No. _____

In The
Supreme Court of the United States

THOMAS F. GEHRMANN AND ERIC W. CARLSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), the Fourth Amendment is violated where law enforcement intentionally or recklessly includes false information or misrepresentations in an affidavit for a search warrant and probable cause is vitiated when the false information or misrepresentations are excised from the affidavit. This Court, however, did not specifically address whether *Franks* applies to evidence that is material to probable cause which is recklessly or intentionally omitted from a search warrant affidavit.

The questions presented, all of which are matters of first impression, are:

1. Whether *Franks* applies to material omissions, and assuming *arguendo* that the customary practice of lower courts that apply that rule is correct:

    a. Whether probable cause is vitiated for a particular offense where the omitted information is exculpatory evidence related to that offense.

    b. Whether, after material omissions based on exculpatory evidence for one class of offenses are considered and probable cause is negated for that class of offenses, the entire affidavit and search warrant are invalid under *Franks* and suppression is warranted.

QUESTIONS PRESENTED – Continued

2. Does the clear error standard of review apply to the question of whether evidence omitted from an affidavit for search warrant is material since that determination is based on a trial court's factual findings, and whether an appellate court exceeds its authority when it applies *de novo* review instead.

3. Whether the government waives the issue of materiality when it concedes that information should have been included in a search warrant affidavit, and if so, does an appellate court violate the party presentation doctrine when its decision focuses entirely on an issue that has been waived.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Thomas F. Gehrmann and Eric W. Carlson (collectively "Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit issued its judgment on April 24, 2018 and its order is available at 731 Fed. Appx. 792. (Pet. App. 1-36). The District Court's order that suppressed evidence based on a violation of *Franks v. Delaware*, 438 U.S. 154 (1978), after a *Franks* hearing is available at 184 F. Supp. 3d 984. (Pet. App. 37-55).

JURISDICTION

The Tenth Circuit reversed the District Court's suppression order and issued its judgment in this interlocutory appeal on April 24, 2018. (Pet. App. 1-36). A motion to stay the mandate before the Tenth Circuit pending the filing of this petition and a motion to publish the Court's decision was denied on June 1, 2018. This case is currently scheduled to proceed to a jury trial in the District Court on October 29, 2018.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

This case concerns the Fourth Amendment and *Franks v. Delaware*, 438 U.S. 154 (1978), and important unanswered federal questions related to *Franks* challenges based on material omissions couched in bad faith because the affiant either recklessly or intentionally omitted the evidence from the search warrant affidavit. This case also raises compelling federal questions that impact all reviewing courts in terms of the proper scope of appellate review.

Cases involving novel Fourth Amendment issues, particularly those implicated by the realities of the digital age, have been at the forefront of this Court's contemporary agenda. *Carpenter v. United States*, 585 U.S. ___ (2018); *Riley v. California*, 134 S.Ct. 2473 (2014); *United States v. Jones*, 132 S.Ct. 945 (2012). However, this Court has not merely restricted its review to cases involving the interplay of the Fourth Amendment and

modern technology, as it recently revisited the traditional "automobile" exception to the warrant requirement and whether that exception applies to the curtilage of a home. *Collins v. Virginia*, 138 S.Ct. 1663 (2018). In all of these cases, this Court upheld protections under the Fourth Amendment, and upholding the constitutional right to privacy that all individuals enjoy is no recent phenomenon for this Court.

Exactly forty years ago, this Court granted certiorari in *Franks* to decide whether the Fourth Amendment and the exclusionary rule guarantees criminal defendants the right to challenge the veracity of search warrant affidavits that are based on intentional or reckless falsehoods. In answering yes to that question, this Court made clear that the Warrant Clause requires a factual showing sufficient to compromise probable cause and that the "obvious assumption" is that there will be a "truthful" showing. *Franks*, 438 U.S. 164-165. The Court then established the procedure for a veracity hearing that applies to suppression of evidence where a magistrate is misled by intentional or reckless falsehoods by an affiant of a search warrant. Since that time, the holding from *Franks* has only been tangentially referenced by this Court on a handful of occasions. *See, e.g., United States v. Leon*, 468 U.S. 897 (1984); *Herring v. United States*, 555 U.S. 135 (2009).

