No. 19-50888

In the United States Court of Appeals for the Fifth Circuit

BRADLEY TERWILLIGER; BENJAMIN MATCEK; JIMMY DAN SMITH,
Plaintiffs-Appellees,

v.

ABELINO REYNA, IN HIS INDIVIDUAL CAPACITY; BRENT STROMAN, IN HIS INDIVIDUAL CAPACITY; MANUEL CHAVEZ, IN HIS INDIVIDUAL CAPACITY; ROBERT LANNING, IN HIS INDIVIDUAL CAPACITY; JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

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CERTIFICATE OF INTERESTED PERSONS

Appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1) **Plaintiffs-Appellees:**

   Bradley Terwilliger; Benjamin Matcek; Jimmy Dan Smith

2) **Defendants-Appellants:**

   Abelino Reyna; Brent Stroman; Manuel Chavez; Robert Lanning; Jeffrey Rogers

3) **Other Defendants in Underlying Case:**

   McLennan County, Texas; City of Waco, Texas; Christopher Frost; Steven Schwartz; Patrick Swanton

4) **Risk Pool for Abelino Reyna and McLennan County:**

   Texas Association of Counties

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Abelino "Abel" Reyna ("Reyna") requests oral argument as he believes it could significantly aid the decisional process in this case.

TABLE OF CONTENTS

Certificate of Interested Persons 2

Statement Regarding Oral Argument 4

Table of Contents 5

Table of Authorities 8

Jurisdictional Statement 16

Issues Presented 17

Statement of the Case 20

Summary of the Argument 21

Argument 23

I. Standard of Review 23

II. Motion to Dismiss Standard 23

III. Probable Cause 24

IV. Qualified Immunity 25

V. The District Court Erred When It Denied Reyna's Motion to Dismiss 29

A. Reyna Did Not Arrest Plaintiffs. 29

B. Plaintiffs' Claims Are Based on an Erroneous Understanding of Probable Cause. 30

C. Reyna is Entitled to Qualified Immunity From Plaintiffs' *Franks* Claim. 34

1. *Franks* Claims Are Limited 34

2. Plaintiffs Failed to Plead Sufficient Facts to State a *Franks* Claim Against Reyna. 36

3. Reyna's Provision of General Criteria Does Not Constitute a *Franks* Claim. 37

4. Multiple Independent Intermediaries Found That Probable Cause Existed to Arrest. 41

5. Plaintiffs Failed to Plead Any Material Falsehoods or Omissions. 42

a. Engaging in Organized Criminal Activities Offense 42

b. Plaintiffs Admitted to Facts Which Establish Probable Cause 44

c. The Alleged Falsehoods and/or Omissions Identified by Plaintiffs do not Undermine the Validity of Probable Cause in the Warrant Affidavit 45

6. Plaintiffs Failed the Additional Step to Establish a *Franks* Claim. 52

7. Plaintiffs Seek a Broad Fourth Amendment Rule that Undermines Public Policy. 53

8. Reyna is Entitled to Immunity From Plaintiffs' Claims. 58

a. Reyna is Entitled to Absolute Immunity From Plaintiffs' Franks Claim 58

b. Reyna is Entitled to Qualified Immunity From Plaintiffs' Franks Claim 59

9. The District Court Improperly Denied Qualified Immunity. 60

D. The District Court Erred in Denying Reyna Qualified Immunity From Plaintiffs' Bystander Claim. 63

E. The District Court Erred in Denying Reyna Qualified Immunity From Plaintiffs' Conspiracy Claim. 66

Conclusion 68

Certificate of Service 69

Certificate of Compliance 69

TABLE OF AUTHORITIES

Cases

Abbott v. Town of Livingston,
No. 16-00188-BAJ-EWD, 2018 U.S. Dist. LEXIS 118580 51

Ala. State Fed'n of Teachers, AFL-CIO *v. James*,
656 F.2d 193 (5th Cir. 1981) 44

Anderson v. Creighton,
483 U.S. 635 (1987) 27, 28, 67

Andrade v. Chojnacki,
65 F. Supp.2d 431 (W.D. Tex. 1999) 67

Appleberry v. Fort Worth Indep. Sch. Dist.,
No. 4:12-CV-235-A, 2012 WL 5076039, *5 (N.D. Tex. October 17, 2012) 64

Arizmendi v. Gabbert,
919 F.3d 891 (5th Cir. 2019), cert. denied, 140 S. Ct. 220 (2019) 43, 48

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 26, 27, 29

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 23, 24, 67

Baker v. McCollum,
443 U.S. 137 (1979) 51

Baker v. Wade,
743 F.2d 236 (5th Cir. 1984) 29

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 23, 62, 66, 67

Bernini v. City of St. Paul,
665 F.3d 997 (8th Cir. 2012) 32, 33

Blanchard v. Lonero,
452 Fed. App'x 577 (5th Cir. 2011) 50

Brosky v. State,
915 S.W.2d 120 (Tex. App.—Fort Worth 1996, pet. ref'd) 44

Burns v. Reed,
500 U.S. 478 (1991) 55

Burt v. State,
567 S.W.3d 335 (Tex. App.—Eastland 2017, reh'g denied) 44

Callahan v. Unified Gov't of Wyandotte County,
806 F.3d 1022 (10th Cir. 2015) 33, 34

Carr v. District of Columbia,
587 F.3d 401 (D.C. Cir. 2009) 32

Cavit v. Rychlik,
No. H-09-1279, 2010 WL 173530 (S.D. Tex. Jan. 14, 2010) 68

Cinel v. Connick,
15 F.3d 1338 (5th Cir. 1994) 24, 29, 41, 64, 66

Coates v. Heartland Wireless Comm'ns, Inc.,
55 F. Supp.2d 628, 646, n.26 (N.D. Tex. 1999) 64

Cuadra v. Houston Indep. Sch. Dist.,
626 F.3d 808 (5th Cir. 2010) 45

Curiel v. State,
243 S.W.3d 10 (Tex. App.—Houston [1st Dist.] 2007, pet ref'd) 43

Davis v. Bayless, Bayless & Stokes,
70 F.3d 367, 372, n.3 (5th Cir. 1995) 24

DeLeon v. City of Dallas,
141 Fed. App'x 258 (5th Cir. 2005) 68

Devenpeck v. Alford,
543 U.S. 146 (2004) 53

District of Columbia v. Wesby,
583 U.S. __, 138 S. Ct. 577 (2018) ..... passim

Dudley v. Angel,
209 F.3d 460 (5th Cir. 2000) 27

Elliot v. Perez,
751 F.2d 1472 (5th Cir. 1985) 28

Evans v. Chalmers,

703 F.3d 636 (4th Cir. 2012) 50, 67

Ex Parte *Pilkington*,
494 S.W.3d 330 (Tex. App.—Waco, 2015, no pet.) 42

Firefighters' Ret. Sys. v. Eisneramper, L.L.P.,
898 F.3d 553 (5th Cir. 2018) 24, 29

Franks v. Delaware,
438 U.S. 154, 155-56, 171-72 (1978); ..... passim

Freeman v. County of Bexar,
210 F.3d 550 (5th Cir. 2000) 35, 53, 63

Gentilello v. Rege,
623 F.3d 540 (5th Cir. 2010) 24

Greene v. Greenwood Pub. Sch. Dist.,
890 F.3d 240 (5th Cir. 2018) 24

Hale v. Fish,
899 F.2d 390 (5th Cir. 1990) 35, 39

Hale v. Townley,
45 F.3d 914 (5th Cir. 1995) 65, 67

Hampton v. Oktibbeha County Sheriff Dep't,
480 F.3d 358 (5th Cir. 2007) 35, 36, 39

Hart v. O'Brien,
127 F.3d 424 (5th Cir. 1997) 39

Hoffa v. United States,
385 U.S. 293 (1966) 50

Horton v. M&T Bank,
No. 4:13-CV-525-A, 2013 WL 6172145, *7 (N.D. Tex. Nov. 22, 2013) 64

Hughes v. Tarrant County,
948 F.2d 918 (5th Cir. 1991) 55

Illinois v. Gates,
462 U.S. 213 (1983) 25, 36

Illinois v. Krull,
480 U.S. 340 (1987) 44

Imbler v. Pachtman,
424 U.S. 409, 423-424 (1976) 56, 57

In re Baker Hughes Sec. Litig.,
136 F. Supp.2d 630, 646-47 (S.D. Tex. 2001) 64

In re Securities Litig. BMC Software, Inc.,
183 F. Supp.2d 860 (S.D. Tex. 2001) 64

Jacobs v. West Feliciana Sheriff's Dept.,
228 F.3d 388 (5th Cir. 2000) 67

Jennings v. Patton,
664 F.3d 297 (5th Cir. 2011) 35, 36

Johnson v. Norcross,
565 Fed. App'x 287 (5th Cir. 2014) 51

Jones v. Perez,
No. 17-11242, 2019 WL 5268618 (5th Cir. Oct. 16, 2019) 35, 36, 53, 63

Kalina v. Fletcher,
522 U.S. 118 (1997) 58

Kohler v. Englade,
470 F.3d 1104, 1114-1115 (5th Cir. 2006) 37, 39

Latiolais v. Cravins,
484 Fed. App'x 983 (5th Cir. 2012) 66, 67

Lormand v. US Unwired, Inc.,
565 F.3d 228 (5th Cir. 2009) 24

Lucario v. State,
677 S.W.2d 693 (Tex. App.—Houston [1st Dist.] 1984, pet ref'd) 44

Lynch v. Cannatella,
810 F. 2d 1363 (5th Cir. 1987) 67

Malley v. Briggs,
475 U.S. 335 (1986)..... 26, 28

Marks v. Hudson,
933 F.3d 481 (5th Cir. 2019) 35, 63

Maryland v. Pringle,
450 U.S. 366 (2003) 24, 25, 30, 31, 32

McBride v. State,
803 S.W.2d 741 (Tex. App.—Dallas 1990, pet. ref'd) 52

McDonald v. Bd. of Election Comm'r,
394 U.S. 802, 808-09 (1969) 44

McDonald v. State,
692 S.W.2d 169 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd) 44, 50

Meadours v. Ermel,
483 F. 3d 417, 421-22 (5th Cir. 2007) 67

Melton v. Phillips,
875 F.3d 256 (5th Cir. 2017) ..... *passim*

Mitchell v. Forsyth,
472 U.S. 511 (1985) 16, 67

Moreno v. Dretke,
450 F.3d 158 (5th Cir. 2006) 38, 62

Moreno v. Dretke,
362 F. Supp.2d 773 (W.D. Tex. 2005) 62

Morin v. Caire,
77 F.3d 116 (5th Cir. 1996) 23

Mowbray v. Cameron County,
274 F.3d 269 (5th Cir. 2001) 67

Mullenix v. Luna,
136 S. Ct. 305 (2-15) 27

Norris v. Hearst Tr.,
500 F.3d 454 (5th Cir. 2007) 24

Papasan v. Allain,
478 U.S. 265 (1986) 24

Plumhoff v. Pickard,
572 U.S. 765 (2014) 27, 30

Porter v. Lear,
751 Fed. App'x 422, 429-430 (5th Cir. 2018) 35, 64, 65, 66

Rakun v. Kendall County, Tex.,
No. CIV.A. SA–06–CV–1044, 2007 WL 2815571 (W.D. Tex. Sept. 24, 2007) 50

Reichle v. Howards,
566 U.S. 658 (2012) 26

Rivera v. Kalafut,
No. 4:09cv181, 2010 WL 3701517 (E.D. Tex. June 15, 2010) 67

Rodriguez v. Ritchey,
556 F.2d 1185 (5th Cir. 1977) 52

Rojas v. State,
693 S.W.2d 605 (Tex. App.—San Antonio 1986, writ refused) 43, 44, 50

