits (*See* doc. 187 at 6-12.)

A. Local Rules

Defendants object to Plaintiffs' response, brief, and exhibits as non-compliant with the Local Rules. (*See* doc. 187 at 5-6.)

Courts have discretion to decline to strike filings, even when they violate the Local Rules. *See, e.g., Green v. JPMorgan Chase Bank, N.A.*, No. 3:11-CV-1498-N, 2013 WL 11609925, at *2 (N.D. Tex. Aug. 16, 2013) ("The Court in its discretion declines to strike the appendix in

[5] Plaintiffs also sued LPD Officer, but he was voluntarily dismissed with prejudice by joint agreed stipulation on March 11, 2021. (doc. 153.)

this instance, but it advises [the defendant] and its counsel to abide by the Local Rules in future filings."); *Graham v. Dallas Indep. Sch. Dist.*, No. 3:04-CV-2461-B, 2006 WL 2468715, at *4 (N.D. Tex. Aug. 24, 2006) ("Under ordinary circumstances, the court might overlook these untimely filings and consider plaintiff's summary judgment response and evidence in the interests of justice."). Defendants' objections are **OVERRULED**. Plaintiffs' exhibits will be considered, but only where they have provided specific citations to indicate the portions of the documents relied upon. *See City of Clinton v. Pilgrim's Pride Corp.*, 654 F. Supp. 2d 536, 541 (N.D. Tex. Sept. 14, 2009) (declining to strike a party's appendix for violations of the Local Rules, but limiting consideration of its appendix).

B. Evidence

Defendants also object and move to strike some of Plaintiffs' summary judgment evidence on grounds that it is misleading, constitutes inadmissible hearsay, and is not proper summary judgment evidence. (*See* doc. 187 at 6-9.) Even if considered, this evidence does not affect the disposition of the pending motion for summary judgment, so Defendants' objections to this evidence are **OVERRULED as moot**. *See Continental Casualty Co. v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 984690, at *1 n. 6 (N.D. Tex. Apr. 14, 2006) (overruling as moot objections to evidence that was not considered by the court in deciding motion for summary judgment).

C. Expert's Declaration

Defendants also object and move to strike Plaintiffs' expert testimony as inadmissible under Rule 702. (*See* doc. 187 at 9-12.)

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597-98 (1993), the Supreme Court acknowledged that Federal Rule of Evidence 702 serves as the proper standard for determining the admissibility of expert testimony. In fact, it was amended to incorporate the principles first articulated by the Supreme Court in *Daubert*, as well as those enunciated in subsequent cases applying *Daubert*. *See* FED. R. EVID. 702 Advisory Committee Notes. Rule 702 now provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based upon sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. Under this rule, the main issue is whether a particular expert has "sufficient specialized

knowledge to assist the jurors in deciding the particular issues in this case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) (citations omitted). A court has discretion to keep an expert witness from testifying if it finds that the witness is not qualified to testify in a particular field or on a given subject. *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999).

The key factors in evaluating expert testimony are relevance and reliability. *Daubert*, 509 U.S. at 589. The burden is on the proponent of the expert testimony to establish its admissibility by a preponderance of the evidence. *Id.* at 592 n.10; *see* FED. R. EVID. 104(a). As stated by this court, relevance requires that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue[,]" and it depends on "whether [the expert's] reasoning or methodology properly can be applied to the facts in issue." *State Automobile Mutual Insurance Company v. Freehold Management, Inc.*, No. 3:16-CV-2255-L, 2019 WL 1436659, at *4 (N.D. Tex. Mar. 31, 2019) (internal quotations omitted) (quoting *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002) and *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 352 (5th Cir. 2007)). Reliability turns on "whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.* (internal quotations omitted) (quoting *Knight*, 482 F.3d at 352).

"*Daubert* standards apply not merely at trial, but also on summary judgment." *Gen. Star Indem. Co. v. Sherry Brooke Revocable Trust*, 2001 WL 34063890, at *9 (W.D. Tex. Mar. 16, 2001); *see also Kumho Tire Co.*, 526 U.S. at 146 (affirming district court decision

granting motion for summary judgment in light of its decision to exclude expert testimony pursuant to *Daubert*). To be considered on summary judgment, "an expert affidavit must include materials on which the expert based his opinion, as well as an indication of the reasoning process underlying the opinion." *Michaels v. Avitech, Inc.*, 202 F.3d 746, 754 (5th Cir., 2000), *cert. denied*, 531 U.S. 926 (Oct. 10, 2000) (quoting *Boyd v. State Farm Ins. Companies*, 158 F.3d 326, 331 (5th Cir. 1998). "Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987).