The *Franks* doctrine that governs material misstatements is now a longstanding principle embraced by both federal and state courts. Yet, since 1978, this Court has not issued any substantive opinion

expanding on or explaining critical issues related to *Franks*. For that reason, lower courts have been forced to create their own substantive and procedural rules which has created confusion and disparity in the application of the law in this context. For instance, although a trend has evolved over time where courts apply the *Franks* doctrine to cases involving material omissions as opposed to affirmative misstatements, this Court never actually established that rule and accordingly this majority approach is not employed by all courts.

Over the years, for instance, a bright line rule has been created by some courts that material omissions fall under the purview of *Franks.* Ironically, considering the issues at play in this case, one of the seminal decisions holding that material omissions will implicate *Franks* was issued by the Tenth Circuit in *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990). Other courts, however, have not specifically adopted that rule, refused to answer the question or have rejected the rule. There is also currently a split in circuits regarding the standard of review that applies to the denial of a *Franks* hearing. Accordingly, a divisive landscape has developed over decades where different courts have created different rules and there is little to no uniformity in the application of this important federal constitutional question.

This case presents this Court with the perfect opportunity to revisit *Franks*, to remedy decades of confusion, and to ensure uniform application of the law in the future when courts are presented with *Franks*

challenges. This case involves important questions of federal constitutional law that have been undecided for decades, but should now be decided, about *Franks* and its application to cases involving material omissions to search warrant affidavits.

Finally, this case also presents important federal questions that apply across the board to all appellate courts in terms of jurisdiction and the proper scope of appellate review based on the interplay of the party presentation doctrine and principles of waiver.

As such, the issues in this case are ripe for consideration and this Court should grant certiorari review.

STATEMENT OF THE CASE

The government's investigation of Dr. Gehrmann and Dr. Carlson was focused on suspected healthcare fraud violations. The primary reason the government obtained the search warrant at issue was to uncover evidence of healthcare fraud, as opposed to tax offenses. The government's execution of the search warrant on September 22, 2011 did not yield evidence of healthcare fraud, contrary to what it asserted it would find in the affidavit in support of the search warrant. Instead, a grand jury returned a seven-count indictment against Dr. Gehrmann and Dr. Carlson charging them with tax violations only.

The defense moved to suppress all the evidence seized after the execution of that search warrant

pursuant to *Franks*. After a hearing on that motion, the District Court granted the defense motion and suppressed the evidence. The District Court concluded that the government had omitted material information from the affidavit submitted in support of the search warrant "with the intent to mislead—or, at the very least, with a reckless disregard of whether it would mislead—the magistrate judge." (Pet. App. 48). The Court rejected the government agent's explanation for that omission as not credible*, id.,* and concluded that the magistrate judge would not have issued the warrant had the government "faithfully represented the facts in [the] affidavit" insofar as the warrant's healthcare fraud allegations were concerned. *Id.*

Although the District Court concluded that there was probable cause to authorize a search for evidence of tax-related offenses, it found that it was "left with an affidavit that sets forth facts establishing probable cause of tax evasion, but not health care fraud, and a warrant that authorizes a search for evidence of both." (Pet. App. 51). Accordingly, the court turned to the applicability of the severance doctrine adopted by the Tenth Circuit, to determine whether the valid portions of the warrant could be severed from the invalid portions, and only the evidence seized pursuant to the latter suppressed. Applying that test, the Court concluded that the government failed to demonstrate that severability was appropriate and suppressed all of the evidence in this case for that reason.

I. The Underlying Healthcare Fraud Investigation

Dr. Gehrmann and Dr. Carlson were both chiropractors who owned and operated Atlas Chiropractic Center ("Atlas") and SpineMed Decompression Center ("SpineMed") in Colorado Springs, Colorado.[1] On September 22, 2011, federal law enforcement agents executed a search warrant of the Atlas/SpineMed office and seized patient files, business records, and other items. Two days later, federal agents searched a related business storage facility and seized additional items.