Rome v. HCC Life Ins. Co.,
323 F. Supp.3d 862 (N.D. Tex. 2018) 24, 29, 41

Saucier v. Katz,
533 U.S. 194 (2001) 26

Shears v. State,
895 S.W.2d 456 (Tex. App.—Tyler 1995, no pet.) 50

Shepperd v. Alaniz,
303 S.W.2d 846 (Tex. App.—San Antonio 1957, no writ) 29

Shine v. Banister,
No. 5:10CV128, 2011 WL 13177776 52

Simon v. Dixon,
141 Fed. App'x 305 (5th Cir. 2005) 42

Simon v. Lundy,
139 Fed. App'x 629 (5th Cir. 2005) 42

Spivey v. Robertson,
197 F.3d 772 (5th Cir. 1999) 58, 59

Streetman v. Jordan,
918 F. 2d 555 (5th Cir. 1990) 67

Summerlin v. Barrow,

No. 4:17-CV-1016-A, 2018 WL 1322172, *3 (N.D. Tex. Mar. 13, 2018) 64

Taylor v. Gregg,
36 F.3d 453 (5th Cir. 1994) 25, 42

Taylor v. Meacham,
82 F. 3d 1556 (10th Cir. 1996) 42

Tellabs, Inc. v. Makor Issues & Rights, Ltd,
551 U.S. 308 (2007) 24

Thierry v. Lee,
148 F.3d 529 5th Cir. 1995) 50

Tuchman v. DSC Comm. Corp.,
14 F.3d 1061 (5th Cir. 1994) 24

Ulrich v. City of Shreveport,
765 Fed. App'x 964 (5th Cir. 2019) 61

United States v. Barnes,
126 F. Supp. 3d 735, 740-41 (E.D. La. 2015) 38, 48

United States v. Brown,
941 F.2d 1300 (5th Cir. 1991) 36

United States v. Francis,
487 F.2d 968 (5th Cir. 1973) 43, 48

United States v. May,
819 F.2d 531 (5th Cir. 1987) 36, 63

United States v. Morris,
477 F.2d 657 (5th Cir. 1973)..... 43, 48, 53

United States v. Phillips,
727 F.2d 392 (5th Cir. 1984) 36

United States v. Sarras,
575 F.3d 1191 (11th Cir. 2009) 48

United States v. Tabares,
No. 115CR00277SCJJFK, 2016 WL 11258758, (N.D. Ga. June 3, 2016) . 38, 48

United States v. Ventresca,
380 U.S. 102 (1965) 36

Walker v. Beaumont Indep. Sch. Dist.,
938 F.3d 724 ..... 24, 29

Westfall v. Luna,
903 F.3d 534 (5th Cir. 2018) 50, 65

White v. Pauly,
137 S. Ct. 548 (2017) 27

Whitley v. Hanna,
726 F.3d 631 (5th Cir. 2013) 64

Wilson v Layne,
526 U.S. 603 (1999) 29

Winfrey v. Rogers,
901 F.3d 483 (5th Cir. 2018) 39

Ybarra v. Illinois,
444 U.S. 85 (1979) 30

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017) 27

Statutes

28 U.S.C. §1292 16

42 U.S.C. §1983.....66, 67

TEX. CONST. ART. V, § 21 29

TEX. CRIM. PROC. CODE § 2.13 29

TEX. PENAL CODE §71.01 ..... 43, 47, 48

TEX. PENAL CODE §71.01(a)(1)-(2) 43, 48

TEX. PENAL CODE §71.02 ..... 43, 44, 49

TEX. PENAL CODE §71.02-.03 ..... 44, 50

TEX. PENAL CODE §71.03 43

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292 because it is an appeal of an order that denied Reyna's assertion of qualified immunity.[1] Reyna timely appealed by filing his notice of appeal within 30 days of the district court's order of September 6, 2019.[2]

[1] ROA.1002-1024. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).
[2] ROA.1002-1024; ROA.1030-1031.

ISSUES PRESENTED

This qualified immunity appeal raises questions regarding the application of probable cause in multi-suspect cases.

1. **Plaintiffs' Allegations Against Reyna Are Insufficient to Establish a Constitutional Violation or a Violation of Clearly Established Law**

   A. Have Plaintiffs alleged a sufficient factual basis to support a claim that Reyna arrested them or caused them to be arrested?

   B. Was it clearly established on May 17, 2015, that law enforcement officers are prohibited from arresting a member of a large, riotous group, some of whom had been observed publicly committing violent crimes resulting in multiple deaths, unless the officers can identify specific unlawful acts attributable to the specific individual group members?

   C. Can Plaintiffs identify controlling authority establishing beyond debate that their arrests were clearly prohibited?

2. **Qualified Immunity from Plaintiffs' Three Remaining Claims**

   A. Is Reyna entitled to immunity from Plaintiffs' *Franks* claims?

      1. Have Plaintiffs alleged a sufficient factual basis to support a claim that Reyna signed or presented an affidavit to a magistrate which caused them to be arrested?

2. Have Plaintiffs alleged a sufficient factual basis to support a claim that Reyna provided false information to anyone to be used in an affidavit or that he omitted material information from anyone in connection with their arrests?

3. Was it a violation of clearly established law for Reyna to provide legal advice to law enforcement officers regarding the elements of the offense of Engaging in Organized Criminal Activity?

B. Is Reyna entitled to immunity from Plaintiffs' bystander claims?

1. Did Plaintiffs properly assert a bystander claim?

2. Did Plaintiffs allege sufficient facts to establish that Reyna was present when the alleged *Franks* violation occurred and had a reasonable opportunity to prevent the violation from occurring?

3. Was it clearly established at the time that an official could be held liable under a bystander claim for failing to prevent a *Franks* violation?

C. Is Reyna entitled to Immunity from Plaintiffs' Conspiracy Claims?

1. Did Plaintiffs allege facts sufficient to establish an agreement between private and public defendants to commit an illegal act?

2. Did Plaintiffs allege facts sufficient to establish Reyna's personal involvement in the alleged conspiracy?

3. Did Plaintiffs allege facts sufficient to rebut Reyna's entitlement to immunity?

STATEMENT OF THE CASE

Plaintiffs Bradley Terwilliger, Benjamin Matcek, and Jimmy Don Smith ("Plaintiffs") were arrested for the felony offense of Engaging in Organized Criminal Activity ("EIOCA"). EIOCA is a criminal enterprise offense, under which an individual may be held liable for acting "in a combination" with others who commit or conspire to commit certain violent crimes.

Plaintiffs' arrests occurred after a battle took place at a Twin Peaks restaurant on May 17, 2015, between rival motorcycle clubs and affiliated personnel, during which nine people were killed and many more were injured.[3] Plaintiffs admit that they are members of or associated with a motorcycle club and that they were wearing clothing that reflected motorcycle club affiliation or support when they were present at the Twin Peaks restaurant on the day of the battle.[4]

Nevertheless, Plaintiffs claim that their arrests violated their constitutional rights because they were not supported by probable cause.[5] Plaintiffs sued Abel Reyna, the former District Attorney of McLennan County, Texas, as well as others.[6] Plaintiffs alleged that the District Attorney's Office set the criteria for establishing probable cause to arrest individuals in connection with the mass

[3] ROA.485 [¶45]; ROA.529-530.
[4] *Infra* at 44-45.
[5] ROA.476-530.
[6] ROA.478-481.

violence that occurred at the restaurant but that law enforcement personnel applied those criteria.[7]

Reyna sought dismissal of all claims, asserting his entitlement to qualified immunity.[8] On September 6, 2019, the District Court entered an order granting in part and denying in part Reyna's motion to dismiss.[9] The District Court denied Reyna's motion as to Plaintiffs': (1) *Franks*; (2) conspiracy; and (3) bystander claims. Reyna filed his notice of appeal on September 25, 2019.[10]

SUMMARY OF THE ARGUMENT

The battle at Twin Peaks involved multiple suspects in two warring groups and clear criminal conduct by members of those groups.

A. Reyna is Entitled to Qualified Immunity From All of Plaintiffs' Claims

Plaintiffs' claims against Reyna should be dismissed because his conduct did not violate clearly established law. He did not arrest Plaintiffs or cause them to be arrested. But even if he had, he would still be entitled to qualified immunity because, at the time of the homicides at Twin Peaks, it was not clearly established that Plaintiffs' arrests violated the Fourth Amendment. The Supreme Court and numerous appellate courts have called into serious question how the notion of "particularized probable cause" should be applied in multi-suspect cases.

[7] ROA.491 [¶68, n.3].
[8] ROA.562-710.
[9] ROA.1002-1023.
[10] ROA.1030-1031.

B. Plaintiffs' *Franks* Claims

Reyna is entitled to qualified immunity from Plaintiffs' *Franks* claims because Reyna was not a signer, presenter, provider, or omitter. He did not sign an affidavit. He did not present an affidavit. He did not provide false factual information to anyone to be used in an affidavit, and he did not omit any material information. All he is alleged to have done is to provide legal advice to law enforcement officers regarding the elements of the offense of Engaging in Organized Criminal Activity ("EIOCA"). He allegedly provided officers with a set of criteria to be applied in determining whether an individual should be arrested for EIOCA. At most, he provided legal advice. He did not provide facts, and he did not omit material facts. The facts were supplied by law enforcement.

C. Plaintiffs' Bystander Claims

Reyna is entitled to qualified immunity from Plaintiffs' bystander claims because: (1) Plaintiffs failed to properly assert a bystander claim; (2) Plaintiffs failed to allege facts sufficient to establish that Reyna was present when the alleged *Franks* violation occurred and that he had a reasonable opportunity to prevent the violation from occurring; and (3) it was not clearly established at the time that an official could be held liable under a bystander claim for failing to prevent a *Franks* violation.

D. Plaintiffs' Conspiracy Claims

Reyna is entitled to qualified immunity from Plaintiffs' conspiracy claims because: (1) Plaintiffs failed to allege facts sufficient to establish an agreement between private and public defendants to commit an illegal act; (2) Plaintiffs failed to allege facts sufficient to establish Reyna's personal involvement in the alleged conspiracy; and (3) Plaintiffs failed to allege facts sufficient to rebut Reyna's entitlement to immunity.