Here, Plaintiffs' expert states that he has "some familiarity with what S.W.A.T. TEAMS do" without explaining the basis of his familiarity or expertise. (*See* doc. 183 at 64.) His opinion that all Defendants "improperly entered" Plaintiffs' home is based on statements in their motions to dismiss, which Plaintiffs characterize as admissions. (*See id.* at 65-66; doc. 182 at 8; doc. 183 at 41, 43, 46, 48.) He also makes general statements regarding how long all Defendants remained in Plaintiffs' home, but he does not discuss Defendants individually; he does not explain how he reached his opinion that all Defendants remained in Plaintiffs' home for a specific amount of time. (*See id.* at 66.) Ultimately, he agrees with the outcome of the Chief's internal investigation and concludes that Defendants were incompetent and unreasonable and violated Plaintiffs' rights. (*See id.* at 70-71, 83.)

Plaintiff's expert does not explain how he reached his conclusions, only that he did reach them. He does not identify the methodology he used, nor provide any

explanation of the reasoning process utilized in reaching his conclusions. He appears to be relying primarily, if not exclusively, on experience to form his conclusions, but fails to articulate how his experience led to his conclusions, why his experience is a sufficient basis for the conclusions reached, and how his experience is reliably applied to the facts of this case. *See Kumho*, 526 U.S. at 152 (stressing that the *Daubert* factors may be relevant to the reliability of experience-based testimony and that the same level of intellectual rigor that characterizes the practice of an expert in the relevant field is employed whether basing testimony upon professional studies or personal experience). He does not explain the facts upon which he relies to reach his conclusion that all Defendants entered Plaintiffs' home and remained there for some time.

Expert opinions that fail to set forth a discernable methodology are conclusory and lack the requisite evidentiary reliability mandated by Rule 702. To be competent summary judgment evidence, an expert's report must contain some "indication of the reasoning process underlying the opinion." *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir. 1998). Neither *Daubert* nor the Federal Rules of Evidence "requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. at 136, 146 (1997). And a "trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument." *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233 (5th Cir.1986). Here, Plaintiffs' expert testimony is

no more than the inadmissible "it is so". *See Viterbo*, 826 F.2d at 424.

Defendants' motion to exclude and strike Plaintiffs' expert testimony is **GRANTED**.

III. SUMMARY JUDGMENT STANDARD IN QUALIFIED IMMUNITY CASES

Summary judgment is appropriate when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Typically, a movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In the context of § 1983 litigation, however, governmental employees asserting the defense of qualified immunity in a motion for summary judgment need only assert the defense in good faith. *See Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 419 (5th Cir. 2008); *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007). They have no burden to put forth evidence. *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 633-34 (5th Cir. 2000).

The burden then shifts to the non-movant to show that the defense does not apply. *See Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009); *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam). The non-movant must identify specific evidence in the record and show how it presents a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324; *see also RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010).[6] Although courts view the evidence in a light most favorable to the non-movant, *Anderson*, 477 U.S. at 255, "a party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or 'only a scintilla of evidence.'" *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam)). The non-movant must show that the evidence is sufficient to support a resolution of the factual issue in his favor. *Anderson*, 477 U.S. at 249.

Even though Defendants have no burden to provide evidence, they have submitted sworn declarations, the search warrant, and the after-incident report. (*See* doc. 169-1.) They have carried their summary judgment

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[6] Rule 56 imposes no obligation for a court "to sift through the record in search of evidence to support a party's opposition to summary judgment." *Adams v. Travelers Indem. Co.*, 465 F.3d 156, 164 (5th Cir. 2006) (quoting *Ragas v. Tenn. Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir.1998)). Parties must "identify specific evidence in the record" supporting challenged claims and "articulate the precise manner in which that evidence supports [those] claim[s]." *Ragas*, 136 F.3d at 458 (citing *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994)).

burden by asserting the qualified immunity defense. *See Gates*, 537 F.3d at 419. The burden now shifts to Plaintiffs to identify evidence in the record creating a genuine issue of material fact regarding whether Defendants violated their constitutional rights, and whether the violation was objectively unreasonable under clearly established law at the time of the violation. *See Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407-08 (5th Cir. 2007).

IV. QUALIFIED IMMUNITY

Defendants move for summary judgment on grounds that they are protected from suit by qualified immunity. (*See* doc. 168 at 12.)

Section 1983 "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms." *Id.* To state a claim under § 1983, a plaintiff must allege facts that show (1) he has been deprived of a right secured by the Constitution and the laws of the United States and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr: Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

A governmental employee who is sued under § 1983 may assert the affirmative defense of qualified immunity. *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992). Qualified immunity protects government officials performing discretionary functions from suit and liability

for civil damages to the extent their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Because an official is entitled to immunity from suit, not merely from liability, immunity questions should be resolved as early as possible in the litigation. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

In deciding whether a defendant is entitled to qualified immunity, courts conduct a two-prong inquiry. Under the first prong, courts consider whether the facts alleged, taken in the light most favorable to the plaintiff, show a violation of a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 200 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009). Under the second prong, courts determine whether the violated constitutional right was clearly established within the specific context of the case. *Id.* at 201. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. It is within the discretion of the court to decide which of the two prongs to address first in light of the circumstances particular to each case. *Pearson*, 555 U.S. at 236; *Lytle v. Bexar Cty.*, 560 F.3d 404, 409 (5th Cir. 2009). If the court answers both the constitutional violation and clearly established questions in the affirmative, the officer is not entitled to qualified immunity. *Lytle*, 560 F.3d at 410.

Appendix D

A. Constitutional Violation[7]

Defendants contend that there is no credible evidence of a Fourth Amendment constitutional violation and that they cannot overcome their entitlement to qualified immunity. (*See* doc. 168 at 12.)

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. IV. Generally, "[w]arrantless searches of a person's home are presumptively unreasonable unless the person consents, or unless probable cause and exigent circumstances justify the search." *United States v. Gomez–Moreno*, 479 F.3d 350, 354 (5th Cir. 2007); *see Payton v. New York*, 445 U.S. 573, 590 (1980) ("Absent exigent circumstances, [a person's] threshold may not reasonably be crossed without a warrant."). Even though warrantless searches are "presumptively unreasonable," "officers do not necessarily violate the Fourth Amendment when they mistakenly execute a search warrant on the wrong address." *Simmons v. City of Paris*, 378 F.3d 476, 479 (5th Cir. 2004) (citing *Maryland v. Garrison*, 480 U.S. 79, 88 (1987)). As recognized by the Supreme Court, officers are entitled to "some latitude for honest mistakes" made "in the dangerous and

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[7] Defendants first move for summary judgment on Plaintiffs' Fourteenth Amendment claim, arguing it fails as a matter of law. (*See* doc. 168 at 11.) As noted, Plaintiffs do not appear to assert a separate Fourteenth Amendment claim, and they did not respond to Defendants' argument. Because they have not asserted a Fourteenth Amendment claim, Defendants' motion for summary judgment on this claim should be **DENIED as moot**.

difficult process of making arrests and executing search warrants." *Garrison*, 480 U.S. at 87. When officers attempting to execute a valid search warrant enter the wrong residence, they do not violate the Fourth Amendment if their conduct is "consistent with a reasonable effort to ascertain and identify the place intended to be searched." *Id.* at 88; *see also Gerhart v. McLendon*, 714 F. App'x 327, 333 (5th Cir. 2017) (quoting *id.*) ("[N]o Fourth Amendment violation occurs when officers attempting to perform a valid search mistakenly search the wrong property-as long as they make 'a reasonable effort to ascertain and identify the place intended to be searched.'"). Even if the initial entry results from an objectively reasonable mistake, the Fourth Amendment requires officers to "immediately terminate a search upon realizing it is the incorrect location." *Thomas v. Williams*, 719 F. App'x 346, 352 (5th Cir. 2018) (citing *Garrison*, 480 U.S. at 87); *see Simmons*, 378 F.3d 476, 479-80 ("[W]hen law enforcement officers are executing a search warrant and discover that they have entered the wrong residence, they should immediately terminate their search.").