ARGUMENT

I. STANDARD OF REVIEW

A denial of a motion to dismiss is subject to *de novo* review.[11]

II. MOTION TO DISMISS STANDARD

A plaintiff must plead sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.[12] A plaintiff's obligation in response to a motion to dismiss is to provide the grounds for his entitlement to relief which requires more than labels and conclusions; a formulaic recitation of the elements of a cause of action will not suffice.[13] A plaintiff must allege sufficient facts to create more than a mere possibility that a defendant has acted unlawfully.[14] A court is not

[11] *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996).
[12] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
[13] *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.
[14] *Iqbal*, 556 U.S. at 678.

bound to accept legal conclusions couched as factual allegations.[15] It need only accept as true the "well-pleaded" facts in a plaintiff's complaint.[16] To be "well pleaded," a complaint must state specific facts to support the claim, not merely conclusions couched as factual allegations.[17]

In deciding a motion to dismiss, courts may consider the complaint, as well as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.[18] A court may also refer to matters of public record.[19]

III. PROBABLE CAUSE

To determine whether an officer had probable cause for an arrest, courts examine the events leading up to the arrest and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.[20] In doing so, facts must not be viewed in isolation, but

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[15] *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Gentilello v. Rege*, 623 F.3d 540, 544 (5th Cir. 2010).
[16] *Papasan*, 478 U.S. at 283; *Greene v. Greenwood Pub. Sch. Dist.*, 890 F.3d 240, 242 (5th Cir. 2018).
[17] *Iqbal*, 556 U.S. at 679; *Tuchman v. DSC Comm. Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 244 (5th Cir. 2009).
[18] *Tellabs, Inc. v. Makor Issues & Rights, Ltd*, 551 U.S. 308, 322 (2007); *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cit. 2019); *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994); *Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007); *Davis v. Bayless, Bayless & Stokes*, 70 F.3d 367, 372, n.3 (5th Cir. 1995).
[19] *Walker*, 938 F.3d at 735; *Firefighters' Ret. Sys. v. Eisneramper, L.L.P.*, 898 F.3d 553, 558 n.2 (5th Cir. 2018); *Rome v. HCC Life Ins. Co.*, 323 F. Supp. 3d 862, 866 (N.D. Tex. 2018) (citing *Cinel*, 15 F.3d at 1343, n. 6).
[20] *District of Columbia v. Wesby*, 583 U.S. __, 138 S. Ct. 577, 586, 585 (2018) (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

should be seen as factors in the totality of the circumstances, which requires the court to look at the "whole picture."[21] Because probable cause "deals with probabilities and depends on the totality of the circumstances,"[22] it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules."[23] It requires only a substantial chance of criminal activity, not an actual showing of such activity."[24] Probable cause "is not a high bar."[25]

'"[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of noncriminal acts.'"[26] Generally, the issuance of a warrant breaks the chain of causation in a wrongful arrest claim.[27]

IV. QUALIFIED IMMUNITY

Governmental officials are protected from suit and liability by qualified immunity unless their alleged conduct: (1) violated a Constitutional or statutory right; and (2) the illegality of the alleged conduct was clearly established at the time.[28] The phrase "clearly established" means that, at the time of the official's conduct, the law was sufficiently clear that every reasonable official would

[21] *Wesby*, at 588.
[22] *Pringle*, 540 U.S. at 371.
[23] *Illinois v. Gates*, 462 U.S. 213, 232 (1983).
[24] *Id*. at 243-244, n. 13.
[25] *Wesby*, 138 S. Ct. at 586.
[26] *Id.* at 588.
[27] *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994).
[28] *Wesby*, 138 S.Ct. at 589.

understand that what he is doing is unlawful.[29] Existing law must have placed the constitutionality of the official's conduct "beyond debate."[30] This demanding standard means that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[31] To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent.[32] It is not enough that the rule is suggested by then-existing precedent.[33] The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.[34] Otherwise, the rule is not one that "every reasonable official would know."[35]

The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him.[36] The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[37] Courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular

[29] *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).
[30] *Id.*; *al-Kidd*, 563 U.S. at 741.
[31] *Id*. (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).
[32] *Id*.
[33] *Id*. at 590.
[34] *Id.*; *see Reichle v. Howards*, 566 U.S. 658, 664 (2012).
[35] *Id.*
[36] *Id*.
[37] *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

circumstances that he or she faced."[38] A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established."[39] The specificity of the rule is "especially important in the Fourth Amendment context."[40]

Probable cause is "incapable of precise definition or quantification into percentages."[41] Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in "the precise situation encountered."[42] The Supreme Court has stressed the need to "identify a case where an officer acting under similar circumstances…was held to have violated the Fourth Amendment."[43] Existing precedent must place the lawfulness of the particular arrest "beyond debate."[44]

Qualified immunity is overcome only if, at the time and under the circumstances of the challenged conduct, *all* reasonable officers would have realized the conduct was prohibited by the federal law on which the suit is founded.[45] The question is whether a reasonable officer *could* have believed that the actions of the defendant officer were lawful in light of clearly established law

[38] *Id.* (quoting *Plumhoff v. Pickard*, 571 U.S. 765, 779 (2014)).
[39] *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).
[40] *Id.* (citing *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (*per curiam*)).
[41] *Id.* (quoting *Pringle*, 540 U.S. at 371).
[42] *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017)).
[43] *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)).
[44] *Id.* (quoting *al-Kidd*, 536 U.S. at 741).
[45] *Dudley v. Angel*, 209 F.3d 460, 462 (5th Cir. 2000).

and the information the officer possessed at the time.[46] If reasonable officers could differ on the lawfulness of a defendant's actions, the defendant is entitled to qualified immunity.[47] The legal principle in question must clearly prohibit the specific conduct of the official in the particular circumstances that were confronting the official.[48]

It is the plaintiff's burden to plead and prove specific facts which overcome qualified immunity.[49] A plaintiff "must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity."[50]

The issue with respect to qualified immunity in this case is as follows: Was it clearly established on May 17, 2015, that law enforcement officers are prohibited from arresting a member of a large, riotous group, members of which had been observed committing serious, violent crimes in a public place resulting in multiple deaths, unless the officers can identify specific unlawful acts attributable to the specific individual member of the group who is being arrested? To establish an affirmative answer to that question, Plaintiffs are required to identify "controlling authority" indicating "beyond doubt" that such an arrest under those circumstances

[46] *Anderson*, 483 U.S. at 641.
[47] *Malley*, 475 U.S. at 341.
[48] *Wesby*, 138 S.Ct. at 590.
[49] *Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).
[50] *Id.*

was clearly prohibited.[51] Plaintiffs cannot do so.

V. THE DISTRICT COURT ERRED WHEN IT DENIED REYNA'S MOTION TO DISMISS

A. Reyna Did Not Arrest Plaintiffs.

Plaintiffs' pleadings establish that they were arrested by the *Waco Police Department* and **not** by Reyna.[52] District attorneys do not have authority to arrest.[53] Brent Stroman, the former Chief of the Waco Police Department, testified that he alone made the decision to arrest the individuals at Twin Peaks, expressly refuting Plaintiffs' conclusory allegations that it was Reyna's advocacy which caused the arrests.[54] Chief Stroman also testified that his knowledge of the facts was provided to him by *Waco Police Department investigators* and **not** by Reyna.[55] Because Reyna did not arrest Plaintiffs or cause their arrest, no claim for wrongful arrest can be brought against him, and he is entitled to qualified

[51] *Wesby*, 138 S.Ct. at 589-90; *al-Kidd*, 563 U.S. at 741-42; *Wilson v Layne*, 526 U.S. 603, 617 (1999).
[52] *See* ROA.481 [¶¶20-23]; ROA.495-496 [¶¶84-86]; ROA.504 [¶129]; ROA.506-507 [¶140]; ROA.509-510 [¶156]; ROA.529-530.
[53] TEX. CRIM. PROC. CODE §2.13; *see also* TEX. CONST. ART. V, § 21; *Baker v. Wade*, 743 F.2d 236, 242 (5th Cir. 1984), *on reh'g,* 769 F.2d 289 (5th Cir. 1985); *Shepperd v. Alaniz*, 303 S.W.2d 846, 850 (Tex. App.—San Antonio 1957, no writ).
[54] *See* transcript of 8/8/16, hearing on Motion to Disqualify McLennan County District Attorney's Office and Appoint an Attorney Pro Tem, ROA.636-637 [p. 96, line 22 to p. 97, line 5]; ROA.641-642 [p. 101, line 23 to p. 102, line 13]; ROA.653 [p. 113, lines 1-14]. These excerpts are properly considered by the Court in determining Reyna's motion to dismiss. *See* ROA.490 [¶64]; *Walker*, 938 F.3d at 735; *Eisneramper*, 898 F.3d at 558, n.2; *Rome*, 323 F. Supp.3d at 866; *Cinel*, 15 F.3d at 1343, n.6.
[55] ROA.635-636 [p. 95, line 20 to p. 96, line 1]; ROA.654 [p. 117, lines 4-11].

immunity.[56]

B. Plaintiffs' Claims Are Based on an Erroneous Understanding of Probable Cause.

Plaintiffs argue that, for probable cause to exist, there must be a showing of facts particularized to an individual.[57] This framing of the issue is too general and runs afoul of the Supreme Court's admonition that the legal issue must be defined with sufficient specificity in order to determine whether conduct is reasonable in the particular circumstances.[58]

Plaintiffs improperly rely on *Ybarra v. Illinois*[59] to support their application of the concept of particularized probable cause.[60] In *Ybarra*, law enforcement officers, who possessed search warrants for a bar and its owner, decided to conduct warrantless pat down searches of numerous patrons who happened to be in the bar at the time.[61] *Ybarra* is not sufficiently similar to the deadly, violent, chaotic scene which existed at Twin Peaks. *Ybarra* does not clearly establish that the Plaintiffs' arrests were violative of the Fourth Amendment.

The Supreme Court's decision in *Maryland v. Pringle*[62] indicates that the *Ybarra* particularized probable cause approach does *not* apply to multi-suspect

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[56] *Wesby*, 138 S.Ct. at 589.
[57] ROA.494 [¶¶78-79]; ROA.512-513 [¶¶173-76].
[58] *Wesby*, 138 S.Ct. at 590; *Plumhoff*, 572 U.S. at 779.
[59] 444 U.S. 85 (1979).
[60] ROA.512 [¶175].
[61] *Ybarra*, 444 U.S. at 87-89.
[62] 450 U.S. 366 (2003).

situations. *Pringle* involved a traffic stop in which police discovered five bags of cocaine.[63] Police arrested all three men in the vehicle, even though each one denied any knowledge of the drugs.[64] The lower court held that absent specific facts showing that each man had personal knowledge and control of the drugs, merely being in a car where drugs were found was not sufficient to establish probable cause.[65] The Supreme Court disagreed and noted that probable cause is a flexible concept which deals with probabilities and the totality of the facts and circumstances present in a particular case.[66] When analyzing probable cause a court is required to look at all circumstances leading to the arrest, to make reasonable inferences from the facts in doing so, and to decide whether those circumstances would lead an objectively reasonable officer to believe that probable cause existed.[67]

The facts in *Ybarra* were not similar to the facts in *Pringle*.[68] *Ybarra* involved police deciding to search all patrons in a public bar when they only had a warrant authorizing the search of the bar and its owner.[69] Nothing about those facts suggested any reasonable inference that bar patrons, who just happened to be at the location, could be searched. By contrast, *Pringle* allowed inferences to be

[63] *Id*.
[64] *Id*. at 368-69.
[65] *Id*.
[66] *Id*. at 369-71.
[67] *Id.* at 370-71.
[68] *Id*. at 372-73.
[69] *Id*.

made to support a reasonable belief that all three men were involved in a criminal enterprise.[70]

Several courts have held that *Pringle* either modified or called into question how the "particularized probable cause" approach, discussed in *Ybarra*, should be applied in multi-suspect cases.

In *Carr v. District of Columbia*,[71] all the members of a protest march were arrested for vandalism even though only some members of the group engaged in acts of vandalism.[72] *Carr* noted that "officers may be able to establish that they had probable cause to arrest an entire group of individuals if the group is observed violating the law *even if specific unlawful acts cannot be ascribed to specific individuals*."[73] In a multi-suspect setting, the particularized probable cause standard "is satisfied if the officers have grounds to believe all arrested persons were a part of the unit observed violating the law."[74]

In *Bernini v. City of St. Paul*, police arrested a large group of protesters.[75] The plaintiffs, citing to *Ybarra*, alleged that their arrests violated the Fourth Amendment because police needed to have particularized probable cause for each

[70] *Id*. at 373-74.
[71] 587 F.3d 401 (D.C. Cir. 2009).
[72] *Id.* at 402-04.
[73] *Id.* at 406 (emphasis added).
[74] *Id*. at 407.
[75] 665 F.3d 997, 1000-02 (8th Cir. 2012).

person arrested.[76] The Eighth Circuit disagreed, noting that the touchstone of the Fourth Amendment is reasonableness under the particular circumstances presented. "*What is reasonable in the context of a potential large-scale urban riot may be different from what is reasonable in the relative calm of a tavern with a dozen patrons*."[77] The Eighth Circuit then cited to *Carr* as holding that the Fourth Amendment is satisfied if police officers have grounds to believe that all arrested people were part of a unit that was observed violating the law.[78] "*Carr* thus demonstrates that a reasonable officer in St. Paul could have believed that the Fourth Amendment did not require a probable cause determination with respect to each individual in a large and potentially riotous group before making arrests."[79]

Callahan v. Unified Gov't of Wyandotte County,[80] involved the arrest of all the members of a police team, even though only some of the team members were observed stealing.[81] The lower court had framed the legal issue too broadly. The properly focused inquiry was whether it was clearly established that police could arrest an entire group when police know some unidentifiable members of the

[76] *Id*. at 1003.
[77] *Id.* at 1003 (emphasis added).
[78] *Id*.
[79] *Id*.
[80] 806 F.3d 1022 (10th Cir. 2015).
[81] *Id.* at 1024-25.

group, but not all, have committed a crime.[82] *Callahan* concluded that the question of probable cause in multi-suspect situations "*is far from beyond debate*."[83]

Because the application of probable cause in multi-suspect cases is far from beyond debate, Reyna is entitled to qualified immunity from all of Plaintiffs' claims arising from their arrests.

C. Reyna is Entitled to Qualified Immunity From Plaintiffs' *Franks* Claim.

Reyna is entitled to qualified immunity from Plaintiffs' *Franks* claims because Plaintiffs failed to allege sufficient facts to establish that Reyna was a signer, presenter, provider, or omitter. Plaintiffs' pleadings, and the public record, establish that: (1) Reyna, at most, provided general criteria regarding the elements of the offense of EIOCA; and (2) only independent law enforcement officers applied those criteria to the facts.

1. *Franks* Claims Are Limited.

A *Franks* claim can only be brought against signers, presenters, providers, or omitters. "Signers" are officials who sign a false warrant affidavit. "Presenters" are officials who present a false warrant affidavit to a magistrate. "Providers" are officials who knowingly, intentionally, or with reckless disregard for the truth, provide materially false statements of fact for use in an affidavit in support of a

[82] *Id.* at 1028.
[83] *Id*. (emphasis added).

warrant which, after the false statements have been excised, does not establish probable cause. "Omitters" are officials who knowingly, intentionally, or with reckless disregard for the truth, omit material information which, if provided to the magistrate, would eliminate probable cause.

A *Franks* violation occurs when an officer signs or presents a warrant affidavit to the magistrate or when an officer knowingly, intentionally, or with reckless disregard for the truth, makes false statements in an affidavit in support of a warrant and after "reconstructing the [affidavit at issue] by excising the falsehoods and inserting the material omission, the warrant would be unsupported by probable cause."[84] The falsehood or omission must be "clearly critical" or material to a finding of probable cause.[85] The final inquiry to establishing a *Franks* violation is "whether any reasonably competent officer possessing the information each officer had at the time she swore her affidavit could have concluded that a warrant should issue."[86] The final inquiry is the ultimate liability

[84] *Franks v. Delaware*, 438 U.S. 154, 155-56, 171-72 (1978); *Melton v. Phillips*, 875 F.3d 256, 262 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1550 (2018) (citing *Jennings v. Patton*, 644 F.3d 297, 301 (5th Cir. 2011) and *Hampton v. Oktibbeha County Sheriff Dep't*, 480 F.3d 358, 363 (5th Cir. 2007)); *Marks v. Hudson*, 933 F.3d 481, 487 (5th Cir. 2019); *Jones v. Perez*, No. 17-11242, 2019 WL 5268618, *3 (5th Cir. Oct. 16, 2019).

[85] *Porter v. Lear*, 751 Fed. App'x 422, 429-430 (5th Cir. 2018) (citing *Hale v. Fish*, 899 F.2d 390, 400 n.3 (5th Cir. 1990)).

[86] *Jones*, 2019 WL 5268618, at *3 (quoting *Freeman v. County of Bexar*, 210 F.3d 550, 553 (5th Cir. 2000)) (holding that the officer did not violate *Franks* when she did not alert the magistrate to the reliability of a witness to the crime that was in serious doubt because the overall evidence established probable cause "even if the information on a reconstructed affidavit would not have sufficed.").

question in a false arrest case: "Did the officer have information establishing probable cause, whether or not that information was included [or excluded] in the warrant?"[87]

An affiant does not need to include every detail in the affidavit when the totality of the circumstances demonstrates probable cause. The affiant does not need to prove the suspect's guilt beyond a reasonable doubt on every element of the charged crime, but rather must only establish that probable cause supports the arrest.[88] The Court must take a realistic, common sense approach when analyzing warrant affidavits and should pay great deference to the magistrate's finding of probable cause.[89] When the Court is confronted with a close call, all doubts or questions "should be largely determined by the preference to be accorded to warrants."[90]

2. Plaintiffs Failed to Plead Sufficient Facts to State a *Franks* Claim Against Reyna.

Plaintiffs did not plead that Reyna signed[91] or presented[92] the warrant affidavit

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[87] *Id.*
[88] *See United States v. Brown*, 941 F.2d 1300, 1304 (5th Cir. 1991); *United States v. Ventresca*, 380 U.S. 102, 107 (1965).
[89] *See United States v. May*, 819 F.2d 531, 535 (5th Cir. 1987) (quoting *Ventresca*, 380 U.S. at 108).
[90] *United States v. Phillips*, 727 F.2d 392, 399 (5th Cir. 1984) (quoting *Gates*, 462 U.S. at 236 n.10.
[91] ROA.504 [¶132]; ROA.508 [¶149], ROA.511 [¶167].
[92] Only a person who signed, presented, or provided false information for use in a warrant affidavit to a magistrate can be liable under *Franks*. *Melton*, 875 F.3d at 262 (citing *Jennings*, 644 F.3d at 301 and *Hampton*, 480 F.3d at 363). Moreover, Plaintiffs explicitly pled that Chavez, not Reyna, presented the warrant affidavits to the magistrate judge. *See* ROA.496 [¶86].

to the magistrate.[93] Plaintiffs also failed to plead that Reyna deliberately or recklessly provided false, material information for use in the warrant affidavit.[94] Plaintiffs assert that various misrepresentations were made[95] but did not plead that Reyna, himself,[96] made or provided these alleged material misrepresentations in the warrant affidavit.

Plaintiffs' Complaint contains a conclusory allegation that Reyna *caused* an affidavit to be presented to the magistrate judge.[97] This conclusory allegation is insufficient to plead a *Franks* claim. By failing to plead the requisite involvement by Reyna, Plaintiffs failed to state a *Franks* claim against Reyna, and he is, therefore, entitled to qualified immunity from this claim.

3. Reyna's Provision of General Criteria Does Not Constitute a *Franks* Claim.

Plaintiffs pled that "the DA's office," not Reyna,[98] provided general criteria to law enforcement officers to assist them in determining whether probable cause existed to arrest the individuals.[99] Plaintiffs alleged that the DA's Office provided

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[93] *See* ROA.476-528.
[94] ROA.476-528.
[95] ROA.476-528.
[96] Notably, Plaintiffs *do* explicitly plead that other defendants allegedly made certain misrepresentations. *See* ROA.498 [¶97].
[97] *See* ROA.515 [¶185].
[98] Plaintiffs cannot seek to hold Reyna liable on the basis of respondeat superior liability. *Kohler v. Englade*, 470 F.3d 1104, 1114-1115 (5th Cir. 2006).
[99] Members of the DA's Office drafted these criteria based upon law enforcement investigators' intelligence about the pre-planned violence, the nature of biker gangs, their affiliations, and the hierarchy of support clubs, etc. *See* ROA.485-487 [¶¶44, 50-51]; ROA.492 [¶69]; ROA.498 [¶97]; ROA.625-657; ROA.658-668.

general criteria for use in a fill-in-the-name template affidavit. The *officers on the scene* thereafter applied the facts they learned at the scene to the general criteria in order to assert probable cause against specific individuals.[100]

The general criteria provided by the DA's office did not constitute any specific factual allegations, assertions, or statements about any particular individual involved in the incident at Twin Peaks. The general criteria merely constituted general legal advice about the elements which must be proven to establish the particular crime, EIOCA. Even assuming, *arguendo*, that this legal advice about the elements of EIOCA was incorrect, an alleged misstatement of the law cannot support a *Franks* claim. *Franks* has never been applied, by any court, to an individual's alleged misstatement of law in a warrant affidavit.[101] Even assuming that Reyna personally provided the general criteria, he is entitled to qualified immunity because: (1) he did not supply any specific factual assertions about any of the Plaintiffs and (2) general statements about the law, even if mistaken, do not support a *Franks* claim. The inclusion of misstatements of the law in an arrest affidavit does not constitute a clear violation of law and does not support a *Franks* claim.

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[100]The officers at the scene who interviewed and then determined that an individual met the criteria to arrest were a credible source for the magistrate to rely on in determining whether probable cause had been established. *Moreno v. Dretke*, 450 F.3d 158, 170 (5th Cir. 2006).

[101] *See United States v. Barnes*, 126 F. Supp. 3d 735, 740-41 (E.D. La. 2015); *United States v. Tabares*, No. 115CR00277SCJJFK, 2016 WL 11258758, *19 (N.D. Ga. June 3, 2016), *report and recommendation adopted*, No. 1:15-CR-0277-SCJ-JFK, 2017 WL 1944199 (N.D. Ga. May 10, 2017).

Even if one assumes, *arguendo*, that Reyna personally provided the general criteria, Plaintiffs did not plead that Reyna had any further involvement in the warrant affidavits. Reyna did not investigate specific individuals, attest to the truth of the information or facts obtained through the investigation of specific individuals, establish facts to support probable cause for specific individuals, execute the warrant, or present the warrant.[102] Instead, Plaintiffs pled that "Defendant Rogers, along with DPS agents Schwartz and Frost provided false and misleading information regarding Plaintiffs[']alleged affiliation with criminal street gangs, which ultimately was a primary factor in causing their false arrest."[103] Providing general criteria for arresting an unidentified individual for EIOCA, without providing and then swearing to the specific information in the affidavit pertaining to a specific individual plaintiff, does not establish a *Franks* violation.[104] Plaintiffs, therefore, failed to plead a Constitutional violation against Reyna.