1. Officers Who Did Not Enter

Although Defendants met their burden simply by asserting the qualified immunity defense, they have also submitted the sworn declarations of Dunn, Glidewell, J. Lewis, Taylor, and K9 Officer, each stating that they did not enter Plaintiffs' house. (*See* doc. 169-1 at 44-45, 48-55.) Dunn avers that he was "stacked up" on the front porch of the house next to Target House at the time when other members of Entry Team entered Plaintiffs'

house. (*Id.* at 44.) He heard someone yell "Wrong house!" and then proceeded to Target House. (*Id.*) Glidewell, J. Lewis, Taylor, and K9 Officer aver that they were tasked with securing the perimeter and remained outside of Plaintiffs' house at the time of the initial entry. (*Id.* at 48, 50, 52, 54.) They also heard someone yell that it was the wrong house, and they proceeded to Target House and secured that location. (*Id.*) Because they have met their summary judgment burden, the burden now shifts to Plaintiffs to identify evidence in the record raising a genuine issue of material fact that Dunn, Glidewell, J. Lewis, Taylor, and K9 Officer unlawfully entered their house.

Plaintiffs provide the sworn declarations of Mother, Father, and Daughter stating that "police officers" broke down the door and entered their house. (*See* doc. 183 at 22, 27, 33.) They also provide their neighbor's sworn declaration stating that she saw "police officers" in their home. (*Id.* at 18-19.) These declarations do not contradict the declarations of Dunn, Glidewell, J. Lewis, Taylor, and K9 Officer that they did not enter Plaintiffs' house. While there is evidence in the record of certain members of the SWAT team entering the house without permission, Plaintiffs have not identified evidence in the record creating a genuine issue of fact on whether these specific defendants physically entered their home. *See Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) ("Personal involvement is an essential element of a civil rights cause of action.").

Plaintiffs point to excerpts from the motions to dismiss filed by Dunn, Glidewell, J. Lewis, Taylor, and K9

Officer, contending that they "all have filed pleadings admitting they entered the house of the Plaintiffs." (doc. 182 at 8; doc. 183 at 41, 43, 46, 48.) The relevant portions of the motions to dismiss the state tort claims against the officers state:

> At the time of the incident, [the officer] was a member of the Waxahachie Police Department as well as the Waxahachie Police Department's SWAT Team. [The officer], and the other Defendants, were serving a search warrant on the behalf of the DEA but mistakenly entered Plaintiffs' home instead of the house next door. All of Plaintiffs' allegations against the Defendants (Plaintiffs do not differentiate between Defendants' actions) involve their actions that night in attempting to execute the DEA search warrant.

(*See* doc. 183 at 41, 43, 46, 48.) These statements were made in the context of the officers' arguments that they were acting within the scope of their employment for purposes of dismissal of the state tort claims against them under Texas Civil Practice and Remedies Code § 101.106(f). (*See id.*) The motions specifically note that Plaintiffs' complaint did not differentiate between Defendants' individual actions, and the reference in each motion appears to be to the entry into Plaintiffs' house by the SWAT team while executing the search warrant rather than the actions of each specific Defendant. Notably, each statement has a citation to specific paragraphs in Plaintiffs' first amended complaint. These general statements in their motions to dismiss are not sufficient to create a genuine issue of material fact upon

which a jury may find in their favor regarding whether Dunn, Glidewell, Taylor, J. Lewis, and K9 Officer unlawfully entered Plaintiffs' home during the SWAT team's execution of the search warrant for Target House. Because no genuine issue of material fact exists as to whether Plaintiffs' Fourth Amendment rights were violated by Dunn, Glidewell, Taylor, J. Lewis, and K9 Officer, they are entitled to qualified immunity as a matter of law. *See Simmons*, 378 F.3d at 481 (finding officers were entitled to qualified immunity because there was no evidence that they entered the residence with the other officers).

2. Officers Who Entered

It is undisputed that SWAT team members entered Plaintiffs' home without their consent and without a search warrant for their home. The sworn declarations of Gonzales, Young, and Fuller state that they entered Plaintiffs' house after breaching the front door, performed a "protective sweep," and instructed two females to get down on the ground. (doc. 169-1 at 36-41.) According to Koch's sworn declaration, he ran into Plaintiffs' house after Entry Team's initial entry and made it to the hallway. (*Id.* at 42-43.) Plaintiffs have met their burden to identify evidence of a violation of their Fourth Amendment rights by Gonzales, Young, Fuller, and Koch. *See Rogers v. Hooper*, 271 F. App'x 431, 433 (5th Cir. 2008) (finding plaintiffs "unquestionably demonstrated the violation of a constitutional right" by the officers who mistakenly entered their home where there was no warrant or any other constitutionally sufficient justification for the entry).