This Court has emphasized the importance of causally connecting an official's conduct to a plaintiff's arrest and has denied liability where the connection is too attenuated.[105] In *Melton*, an officer used a police database to identify a criminal suspect and included the identification of the suspect in an incident report, which

[102] *See* ROA.476-528.
[103] *See* ROA.486 [¶50]; ROA.498 [¶97].
[104] *Franks* violations arise from material misrepresentations about a specific individual or a specific individual's conduct or activity contained within a warrant affidavit. *See Hale*, 899 F.2d at 400; *Hart v. O'Brien*, 127 F.3d 424, 442 (5th Cir. 1997); *Kohler*, 470 F.3d at 1113; *Hampton*, 480 F.3d at 362; *Melton*, 875 F.3d at 260; *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018).
[105] *Melton*, 875 F.3d at 261.

was later used in an arrest warrant.[106] After the criminal suspect was arrested, and his case was ultimately dismissed for insufficient evidence, the criminal suspect sued the officer for a Fourth Amendment *Franks* violation, alleging that the officer provided false information in the incident report and that any investigator would know an incident report would be used to obtain an arrest warrant.[107] This Court held that the connection between the officer's conduct and the plaintiff's arrest was too attenuated to hold the officer liable under *Franks*.[108]

Similar to the officer in *Melton*, neither Reyna nor the DA's Office could anticipate that the individual police officers who were investigating the event and interviewing suspects would have used the general arrest criteria in any improper way.[109] That is, the provision of general criteria, outlining for officers the requisite factors to establish a finding of probable cause for EIOCA, at the outset of a multi-party investigation after mass violence erupted, is not causally connected to the officers' purported decisions to fill in Plaintiffs' names into the warrant affidavits and allegedly lie, or omit information obtained during the investigation, to establish probable cause to arrest Plaintiffs for EIOCA. In fact, Plaintiffs alleged

[106] *Id.* at 265-266.
[107] *Id.* at 261-265.
[108] *Id.* Additionally, it is important to note that *Melton* was decided in 2017, and the Court acknowledged that the officer's alleged conduct—recklessly providing a false statement in an incident report that is later used in an arrest warrant—did not violate clearly established law. *See id.* at 266.
[109] *Id.* at 265. Unlike the officer in *Melton*, however, Reyna did not provide any false information or omit any material information about any specific individual arrested.

that Reyna explicitly instructed law enforcement officers to ensure that the criteria were adequately met for each individual.[110] Simply put, both Reyna's and the DA's office's alleged conduct—providing general criteria which were not directed at any specific individual—is too attenuated to Plaintiffs' arrests to state a viable *Franks* claim. Reyna is entitled to qualified immunity.

4. Multiple Independent Intermediaries Found That Probable Cause Existed to Arrest.

A neutral and independent intermediary—Magistrate Peterson—after reviewing the warrant affidavit, found that probable cause existed to arrest Plaintiffs for EIOCA.[111] Plaintiffs' warrant affidavits are entitled to a presumption of validity.[112]

Additionally, at the very least, arguable probable cause existed here not only because over 150 indictments were issued by the McLennan County Grand Jury but also because other arrestees from the Twin Peaks incident opted to have examining trials to determine whether there was probable cause to arrest them.[113]

After the other *substantially similar* arrestees raised *identical* arguments as raised here in examining trials while challenging the validity of the factual

[110] ROA.496 [¶87].
[111] *See* ROA.529-530.
[112] *See Franks*, 438 U.S. at 171.
[113] *See, e.g.*, ROA.658-668 [p. 7, line 4 to p. 8, line 16; and p. 100, line 20 to p. 101, line 4]. The Court may properly consider this hearing, as the examining trial was a public proceeding in open court and was explicitly referred and relied on in their complaint. *See* ROA.476-528; *Rome*, 323 F.Supp.3d at 866; *Cinel*, 15 F.3d at 1343, n. 6.

allegations contained in the warrant affidavit, a neutral magistrate specifically found probable cause.[114] A finding of probable cause after an examining trial is an independent determination that breaks the chain of causation in a wrongful arrest claim.[115] In addition, the Waco Court of Appeals held that probable cause existed to believe that a similarly situated person on the scene that day committed the offense of EIOCA.[116] Arguable probable cause exists here, and the independent intermediary doctrine breaks the chain of causation.[117] As a result, Plaintiffs failed to state a valid *Franks* claim, and Reyna in entitled to qualified immunity.

5. Plaintiffs Failed to Plead Any Material Falsehoods or Omissions.

a. Engaging in Organized Criminal Activities Offense.

Plaintiffs were arrested, pursuant to an arrest warrant and charged for violating Texas Penal Code Section 71.02—Engaging in Organized Criminal Activity ("EIOCA").[118] Under Section 71.02(a)(1), "[a] person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit one or more of the following: (1) murder, capital

[114] *See, e.g.*, ROA.655-668 [p. 7, line 4 to p. 8, line 16; and p. 100, line 20 to p. 101, line 4].
[115] *Simon v. Dixon*, 141 Fed. App'x 305, 306 (5th Cir. 2005); *Simon v. Lundy*, 139 Fed. App'x 629, 630 (5th Cir. 2005); *Taylor v. Meacham*, 82 F. 3d 1556, 1564 (10th Cir. 1996).
[116] *Ex Parte Pilkington*, 494 S.W.3d 330 (Tex. App.—Waco, 2015, no pet.).
[117] *See Gregg*, 36 F.3d at 456 ("It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party."); *Dixon*, 141 Fed. App'x at 306; *Lundy*, 139 Fed. App'x at 630; *Meacham*, 82 F. 3d at 1564.
[118] ROA.495 [¶80], ROA.592-593.

murder,…aggravated assault…"[119] A "member of a criminal street gang" is statutorily defined as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities."[120]

The EIOCA offense explicitly provides that it is not a defense to claim that "one or more members of the combination are not criminally responsible for the object offense."[121] Committing murder, capital murder, or aggravated assault is not a necessary element of the offense, and the State is not required to show that the criminal defendant himself committed the underlying offense.[122] Just because a person was not directly involved in the violence does not mean that probable cause did not exist to arrest the person for the offense of EIOCA.[123] Actual participation

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[119] TEX. PENAL CODE §71.02. Section 71.02 does not require an individual to be a member of a criminal street gang, as posited by Plaintiffs. *See id.* An individual can also be held liable for acting "in a combination," which is statutorily defined as "three or more persons who collaborate in carrying on criminal activities, although: (1) participants may not know each other's identity; [or] (2) membership in the combination may change from time to time." *Id.*; TEX. PENAL CODE §71.01(a)(1)-(2). "[A]rrests based on faulty warrant affidavits…could later be justified by pointing to probable cause for the *same* offense identified by the warrant." *Arizmendi v. Gabbert*, 919 F.3d 891, 901 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 220 (2019) (citing *United States v. Francis*, 487 F.2d 968, 971-72 (5th Cir. 1973); *United States v. Morris*, 477 F.2d 657, 662 (5th Cir. 1973)). As pled, arguable probable cause existed for arresting Plaintiffs for acting in a "combination" to commit or conspire to commit capital murder, murder, or aggravated assault. *See* TEX. PENAL CODE §71.02.

[120] TEX. PENAL CODE §71.01(d).

[121] *See* TEX. PENAL CODE §71.03(1).

[122] TEX. PENAL CODE §71.02(a); *Rojas v. State*, 693 S.W.2d 605, 612 (Tex. App.—San Antonio 1986, writ refused); *see Curiel v. State*, 243 S.W.3d 10, 15 (Tex. App.—Houston [1st Dist.] 2007, pet ref'd) (the underlying offense does not need to be committed by more than one person).

[123] *See* TEX. PENAL CODE §71.02.

in the underlying offense—*e.g.* murder or aggravated assault—is not required for the charge of EIOCA.[124] Moreover, EIOCA is a criminal enterprise offense, which generally involves uniform facts, and, as a result, similarities in charges or allegations against members should not be surprising.[125]

Legislatures are presumed to have acted constitutionally in passing legislation.[126] The EIOCA statute is presumptively constitutional. Moreover, the EIOCA statute has repeatedly been held constitutional when challenged.[127]

It is not clearly established that Reyna, assuming that he provided the criteria to establish probable cause to arrest for a constitutionally valid statute in the warrant affidavits, could be held liable under the Fourth Amendment. Reyna is entitled to qualified immunity.

b. Plaintiffs Admitted to Facts Which Establish Probable Cause.

Plaintiffs admitted to facts which establish probable cause regarding the offense of EIOCA. Plaintiffs admitted: (1) that they are members of or affiliated with a motorcycle club;[128] (2) that they were wearing various patches, jackets,

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[124] *See* TEX. PENAL CODE §§71.02-.03; *Rojas*, 693 S.W.2d at 612; *McDonald v. State*, 692 S.W.2d 169, 174 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd).
[125] *See* TEX. PENAL CODE §71.02.
[126] *See* ROA.476-528; *Ill. v. Krull*, 480 U.S. 340, 351 (1987) (citing *McDonald v. Bd. of Election Comm'r*, 394 U.S. 802, 808-09 (1969)); *Ala. State Fed'n of Teachers, AFL-CIO v. James*, 656 F.2d 193, 195 (5th Cir. 1981).
[127] *See Burt v. State*, 567 S.W.3d 335 (Tex. App.—Eastland 2017, reh'g denied); *Brosky v. State*, 915 S.W.2d 120 (Tex. App.—Fort Worth 1996, pet. ref'd); *Lucario v. State*, 677 S.W.2d 693 (Tex. App.—Houston [1st Dist.] 1984, pet ref'd).
[128] ROA.502-503 [¶119]; ROA.505 [¶136]; ROA.508 [¶152]. EIOCA does not require that

vests, and t-shirts that reflected motorcycle club affiliation or support for the Cossacks or Bandidos;[129] (3) that tension existed between the Cossacks, Bandidos, and their support clubs before May 17, 2015;[130] and (4) that they were present at Twin Peaks on May 17, 2015, where violence occurred.[131] Additionally, Plaintiffs admitted that (1) after mass violence and gunfire erupted at Twin Peaks, nine individuals were killed, and many others were injured;[132] and (2) hundreds of weapons, including knives and firearms, were confiscated from individuals present at the Twin Peaks scene.[133] By Plaintiffs' own admissions, probable cause, or at least arguable probable cause, existed to arrest and charge them with EIOCA.[134]

c. The Alleged Falsehoods and/or Omissions Identified by Plaintiffs do not Undermine the Validity of Probable Cause in the Warrant Affidavit.

Plaintiffs base their *Franks* claim on their theory that because the warrant affidavits are allegedly "general warrants" that lacks specific or particularized facts about Plaintiffs, the warrant affidavits are false, misleading, and a *Franks* violation under the Fourth Amendment.[135] Plaintiffs extrapolate from the uniformity of the

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individuals be "member of a criminal street gang," but rather persons acting in "combination" also violate EIOCA. *See* TEX. PENAL CODE §71.02.

[129] ROA.503 [¶124]; ROA.507 [¶143]; ROA.510 [¶160].

[130] ROA.482 [¶27]; ROA.485 [¶44].

[131] ROA.489 [¶60]; ROA.503[¶123]; ROA.506 [¶139]; ROA.509 [¶155].

[132] ROA.483 [¶29]; ROA.485-486 [¶45].

[133] ROA.487-488 [¶55]; ROA.503 [¶120]; ROA.509 [¶155]; ROA.510 [¶164].

[134] A plaintiff's own admission alone can establish probable cause. *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010).

[135] ROA.476-477 [¶1]; ROA.483-484 [¶¶36, 38-39]; ROA.494 [¶78]; ROA.516-517 [¶¶191-192].

warrant affidavits that the warrant affidavits for their arrests are "general warrants," so lacking in particularized probable cause that no reasonable officer could believe that probable cause existed to arrest the individual plaintiffs.[136] Plaintiffs argue that because the affidavits were the same for each person arrested, particularized probable cause cannot exist.[137]

Plaintiffs' particularized probable cause theory was not clearly established as being applicable to the factual situation of this case. The situation law enforcement faced at Twin Peaks involved multiple suspects in a group and clear criminal conduct by members of that group. At the time of the incident, it was not clearly established that the concept of particularized probable cause, in the form asserted by Plaintiffs, was the applicable standard.[138] It was also not clearly established how such a concept should be applied. Reyna is, therefore, entitled to qualified immunity.