3. Commander and Leader

Defendants provide the sworn declarations of Commander and Leader and the after-incident report. (*See* doc. 169-1 at 1-3, 15-24, 46-47.) Commander initially briefed the SWAT team on information about the target location and its occupants, directed the team to Plaintiffs' house, and remained "outside in a command and control status." (*Id.* at 2-3, 15-18.) He "turned over control to" Leader after the target location was secured. (*Id.* at 18-19.) Leader led the SWAT team and broke out the front windows of Plaintiffs' house but denies ever entering it. (*Id.* at 46.)

Plaintiffs argue that "as commander" and "second in command", Commander and Leader "bear special responsibility for what happened at the home of the plaintiffs on 27 March 2019, and both have so admitted." (doc. 181 at 21.) They point to excerpts from Chief's deposition testimony that he ordered an internal investigation into the incident, that Leader submitted a statement that he "as team leader" shared responsibility and blame with Commander for the team's mistakes, and that Commander was suspended without pay as a result of the incident. (doc. 183 at 167-73.)

The officers in charge of planning and leading the execution of a search warrant "are responsible for ensuring that they have lawful authority for their actions." *Hunt v. Tomplait*, 301 F. App'x 355, 360 (5th Cir. 2008) (citing *Ramirez v. Butte–Silver Bow Cnty.*, 298 F.3d 1022, 1027 (9th Cir. 2002)). In *Hunt*, the Fifth Circuit held that the deputy who actively led the search team to

the wrong residence could not rely on the fact that he never physically entered the house to avoid liability for any unlawful search. *Id.* at 361. Even though the deputy was responsible for identifying the residence described in the search warrant and leading the search team to the property, he never consulted the warrant. *Id.* at 360. After directing the search team to the wrong house, the deputy secured the road while the team entered the house. *Id.* The Fifth Circuit noted that the deputy was responsible for leading the search team to the correct location and not "a mere bystander in the execution of the search warrant." *Id.* Because the deputy's misidentification of the residence to be searched and guidance of the search team to the incorrect residence was a direct cause of the Fourth Amendment violation, the deputy could not "contend that he did not effectuate the violation because he did not physically enter the incorrect residence." *Id.* at 361. The court affirmed the district court's order denying summary judgment on deputy's qualified immunity defense. *Id.*

Plaintiffs have met their burden to identify summary judgment evidence sufficient to create a genuine issue of material fact regarding whether Commander and Leader violated their Fourth Amendment rights. Even though they deny entering the house during Entry Team's initial entry, genuine issues of material fact exist regarding their responsibilities in planning and leading the execution of the search warrant, and whether their conduct caused the unlawful entry. *See Hunt*, 301 F. App'x at 360. Viewing the evidence in the light most favorable to Plaintiffs as the nonmovants, a reasonable jury could find that Commander and Leader were

"personally involved" in the error that caused the SWAT team's unlawful entry and search of Plaintiffs' home instead of the Target House. *See Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005) (citation omitted) ("As a prerequisite [to § 1983 liability], a plaintiff 'must identify defendants who were either personally involved in the constitutional violation or whose acts are causally connected to the constitutional violation alleged.'").

B. Objectively Unreasonable

To show the inapplicability of the qualified immunity defense, a plaintiff must present evidence to show that the violation of his constitutional rights was objectively unreasonable given the clearly established law at the time of the alleged constitutional violation. *See Zarnow*, 500 F.3d at 407-08; *Club Retro*, 568 F.3d at 194. "The defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." *Thompson v. Upshur Cty., Tex.*, 245 F.3d447, [sic] 457 (5th Cir. 2001).

In order for a constitutional right to be "clearly established" under the second prong, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Saucier*, 533 U.S. at 202. "Because the focus is on whether the officer had fair notice that [his] conduct was unlawful, reasonableness is judged against the

backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). The Supreme Court has repeatedly warned courts "not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011)) (the general proposition "that an unreasonable seizure violates the Fourth Amendment is of little help"). When the constitutional violation is obvious, a materially similar case is unnecessary in order to find the law clearly established. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see Gerhart v. McLendon*, 714 F. App'x 327, 335-36 (5th Cir. 2017) ("We need not immunize an officer from suit for an obvious violation simply because no case has held that the officer's precise conduct was unlawful.").

1. Initial Entry

At the time of the initial entry in March 2019, it was clearly established that officers who participate in searches "must make reasonable, non-feeble efforts to correctly identify the target of a search—even if those efforts prove unsuccessful." *Gerhart v. McLendon*, 714 F. App'x 327, 334 (5th Cir. 2017) (citing *Rogers v. Hooper*, 271 F. App'x 431, 435 (5th Cir. 2008)). The Fifth Circuit has recognized that "[w]hat's reasonable for a particular officer depends on his role in the search." *Gerhart v. Barnes*, 724 F. App'x 316, 325 (5th Cir. 2018) (citing *id.* at 335). "[L]aw enforcement officers are generally granted qualified immunity if the evidence is undisputed that they merely made an honest mistake when entering

the incorrect home." *Hunt*, 301 F. App'x at 361 (citing *Simmons*, 378 F.3d at 479-80).

Defendants provide Commander's sworn explanation of how he received information and photos from the DEA about Target House. (doc. 169-1 at 1.) At the final briefing, DEA agents provided "real-time intelligence" that a truck and trailer would be parked outside Target House. (*Id.*) LPD Officer then led the SWAT Team to the location and pointed the team to the house with the truck and trailer. (*Id.* at 2.) After Commander realized it was the wrong house, he directed the team to Plaintiffs' house, believing it looked like the house in the DEA's photos. (*Id.*) He also believed that the house number was "573," but the reflection from the porch light made it difficult to read. (*Id.*) His after-incident report that details how he reviewed the search warrant, conducted additional research on the house and its occupants, briefed the team on the intelligence from the DEA, and developed a plan with the team to execute the search warrant. (*Id.* at 15-24.) Defendants also provide the sworn declarations from members of the SWAT team stating that they believed Commander was directing them to Target House when he pointed to Plaintiffs' house. (*See id.* at 36-55.) Defendants have brought forward evidence to show that they engaged in reasonable efforts to identify the correct residence. *See Garrison*, 480 U.S. at 88; *see also Greene v. Knight*, 564 F. Supp. 2d 604, 611-12 (N.D. Tex. 2008) (finding officers' actions were "objectively reasonable" when they relied on information supplied by another officer and served warrants at the wrong address).

The burden now shifts to Plaintiffs to identify evidence in the record creating a genuine issue of material fact regarding whether Defendants made reasonable efforts to identify the correct residence. Plaintiffs generally argue that their 215-page appendix creates fact issues about whether Defendants acted "incompetently" and "as no reasonable officer should have acted" "in connection with their illegal entry into the home." (doc. 182 at 8.) As noted, the responding party on summary judgment must "identify *specific evidence* in the record" supporting challenged claims and "articulate the *precise manner* in which that evidence supports [those] claim[s]." *Ragas*, 136 F.3d at 458 (emphasis added) (citing *Forsyth*, 19 F.3d at 1537). Plaintiffs have neither identified specific evidence in the record nor articulated the precise manner in which it supports their claims that Defendants' conduct was objectively unreasonable. *See Williams v. Valenti*, 432 F. App'x 298, 303 (5th Cir. 2011) (per curiam) ("When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court.") (citation omitted). They fail to identify evidence in the record from which a jury could infer that Defendants did not make "reasonable efforts" to identify the target house. *See also Rogers*, 271 F. App'x. at 435 (holding that officers were entitled to immunity where they directed the search team to the wrong house based, in part, on the location of a car they had observed during their initial surveillance of the house); *see also Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 304-05 (5th Cir. 2004) (affirming grant of qualified immunity to officer sued under unreasonable-

search-and-seizure theory where officer entered plaintiff's house mistakenly based on information provided by other agents). The officers who initially entered Plaintiffs' home (Gonzales, Young, Fuller, Koch), Leader, and Commander are all therefore entitled to qualified immunity on the wrongful entry claim.

2. Termination of Search

The clearly established law at the time of the alleged unlawful entry was that officers are "required to discontinue the search immediately if they realize they have entered the wrong residence." *Thomas*, 719 F. App'x at 352 (citing *Simmons*, 378 F.3d at 479-80). "Qualified immunity does not provide a safe harbor for police to remain in a residence after they are aware that they have entered the wrong residence by mistake." *Simmons*, 378 F.3d at 481. "[T]he violation of the constitutional right hinges upon the officers conducting a *search* even after realizing they are in the wrong location." *See Thomas*, 719 F. App'x at 353 (emphasis original).