Because criminal enterprise offenses, by their very nature, involve generally uniform facts, similarity should not be surprising. Regardless, the warrant affidavit identifies Plaintiffs and the facts which are asserted to apply to each of the Plaintiffs.[139] In support of their *Franks* claim, Plaintiffs make conclusory allegations about various falsehoods and omissions that they assert are material and

[136] ROA.516-517 [¶¶191-192].
[137] ROA.516-517 [¶¶191-192].
[138] *Supra* at 30-34.
[139] ROA.529-530.

undermine probable cause.[140] Plaintiffs make the conclusory assertion that "each such allegation [in the warrant affidavit] is false and untrue."[141] Plaintiffs' allegations are not only conclusory, unreasonable, and untrue but also are not material and do not undermine the existence of probable cause to arrest each Plaintiff for EIOCA.

Plaintiffs assert that the warrant affidavit contains the following allegedly "false and misleading" information about Plaintiffs: (1) each Plaintiff is a "member of a criminal street gang;" and (2) "after the altercation, the subject was apprehended at the scene, while wearing common identifying distinctive signs or symbols or had an identifiable leadership or continuously or regularly associate in the commission of criminal activities."[142]

The first statement, about Plaintiffs' membership in a criminal street gang, cannot provide a basis to state a *Franks* claim. Plaintiffs allege that "no law enforcement list or database showed any of these Plaintiffs to be a member of a criminal street gang" and because of this, that Reyna knew or should have known that Plaintiffs were not members of a criminal street gang.[143] Plaintiffs' reliance on law enforcement lists or databases to establish a *Franks* claim is unavailing. First,

[140] ROA.515-517 [¶¶188-192].
[141] ROA.494 [¶79].
[142] ROA.515-516 [¶¶188-191].
[143] ROA.497-499 [¶¶95, 100-101]. Additionally, Plaintiffs' allegation that Reyna was privy to the databases is conclusory and not supported by any evidence in the record.

the EIOCA's statutory definition of "criminal street gang" does not include any requirement that a group must be listed in a law enforcement database in order to be considered a criminal street gang or to establish probable cause.[144] Similarly, it does not matter if Plaintiffs were not members of the Bandidos or Cossacks, but rather belonged to some other motorcycle club because the warrant authorized the arrest of Bandidos, Cossacks, and their *associates*.[145] Second, even assuming that probable cause did not exist to show that Plaintiffs were members of a criminal street gang, probable cause did exist to show Plaintiffs were acting "in a combination" to commit or conspire to commit capital murder, murder, or aggravated assault in violation of EIOCA.[146] As a result, Plaintiffs' allegation is conclusory and amounts to nothing more than a self-serving denial, which does not defeat probable cause, state a *Franks* claim, or overcome Reyna's immunity.[147]

Misstatements of law do not constitute a *Franks* violation under the Fourth Amendment and have never been used to state a *Franks* claim.[148] Alleged

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[144] Texas Penal Code §71.01(d).
[145] ROA.529-530; ROA.502-203 [¶119]; ROA.505 [¶136]; ROA.508 [¶152].
[146] "[I]n a combination" is statutorily defined as ""three or more persons who collaborate in carrying on criminal activities, although: (1) participants may not know each other's identity; [or] (2) membership in the combination may change from time to time." *Id.*; TEX. PENAL CODE §71.01(a)(1)-(2). "[A]rrests based on faulty warrant affidavits…could later be justified by pointing to probable cause for the *same* offense identified by the warrant." *Arizmendi*, 919 F.3d at 901; *Francis*, 487 F.2d at 971-72; *Morris*, 477 F.2d at 662.
[147] *See United States v. Sarras*, 575 F.3d 1191, 1219 (11th Cir. 2009); *Franks*, 438 U.S. at 171 (the allegations "should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons").
[148] *See Barnes*, 126 F. Supp. at 740-41; *Tabares*, 2016 WL 11258758, at *19.

misstatements of law do not negate the validity of probable cause or the warrant affidavits, nor suffice to state a valid *Franks* claim.[149]

Plaintiffs assert the following information was improperly omitted from the warrant affidavit: (1) no particularized evidence that Plaintiffs were connected to the deaths or injuries that occurred at Twin Peaks; and (2) indisputable video evidence that shows Plaintiffs did not plan, participate, or engage in criminal conduct.[150] Plaintiffs' first assertion, regarding the omission of particularized evidence connecting Plaintiffs to the injuries or deaths, is not a material omission which undermines probable cause. Under the facts of this case, sufficient particularized probable cause for an EIOCA violation was included in the warrant affidavits.[151]

As for the second alleged omission, regarding evidence connecting Plaintiffs to the violence, the Plaintiffs' actual participation in violence—i.e. involvement, participation, or encouragement[152]—and video evidence allegedly showing Plaintiffs' lack of planning, participating, or engaging in criminal conduct are irrelevant to the EIOCA offense. Plaintiffs were arrested for engaging in organized

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[149] Plaintiffs admitted to facts establishing probable cause to arrest them for EIOCA, and probable cause existed to arrest them for acting in a combination in violation of EIOCA. *Supra* at 44-45.
[150] *See* ROA.516-517 [¶192].
[151] ROA.529-530; *see also supra* at 41-48.
[152] ROA.483-484 [¶¶31, 33, 36]; ROA.486 [¶46]; ROA.487-489 [¶¶54-56, 58]; ROA.492-493 [¶¶74, 76]; ROA.496 [¶89]; ROA.499 [¶103]; ROA.505 [¶134]; ROA.511 [¶169]; ROA.516-517 [¶192].

criminal activity to commit or *conspire to commit* murder, capital murder, or aggravated assault.[153] Additionally, EIOCA is a specific intent offense, which means that "specific intent may be inferred from the circumstances," and officers are not required to inquire as to the motivations or establish any intent further than a sufficient inference of the intent.[154] Plaintiffs' self-serving denials of any knowledge of preplanned violence or of intentions of committing violence do not defeat probable cause that officers at the time of the incident could reasonably infer that Plaintiffs, who admit to being members of a group and to members of those groups committing violence, were engaging in organized criminal activity by conspiring to commit capital murder, murder, or aggravated assault. Additionally, "affiants are not required to include every piece of exculpatory information in [warrant] affidavits,"[155] and Plaintiffs' reliance on after-acquired evidence—i.e. the video surveillance footage and cellphone evidence—does not negate officers' finding of probable cause at the time of the incident.[156]

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[153] *See* TEX. PENAL CODE §71.02-.03; *Rojas*, 693 S.W.2d at 612; *McDonald*, 692 S.W.2d at 174.

[154] *See Blanchard v. Lonero*, 452 Fed. App'x 577, 586 (5th Cir. 2011) (quoting *Thierry v. Lee*, 48 F.3d 529 (5th Cir. 1995)); TEX. PENAL CODE §71.02; *see also Shears v. State*, 895 S.W.2d 456, 459 (Tex. App.—Tyler 1995, no pet.).

[155] *Evans v. Chalmers*, 703 F.3d 636, 651 (4th Cir. 2012); *Rakun v. Kendall County, Tex*, No. CIV.A. SA–06–CV–1044, 2007 WL 2815571, *12 (W.D. Tex. Sept. 24, 2007) (citing *Gordy v. Burns*, 294 F.3d 722, 729 (5th Cir. 2002)) ("[T]he mere fact that there may be some exculpatory evidence does not negate probable cause if the totality of the circumstances support a reasonable conclusion that criminal activity is afoot.").

[156] *See Westfall v. Luna*, 903 F.3d 534, 542–43 (5th Cir. 2018) ("Probable cause exists 'when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense.'"); *Hoffa v. United States*, 385 U.S. 293, 310 (1966) ("The police are not

Plaintiffs object to the omission from the warrant affidavits of allegedly available affirmative defenses to the crime of EIOCA.[157] This Court, however, has repeatedly declined to determine whether an officer must include or consider facts establishing an affirmative defense in determining probable cause in the warrant affidavits. It was not clearly established at the time of Plaintiffs' arrests that such an omission from a warrant affidavit would constitute a *Franks* violation.[158] Reyna is entitled to qualified immunity.

Plaintiffs also assert a self-serving version of why they were present at Twin Peaks that day and refer to this assertion as "evidence" which purportedly negates probable cause to arrest them for EIOCA.[159] Plaintiffs' assertion is absurd when considered in the context of what actually happened. Plaintiffs ignore the totality of the circumstances that confronted officers at Twin Peaks.[160] Neither the officers

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required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."). Furthermore, "[t]he Constitution does not guarantee that only the guilty will be arrested." *Baker v. McCollum*, 443 U.S. 137, 145 (1979).

[157] *See, e.g.*, ROA.483-484 [¶¶31, 33, 36]; ROA.486 [¶46]; ROA.487-489 [¶¶54-56, 58]; ROA.492-493 [¶¶74, 76]; ROA.496 [¶89]; ROA.499 [¶103]; ROA.505 [¶134]; ROA.511 [¶169]; ROA.516-517 [¶192].

[158] *Johnson v. Norcross*, 565 Fed. App'x 287, 291 (5th Cir. 2014); *see also Abbott v. Town of Livingston*, No. 16-00188-BAJ-EWD, 2018 U.S. Dist. LEXIS 118580, *11 (M.D. La. July 16, 2018).

[159] ROA.487-488 [¶55].

[160] Plaintiffs' allegations about the content of over 192 individuals' interviews are conclusory, and it is not a reasonable inference that over 192 individuals gave the same story as to why they were present at Twin Peaks, or that Reyna would know the content of over 192 interviews that he

at the scene nor this Court are required to adhere to the Plaintiffs' innocent explanations of the suspicious facts surrounding the events at Twin Peaks, which lack credibility and ignore the totality of the circumstances that law enforcement faced. "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[161]

Finally, the lack of convictions and dismissals of criminal cases are irrelevant to the existence of probable cause. Plaintiffs' claims of innocence do not provide a basis for denying Reyna's assertion of qualified immunity from Plaintiffs' *Franks* claims.[162]

Even assuming that Reyna provided false statements or omitted material information, Plaintiffs failed to allege facts to establish that, after reconstructing the warrants, the arrests would be unsupported by probable cause. For these reasons, Plaintiffs failed to state a *Franks* claim and to overcome Reyna's qualified immunity.

6. Plaintiffs Failed the Additional Step to Establish a *Franks* Claim.

The ultimate inquiry for a Fourth Amendment false arrest claim is whether the

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did not conduct.

[161] *Wesby*, 138 S. Ct. at 588.

[162] *See Shine v. Banister*, No. 5:10CV128, 2011 WL 13177776, *10, n.10 (E.D. Tex. July 14, 2011) (citing *Rodriguez v. Ritchey*, 556 F.2d 1185, 1190, n.21 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978)). A conviction on the underlying offense is not necessary to convict (or find probable cause to arrest) an individual for engaging in organized criminal activity. *McBride v. State*, 803 S.W.2d 741, 744 (Tex. App.—Dallas 1990, pet. ref'd).

arrest was reasonable.[163] An arrest is reasonable when "there is probable cause to believe that a criminal offense has been … committed."[164] That is why this Court has applied an additional step after completing the traditional *Franks* analysis.[165] This additional step asks "whether any reasonably competent officer possessing the information each officer had at the time he swore his affidavit could have concluded that a warrant should issue."[166] "This inquiry is the ultimate liability question in a false arrest case: Did the officer have information establishing probable cause, whether or not that information was included in the warrant?"[167] Plaintiffs failed to plead sufficient facts to establish that no reasonable officer could have concluded that a warrant should issue.[168] As a result, Plaintiffs failed to plead a *Franks* claim against Reyna and failed to overcome Reyna's entitlement to qualified immunity.

7. Plaintiffs Seek a Broad Fourth Amendment Rule That Undermines Public Policy.

Plaintiffs are advocating for a broad rule of liability under *Franks*, seeking to hold Reyna liable for causing a warrant affidavit to be presented to the magistrate and for the provision of general criteria regarding the elements of the offense of EIOCA.

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[163] *Morris*, 477 F.2d at 663.
[164] *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).
[165] *Jones*, 2019 WL 5268618, at *3.
[166] *Freeman*, 210 F.3d at 553.
[167] *Jones*, 2019 WL 5268618 at *3.
[168] *Supra* at 27-28.

Based on public policy concerns, "a broader rule of liability" under a Fourth Amendment *Franks* claim has been rejected because "the *Franks* rule is a narrow one."[169] Six concerns support the need for a narrow rule of liability under *Franks.* A broad Fourth Amendment rule (1) "could interfere with criminal convictions and be costly to society;" (2) "would have minimal benefit in light of existing penalties against perjury, including criminal prosecutions, departmental discipline for misconduct, contempt of court, and civil actions;" (3) is unnecessary because "magistrates have the ability to inquire into the accuracy of an affidavit before a warrant issues, both by questioning the affiant and by summoning others to testify at a warrant proceeding;" (4) would cause "less final, and less deference paid to, the magistrate's determination of veracity, the less initiative will he use in that task, despite the fact that the magistrate's scrutiny is the last bulwark preventing any particular invasion of privacy before it happens;" (5) would result in "the proliferation of challenges to the veracity of warrant applications could unduly burden the court system and be abused by defendants as a source of discovery;" and (6) "would be in tension with the fact that an affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants whose identity often will be properly protected from revelation, so that

[169] *Melton*, 875 F.3d at 262-63 (citing *Franks*, 438 U.S. at 167).

the accuracy of an affidavit in large part is beyond the control of the affiant."[170]

Allowing liability to attach to an individual who allegedly caused an affidavit to be presented to a magistrate would undermine the public policy interests at issue and greatly expand *Franks*' narrow rule.[171] As held in *Melton*, a *Franks* claim should be limited only to those individuals who signed, presented, or knowingly, intentionally, or with reckless disregard for the truth, provided false, material information, or omitted material information, in a warrant affidavit.[172] This Court should not allow Reyna to be held liable under *Franks* for allegedly causing a warrant affidavit to be presented to the magistrate and should reject Plaintiffs' attempt to expand the *Franks* rule because the public policy concerns outweigh such an expansion of *Franks*.

Moreover, prosecutors have a vital obligation to give legal advice to the police and must work with police to ensure the appropriate administration of justice and safety in the community.[173] As police officers do not ordinarily hold law degrees,[174] district attorneys supply police with generalized form affidavits that list the elements necessary to establish probable cause to arrest an individual for various offenses. These warrant affidavit forms are not directed at any particular

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[170] *Id.* (quoting *Franks*, 438 U.S. at 165-167) (internal quotations omitted).
[171] *See id.*
[172] *See id.*
[173] *Hughes v. Tarrant County*, 948 F.2d 918, 922 (5th Cir. 1991) (citing *Burns v. Reed*, 500 U.S. 478, 494-495 (1991)).
[174] *Burns*, 500 U.S. at 494.

individual but rather are drafted to assist law enforcement when they are investigating an individual for an offense.

Holding a district attorney liable for providing law enforcement with general criteria required to establish probable cause, without specifying anything about any particular individual, would harm the public. Allowing criminal defendants to hold a district attorney liable for providing law enforcement with a generalized, fill-in-name warrant affidavit would lead to more unlawful arrests due to misunderstandings of law, interfere with criminal convictions, increase the costs on society, unduly burden the court systems, and result in a sharp increase in challenges to warrant affidavits directed at district attorneys simply because a district attorney provided such a form affidavit. It would also, as seen in the criminal trials in the aftermath of the battle at Twin Peaks, subject district attorneys to unnecessary and frivolous motions in the criminal proceedings.[175] Additionally, the district attorney's work and independence would be impeded and his energies would be directed away from his public duties.[176] District attorneys would stop providing legal advice to law enforcement for warrant affidavits. Finally, allowing liability in this context would undermine the magistrate's finding of probable cause

[175] *See* ROA.658-668 [Motion to Disqualify McLennan County District Attorney's Office].
[176] *Imbler v. Pachtman*, 424 U.S. 409, 423-424 (1976).

and the various pre-trial procedures (i.e. examining trials or writs of habeas corpus) which ensure that probable cause existed to arrest an individual.[177]

Even assuming that Reyna personally provided the general criteria which would establish probable cause to arrest any individual for EIOCA who met the criteria, Reyna would have only provided the general criteria for investigating officers to use while interviewing and investigating potential suspects and then those officers would exercise their discretion in determining if the suspect met the probable cause criteria. Not only were the investigating officers the individuals who determined who fit the general criteria for EIOCA, but Reyna also had no way of knowing that investigating officers would use the general criteria in any inappropriate or unconstitutional way. The accuracy of the warrant affidavits at issue were beyond Reyna's control, as he did not investigate a single individual connected to the battle at Twin Peaks, would have relied on information collected by investigating officers, and could not have known that investigating officers would use the fill-in-name warrant affidavit in any unconstitutional way.[178]

A district attorney, such as Reyna, should not be denied qualified immunity for providing law enforcement with general criteria when he did not provide or swear to any specific information about a specific individual. Allowing for such liability would subject district attorneys to harassing and excessive litigation and

[177] *See Melton*, 875 F.3d at 262-63; *Imbler*, 424 U.S. at 427.
[178] *See Melton*, 875 F.3d at 262-63.

erode the criminal justice system and the vital cooperation and coordination needed between prosecutors and police.

8. Reyna is Entitled to Immunity From Plaintiffs' Claims.

a. Reyna is Entitled to Absolute Immunity From Plaintiffs' Franks Claim.

A prosecutor acts as an advocate in supplying legal advice to support an affidavit for an arrest warrant and is entitled to absolute immunity as long as a prosecutor does not personally attest to the truth of the evidence presented to a judicial officer, or exercise judgment going to the truth or falsity of evidence.[179] When prosecutors are "acting as advocates in supplying legal advice based on facts provided by police officers to support an affidavit for an arrest warrant, the prosecutors…are absolutely immune."[180]

Plaintiffs pled that "[i]nvestigators many of whom were from the Austin division of DPS, were providing the information learned during interviews directly to Defendant Reyna…" and based on that information, the DA's Office supplied the criteria for the offense of EIOCA.[181] Based on Plaintiffs' own pleadings, Reyna is entitled to absolutely immunity (or, in the alternative, qualified immunity) because like the district attorneys in *Spivey*, Reyna would have been acting as an

[179] *Spivey v. Robertson*, 197 F.3d 772, 776 (5th Cir. 1999) (citing *Kalina v. Fletcher*, 522 U.S. 118, 122-31 (1997)).
[180] *See id.*
[181] ROA.488 [¶57].

advocate in supplying legal advice based on the facts provided by investigators.[182]

Based on Plaintiffs' own allegations, Plaintiffs failed to adequately plead a viable *Franks* claim against Reyna. Reyna is entitled to absolute and/or qualified immunity from Plaintiffs' *Franks* claim.

b. Reyna is Entitled to Qualified Immunity From Plaintiffs' Franks Claim.

For the reasons explained above, Plaintiffs failed to state a constitutional violation, and alternatively, the alleged conduct's illegality was not clearly established at the time.[183]

First, no governmental official has ever been held liable for allegedly causing an affidavit to be presented to magistrate, providing general criteria, or including a misstatement of law in the affidavit. It was, therefore, not clearly established that such actions could be violations of the law.[184]

Second, it was not clearly established at the time that the lack of particularized facts due to the uniformity of the warrant affidavits in the context of mass, group violence/riot arrests violates the Fourth Amendment.[185]

Third, Plaintiffs' alleged falsehoods or omissions, even assuming that Reyna was responsible for their inclusion or exclusion in the warrant affidavit forms, fail

[182] *See Spivey*, 197 F.3d at 776.
[183] *See* ROA.476-528; *Wesby*, 138 S.Ct. at 589.
[184] *Supra* at 25-29.
[185] *Supra* at 30-34.

to mitigate probable cause to arrest or to overcome Reyna's entitlement to qualified immunity.[186]

Fourth, Plaintiffs fail to overcome Reyna's entitlement to qualified immunity because Plaintiffs did not plead sufficient facts to establish that no reasonable officer could have concluded that the warrants should issue and that probable cause existed to arrest Plaintiffs for EIOCA.[187]

Finally, public policy concerns support a finding that Reyna is entitled to qualified immunity from Plaintiffs' claims.[188]

9. The District Court Improperly Denied Qualified Immunity.

The District Court improperly denied qualified immunity to Reyna based upon allegations concerning Reyna's alleged state of mind. Additionally, the District Court failed to adhere to the proper analysis and procedure for a *Franks* claim.

The District Court denied Reyna's Motion to Dismiss because Plaintiffs pled that Reyna "caused an affidavit against each Plaintiff to be presented to the Magistrate Judge…," and "while the complaint offers ambiguous allegations of [Reyna's] state of mind," the district court decided to allow Plaintiffs discovery "because the question of deliberateness or recklessness requires inquiry into the specifics of [Defendants' states of mind]."[189]

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[186] *Supra* at 42-53.
[187] *Supra* at 58-59.
[188] *Supra* at 54-58.
[189] ROA.1012-1013.

The District Court erred in denying Reyna's motion because Plaintiffs did not plead that Reyna signed, presented, or provided false information in the warrant affidavit or omitted material information.[190] The district court erred by analyzing Plaintiffs' allegations regarding Reyna's state of mind and relying on these allegations as a basis for denying Reyna's motion and entitlement to qualified immunity. Had the District Court reconstructed the affidavit, it would have determined that the alleged falsehoods and omissions identified by Plaintiffs do not invalidate the existence of probable cause contained in the affidavits.

Plaintiffs' complaint offers only conclusory and ambiguous allegations regarding Reyna's state of mind.[191] Plaintiffs, therefore, failed to state a claim and have failed to defeat Reyna's entitlement to qualified immunity

Plaintiffs alleged that Reyna "*knew or should have known* that Plaintiffs were not members of a criminal street gang because neither Plaintiffs nor their respective motorcycle clubs were identified on any law enforcement database at the time of the incident.[192] Plaintiffs essentially alleged that Reyna was negligent. Such an allegation does not state a *Franks* claim.[193]

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[190] ROA476-530.
[191] ROA.520-521.
[192] ROA.498-499 [¶¶100-101, 103] (emphasis added).
[193] *Ulrich v. City of Shreveport*, 765 Fed. App'x 964, 967 (5th Cir. 2019) (citing *Franks*, 438 U.S. at 264) (the plaintiff's allegations that the defendant knew or should have known various facts only alleged simple negligence and failed to meet the pleading standard, which requires alleging that the defendant made "knowing and intentional omissions" or falsehoods.).

Plaintiffs' conclusory allegations regarding Reyna's knowledge about each specific individual arrested fails to meet the *Twombly*[194] plausibility standard. There were over 192 individuals arrested that day, and Reyna, who did not interview a single individual, could not have plausibly known any specific information about any particular person arrested and could not act with deliberate or reckless disregard for the truth by relying on law enforcement's findings.[195] Plaintiffs failed to plead sufficient facts to allow the Court to draw a *reasonable* inference that Reyna somehow provided false information about any particular plaintiff.

Plaintiffs also did not plead that Reyna provided false information about any particular individual or that he instructed officers to lie.[196] Instead, Plaintiffs expressly admitted that Reyna testified *under oath* that he "personally instruct[ed] Chavez [the affiant] to confirm the accuracy and truthfulness of the statements made in the probable cause affidavit before presenting it to the magistrate."[197] Plaintiffs' own pleading negates any assertion that Reyna acted with deliberate or reckless disregard for the truth.