According to the sworn declarations of Gonzales, Young, and Fuller, they began a protective sweep to check for occupants after they entered Plaintiffs' house and encountered Mother and Daughter. (*See* doc. 169-1 at 38-41) They instructed them to lie on the ground, and they complied. (*Id.*) When they encountered Father, they heard members of the SWAT team yelling "Wrong house!", "immediately exited" the house, and proceeded to Target House. (*Id.*) They estimate they were in Plaintiffs' house for "no more than 30 seconds." (*Id.* at 36, 38, 40.) Koch's sworn declaration states that he entered

Plaintiffs' house after Entry Team's initial entry and was in the hallway when he heard "Wrong house!" (*Id.* at 42-43.) He "immediately ran out" and proceeded to Target House with Entry Team. (*Id.* at 42.) He estimates he was in Plaintiffs' house for "no more than 5-10 seconds." (*Id.*)

According to Commander's sworn declaration, he went to Plaintiffs' house after the warrant was executed on Target House and asked Plaintiffs if they needed medical attention or an ambulance. (*Id.* at 2-3.) Several DEA agents were at their house "checking on [their] welfare and making arrangements for an after-hours glass company to make repairs to the damaged windows and door." (*Id.* at 2.) He contends that when he entered the house after the initial entry, "at no time did the Plaintiffs ask [him] to leave." (*Id.* at 3.) The after-incident report reflects that members of the SWAT team departed the scene at 12:45 a.m., and Commander "cleared the scene" at 1:30 a.m. (*See* doc. 169-1 at 19-20.) Defendants have brought forward evidence to show that Gonzales, Young, Fuller, Koch, Leader, and Commander acted reasonably once they discovered that they were in the wrong house. *See Garrison*, 480 U.S. at 88.

The burden is now on Plaintiffs to identify evidence raising a genuine issue of material fact as to whether these officers unreasonably remained in their house. Plaintiffs provide the sworn declarations of Mother, Father, and Daughter stating that "police officers" broke windows, broke down the front door, and entered their home with their weapons drawn. (*See* doc. 183 at 22, 27, 33.) They state that police officers roamed the house,

searched rooms, and tossed and moved things without permission for "a long time." (*Id.*) Daughter contends that she was restrained with zip-ties on the floor for "more than twenty minutes," and that when the ambulance took her and Mother to the hospital "at least thirty or more minutes" after initial entry, police officers were still in the house. (*Id.* at 22-23.) Mother contends that she was made to lie on the floor for "at least fifteen minutes," and that police officers were in the house for "more than twenty-five or thirty minutes." (*Id.* at 34-35.) Father contends that police officers were in the house for "more than two hours." (*Id.* at 28.) Plaintiffs also provide their neighbor's sworn declaration, which reflects that "police officers" were still in their house twenty-five minutes after initial entry. (*Id.* at 18-19.)

Plaintiffs do not dispute Defendants' evidence that Gonzales, Young, Fuller, and Koch "immediately exited" their house after learning it was the wrong location and proceeded to Target House, or that Leader never entered their house. As discussed, DEA agents and LPD officers were also involved in the execution of the search warrant. Plaintiffs also do not dispute that DEA agents were in Plaintiffs' house after the initial entry and remained until repairs were completed. While Plaintiffs provide sworn statements of "police officers" being in their home from between thirty minutes to more than two hours, they offer no evidence that Gonzales, Young, Fuller, and Koch were the police officers who remained in their home during that time frame. Generalized testimony addressing the defendants as a group is not competent summary judgment evidence of each defendant's personal involvement in the deprivation of a plaintiff's

constitutional right. *See Murphy v. Kellar*, 950 F.2d 290, 292 (5th Cir. 1992) (explaining that a § 1983 plaintiff "must specify the personal involvement of each defendant" after being given the opportunity for discovery); *see, e.g., Thomas v. Humfield*, 32 F.3d 566, 1994 WL 442484, at *5 (5th Cir. 1994) ("A civil rights claimant to prevent an adverse summary judgment must specifically identify each defendant's personal involvement in the alleged wrongdoing."). The personal involvement or causal connection of each individual must be demonstrated because allegations of group liability are insufficient to sustain a § 1983 action against each individual defendant. *See Stewart v. Murphy*, 174 F.3d 530, 537 (5th Cir. 1999) (holding that each defendant's actions in a § 1983 case must be considered individually); *see also Cass v. City of Abilene*, 814 F.3d 721, 728 (5th Cir. 2016) (finding defendant entitled to qualified immunity where plaintiff failed to establish personal involvement). Plaintiffs have not brought forward sufficient evidence to support a resolution in their favor on whether the actions of Gonzales, Young, Fuller, Koch, Leader, and Commander after the initial entry were unreasonable or violated a clearly established right.