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[194] *Twombly*, 550 U.S. at 544.
[195] *See* ROA.476-528; *Moreno*, 450 F.3d at 170 (discussing the presumption of the reliability of police officers); *Moreno v. Dretke*, 362 F. Supp.2d 773, 800 (W.D. Tex. 2005) (acknowledging that probable cause can be properly established by hearsay, information from informants, and information obtained hastily by the affiant).
[196] *See* ROA.476-528.
[197] ROA.496 [¶87].

Finally, the District Court erred because it failed to adhere to the proper analysis of a *Franks* claim.[198] It failed to give proper deference to the magistrates' independent findings of probable cause and failed to make any attempt to reconstruct the warrant affidavit.[199] By failing to reconstruct the affidavit, the District Court improperly assumed that Plaintiffs' conclusory pleadings were material and sufficient to undermine the findings of probable cause supported by the affidavit.[200] In addition to failing to reconstruct the affidavit by omitting falsehoods and inserting material omissions, the District Court did not apply the final step to the *Franks* analysis—by asking whether the officer had information establishing probable cause to arrest whether or not the material information was included or excluded.[201] The District Court erred when it denied Reyna's entitlement to qualified immunity from Plaintiffs' *Franks* claim.

D. The District Court Erred in Denying Reyna Qualified Immunity From Plaintiffs' Bystander Claim.

Plaintiffs did not plead a bystander cause of action in their complaint.[202] Rather, Plaintiffs improperly attempted to assert a bystander liability claim for the first time in their Response to Reyna's Motion to Dismiss, which the district court

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[198] *See* ROA.1012-1013.
[199] *See id.*; *Franks*, 438 U.S. at 155-56, 171-72; *Melton*, 875 F.3d at 262; *Marks*, 933 F.3d at 487; *Jones*, 2019 WL 5268618, at *3; *May*, 819 F.2d at 535.
[200] *See* ROA.1012-1013; *Melton*, 875 F.3d at 262; *Marks*, 933 F.3d at 487; *Jones*, 2019 WL 5268618, at *3.
[201] *See* ROA.1012-1013; *Jones*, 2019 WL 5268618, at *3 (quoting *Freeman*, 210 F.3d at 553)).
[202] *See* ROA.476-530.

expressly noted.[203] A plaintiff cannot amend a complaint by adding additional causes of action in response to a motion to dismiss.[204] Plaintiffs thus failed to plead a bystander cause of action which was sufficient to overcome Reyna's qualified immunity, and the District Court should have dismissed it.[205]

Plaintiffs also failed to plead sufficient facts to support such a claim and to defeat Reyna's qualified immunity. The District Court stated that because "a bystander claim is dependent on the individual defendants' state of mind," dismissal was not appropriate.[206] A determination that Plaintiffs did not sufficiently plead a bystander claim does not require any analysis of Reyna's subjective state of mind. The District Court erred in not dismissing this cause of action.

This Court has recognized a bystander claim against officers who: (1) know that a fellow officer is violating an individual's constitutional rights; (2) have a reasonable opportunity to prevent the harm; and (3) choose not to act.[207] The

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[203] ROA.840-841. See ROA.1015.
[204] *Summerlin v. Barrow*, No. 4:17-CV-1016-A, 2018 WL 1322172, *3 (N.D. Tex. Mar. 13, 2018); *Horton v. M&T Bank*, No. 4:13-CV-525-A, 2013 WL 6172145, *7 (N.D. Tex. Nov. 22, 2013); *Appleberry v. Fort Worth Indep. Sch. Dist.*, No. 4:12-CV-235-A, 2012 WL 5076039, *5 (N.D. Tex. October 17, 2012); *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp.2d 860, 915 (S.D. Tex. 2001); *In re Baker Hughes Sec. Litig.*, 136 F. Supp.2d 630, 646-47 (S.D. Tex. 2001); *Coates v. Heartland Wireless Comm'ns, Inc.*, 55 F. Supp.2d 628, 646, n.26 (N.D. Tex. 1999).
[205] *Porter*, 751 Fed. App'x at 431 (citing *Cinel*, 15 F.3d at 1345).
[206] ROA.1015.
[207] *Whitley v. Hanna*, 726 F.3d 631, 646–47 (5th Cir. 2013).

officer must be "present at the scene." [208] Plaintiffs failed to adequately plead that Reyna was present and/or had a reasonable opportunity to prevent the alleged harm when another official allegedly committed a *Franks* violation.[209] Plaintiffs thus failed to plead a viable bystander claim sufficient to overcome Reyna's entitlement to qualified immunity. The District Court, therefore, erred when it denied Reyna's motion to dismiss Plaintiffs' bystander claim.

Moreover, it was not clearly established that an official could be held liable under a bystander theory for failing to prevent an alleged *Franks* violation.[210] In order to overcome Reyna's entitlement to qualified immunity, Plaintiffs must cite to controlling authority recognizing bystander liability in the context of their *specific* underlying Fourth Amendment claim.[211] Reyna has not located a single

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[208] *Luna*, 903 F.3d at 547 (citing *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995).

[209] ROA.476-530. This raises the legitimate question of what "scene" an officer would need to be present at to be liable under a bystander theory for not preventing a *Franks* violation. Is it when the investigation occurs that reveals the facts that are allegedly misrepresented? Is it when the faulty affidavit is actually presented to a magistrate? Is it when the faulty affidavit is executed by a magistrate? Or is it when someone is actually arrested pursuant to the faulty affidavit? This may be one reason why, as discussed above, Defendant can locate no case imposing bystander liability for a *Franks* violation. Regardless, Plaintiffs do not specifically plead that Reyna was present at any of these points.

[210] Typically, a bystander liability claim arises from an underlying claim of excessive force, when a fellow officer sees an officer clearly violating a person's right to be free from such force and fails to prevent it. *See, e.g.*, *Townley*, 45 F.3d at 919.

[211] *Porter*, 751 Fed. App'x at 431 (emphasis added) (holding that officers were entitled to qualified immunity from a bystander claim because, "although this court has recognized bystander liability claims under §1983 in the context of excessive-force claims [citations omitted], *plaintiffs cite no case law applying bystander liability to an excessively-destructive-search claim* [the 4th Amendment violation at issue in the case]. Thus, plaintiffs have not met their burden of showing a clearly established constitutional violation and cannot overcome the officers' qualified immunity."). Similarly, as Plaintiffs in the case at bar can cite to no authority applying bystander liability to a *Franks* claim, Reyna is entitled to qualified immunity.

U.S. Supreme Court case or a single case from this Court that has applied a bystander claim to an alleged *Franks* violation, nor have Plaintiffs identified one. When a plaintiff fails to cite to any authority applying bystander liability to the specific underlying Fourth Amendment claim, the plaintiff fails to "[meet] their burden of showing a clearly established constitutional violation and cannot overcome the officers' qualified immunity."[212] As a result, Reyna could not have violated clearly established law, and the District Court erred when it denied him qualified immunity from Plaintiffs' bystander claims.

E. The District Court Erred in Denying Reyna Qualified Immunity From Plaintiffs' Conspiracy Claim.

Plaintiffs allege that the individual Defendants conspired to violate their rights.[213] Courts are not required to accept such terms as "conspiracy" as sufficient without more specific allegations.[214]

To prove a conspiracy under §1983, a plaintiff must show: (1) an agreement between private and public defendants to commit an illegal act, and (2) an actual deprivation of constitutional rights.[215] "A conspiracy may be charged under section 1983…*but a conspiracy claim is not actionable without an actual violation*

[212] *Id.*
[213] ROA.520-521 [¶¶211-15].
[214] *Twombly*, 550 U.S. at 557.
[215] *Latiolais v. Cravins*, 484 Fed. App'x 983, 991 (5th Cir. 2012) (citing *Cinel*, 15 F.3d at 1343).

of section 1983."[216] Plaintiffs did not state a viable claim for any violation of their Constitutional rights. As a result, Reyna cannot be liable for any conspiracy.

Plaintiffs failed to adequately plead a conspiracy claim.[217] Bald allegations of conspiracy are insufficient to avoid dismissal.[218] Plaintiffs failed to allege any facts to establish an agreement between private and public defendants to commit an illegal act. Plaintiffs must plead each Defendant's personal involvement in the alleged violation of constitutional rights and must also plead why qualified immunity does not apply to each Defendant.[219] The Court must analyze separately each individual Defendant's entitlement to qualified immunity.[220] When Defendants, who are alleged to have engaged in a conspiracy, are shown to be entitled to qualified immunity, no claim for a §1983 conspiracy exists.[221] Global allegations or lumping defendants into groups in allegations does not suffice.[222]

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[216] *Id*. at 989 (citing *Townley*, 45 F.3d at 920) (emphasis added).

[217] Moreover, "[p]olice officers and prosecutors often work together to establish probable cause and seek indictments; such collaboration could always be characterized as a 'conspiracy.' Allowing § 1983 claims against [officials] to proceed on allegations of such a 'conspiracy' would in virtually every case render the [officials'] qualified immunity from suit 'effectively lost,' and make discovery the rule, rather than the exception." *Evans*, 703 F.3d at 648-649 (citing *Mitchell*, 472 U.S. at 526; *Anderson*, 483 U.S. at 639–40 & n. 2).

[218] *See Twombly*, 550 U.S. at 557; *Streetman v. Jordan*, 918 F. 2d 555, 557 (5th Cir. 1990); *Lynch v. Cannatella*, 810 F. 2d 1363, 1370 (5th Cir. 1987).

[219] *Meadours v. Ermel*, 483 F. 3d 417, 421-22 (5th Cir. 2007); *Jacobs v. West Feliciana Sheriff's Dept.*, 228 F.3d 388, 395 (5th Cir. 2000); *Iqbal*, 129 S. Ct. at 1948; *see also Andrade v. Chojnacki*, 65 F. Supp.2d 431,459 (W.D. Tex. 1999).

[220] *Meadours*, 483 F. 3d at 421-22; *Jacobs*, 228 F.3d at 395; *Iqbal*, 129 S. Ct. at 1948.

[221] *Townley*, 45 F.3d at 921; *Mowbray v. Cameron County*, 274 F.3d 269, 279 (5th Cir. 2001); *see Iqbal*, 556 U.S. at 676; *Meadours*, 483 F. 3d at 421-22; *Jacobs*, 228 F.3d at 395; *Andrade*, 65 F. Supp. 2d at 459.

[222] *See Andrade*, 65 F. Supp.2d at 459; *Rivera v. Kalafut*, No. 4:09cv181, 2010 WL 3701517, at

Attempts to impute to all defendants allegations against one defendant do not meet the applicable standard.[223] Plaintiffs do not offer any specific factual allegations sufficient to defeat Reyna's entitlement to qualified immunity. The conspiracy claim against Reyna must be dismissed.[224]

CONCLUSION

This Court should reverse that portion of the District Court's order which denied Reyna's motion to dismiss as to Plaintiffs' *Franks* claim, bystander claim and conspiracy claim. Reyna should be granted qualified immunity as to all of Plaintiffs' claims against him.

Respectfully submitted,

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*4 (E.D. Tex. June 15, 2010); *Cavit v. Rychlik*, No. H-09-1279, 2010 WL 173530, at *2 (S.D. Tex. Jan. 14, 2010).
[223] *DeLeon v. City of Dallas*, 141 Fed. App'x 258, 261, 263 (5th Cir. 2005).
[224] ROA.520-521 [¶¶211-15].

Counsel of Record for Defendant-Appellant Abelino Reyna

CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on February 5, 2020, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Thomas P. Brandt
Thomas P. Brandt

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Dated: February 5, 2020

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