Plaintiffs also do not identify evidence creating a genuine issue of material fact as to when Gonzales, Young, Fuller, Koch, Leader, and Commander learned or should have learned that they were in the wrong house, or as to whether they searched their house *after* they learned or should have learned of their mistake. *See Thomas*, 719 F. App'x at 353 (finding district court properly granted officer qualified immunity in the absence of evidence that he performed a search after

realizing he was at the wrong location). While there is evidence that Commander entered Plaintiffs' house with full awareness that it was not the target location, there is no evidence that he performed an unconstitutional search at that time. He submitted evidence to show that he remained in the house to check on Plaintiffs' medical needs, which is not objectively unreasonable conduct. *See id.* (finding it was not "objectively unreasonable" for officer to remain in plaintiffs' home "to explain the circumstances under which the officers inadvertently entered their home"). They also point to no evidence that they asked Commander or any of the other defendants to leave their home. Plaintiffs have failed to provide sufficient evidence to create a genuine issue of material fact that Defendants "failed in their duty of immediate termination of a search upon learning of the mistake." *Rogers*, 271 F. App'x at 436.[8]

In conclusion, Plaintiffs have not met their summary judgment burden to identify a genuine issue of material fact as to whether their Fourth Amendment rights were violated by Defendants. Because no genuine issue exists as to any material fact regarding any claim of unlawful search or seizure, Defendants are entitled to qualified immunity.

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[8] Plaintiffs' response contends that the "Fourth Amendment also protects against unreasonable use of force." (doc. 182 at 6.) While their first amended complaint contains allegations that they were "attacked," "roughed up," "abused," and "assaulted," it does not assert a claim for excessive force. (*See* doc. 16 at 3, 10, 19.)

Appendix D

V. RECOMMENDATION

Defendants' motion for summary judgment on grounds of qualified immunity on Plaintiffs' Fourth Amendment claims should be **GRANTED in part**. All claims for Fourth Amendment violations against Dunn, Glidewell, J. Lewis, Taylor, and K9 Officer should be **DISMISSED with prejudice** on grounds of qualified immunity under the constitutional violation prong, and Plaintiff's claims for unlawful entry and for unlawful search against Gonzales, Young, Fuller, Koch, Leader, and Commander should be **DISMISSED with prejudice** on grounds of qualified immunity under the objective reasonableness prong. Because no Fourteenth Amendment claims were asserted against them, Defendants' motion for summary judgment on the Fourteenth Amendment claims should be **DENIED as moot.** This action should be dismissed with prejudice as to Defendants.[9]

SO RECOMMENDED on this 28th day of February, 2022.

/s/ Irma Carrillo Ramirez
Irma Carrillo Ramirez
United States Magistrate Judge

[9] Plaintiffs' first amended complaint specifically states that it still names unidentified "John Doe" defendants, (*see* doc. 16 at 2 n. 1, at 11-15 n. 5, 6), so those claims appear to remain pending.

Appendix E

Appendix E

Order on Petition for Rehearing en Banc from the
United States Court of Appeals for the Fifth Circuit

June 26, 2024

Appendix E

United States Court of Appeals
For the Fifth Circuit

No. 22-10441

KAREN JIMERSON; JJ; JJ; XP; JP,

Plaintiffs–Appellees,

versus

MIKE LEWIS, LT,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-2826

ON PETITION FOR REHEARING EN BANC

Before STEWART, DENNIS, and SOUTHWICK, *Circuit Judges.*

Appendix E

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.

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*Judge Irma Carrillo Ramirez, did not participate in the consideration of the rehearing en banc.

Appendix F

Appendix F

Judgment of the United States Court of Appeals
for the Fifth Circuit

February 1, 2024

Appendix F

United States Court of Appeals
For the Fifth Circuit

No. 22-10441

KAREN JIMERSON; JJ; JJ; XP; JP,

Plaintiffs–Appellees,

versus

MIKE LEWIS, LT,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-2826

Before STEWART, DENNIS, and SOUTHWICK, *Circuit Judges.*

J U D G M E N T

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

Appendix F

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REVERSED, 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 appellees pay to appellant the costs on appeal to be taxed by the Clerk of this Court.

JAMES L. DENNIS, *Circuit Judge*, dissenting.