The origins of the 2011 search was a Colorado regulatory investigation that began almost four years earlier. In December of 2007, one of Dr. Carlson's former patients called the fraud hotline at United Healthcare ("United") to report Dr. Carlson for overbilling and other improper billing practices. United began an investigation and eventually referred that matter to the Colorado Department of Regulatory Agencies ("DORA"). When DORA received the information from United regarding its concerns that Dr. Carlson was double billing some of his patients, DORA opened an investigation. As part of that investigation, DORA retained Dr. Ben Elder in February of 2009 to review the

[1] Dr. Gehrmann and Dr. Carlson had a third partner in the businesses, Dr. John Davis, who was also indicted in this case for tax offenses but Dr. Davis entered a guilty plea and chose to cooperate in order to receive a misdemeanor disposition. In its decision, the Tenth Circuit erroneously refers to Dr. Davis as a "nonparty" on more than one occasion. (Pet. App. 3, 5).

administrative case concerning Dr. Carlson. Dr. Elder subsequently issued a report on April 27, 2009, that concluded that Dr. Carson tried to defraud patients and the Board of Chiropractic Examiners by billing United for non-covered treatments under different procedural codes.

Dr. Elder's report included numerous egregious allegations of healthcare fraud that were based on an unidentified former patient's allegations. In the end, Dr. Elder claimed that Dr. Carlson misappropriated approximately $460,000. Dr. Gehrmann was not a part of the allegations lodged by this disgruntled former patient of Dr. Carlson. The accusations of this individual, who is still unidentified to this day, would later prove to be unsubstantiated for more than one reason. On March 23, 2011, DORA concluded its investigation. It issued a Letter of Admonition to Dr. Carlson regarding the case. (Pet. App. 56-57).

DORA did not find that Dr. Carlson engaged in any fraud; instead, it admonished Dr. Carlson for failing to "make essential entries on patient records including family and social history and appropriate intake examination information[.]" *Id.* The Admonition Letter stated that it was "a full and final resolution of the issues raised in Case Number 2008-003722," the case that had been opened by the tip of alleged healthcare fraud and United's ensuing investigation. *Id.* The Admonition Letter did not accuse or criticize Dr. Carlson for engaging in healthcare fraud. As the District Court would later put it: the letter "did not

sustain the health care fraud charges that it investigated." (Pet. App. 47).

The healthcare fraud investigation, however, did not stop with the State administrative proceeding because DORA brought the federal government into the fold at some point in 2010. DORA provided several documents regarding its healthcare fraud investigation, including Dr. Elder's report and United's own investigative report, to Christina Galeassi, a Senior Investigator with the Department of Labor ("DOL").

By August of 2010, Internal Revenue Service ("IRS") Agent Adam Rutkowski was conducting surveillance of the Atlas/SpineMed office. Investigator Galeassi emailed the State materials, including the United materials and Dr. Elder's report, to Assistant U.S. Attorney Jaime Pena at some time before October of 2010, because Agent Rutkowski received those same documents via email from the U.S. Attorney by October of 2010, at the latest.

As he later admitted, by this time, Agent Rutkowski had a copy of the DORA complaint, the United complaint and a letter from the DOL to AUSA Pena which summarized the healthcare fraud investigation, and included a summary of Dr. Elder's report. Agent Rutkowski reviewed all of these materials in order to determine the reasons for the joint DOL/IRS investigation and he spoke with Investigator Galeassi about those materials after he reviewed them. Agent Rutkowski, however, never spoke with anyone at United or DORA connected to the investigation. Agent

Rutkowski never bothered to reach out to Dr. Elder about all of the accusations in the report he generated for DORA before authoring the affidavit. He only tried to reach out to Dr. Elder after the defense filed its *Franks* motion and obtained an evidentiary hearing.

On May 9, 2011, Investigator Galeassi informed Agent Rutkowski that the Admonition Letter was available on DORA's website, and Agent Rutkowski downloaded the letter on approximately the same date. Agent Rutkowski recognized the potential significance of the Admonition Letter, he read it thoroughly, studied the statutes referenced in it, and made his on-the-job trainer aware of it. Agent Rutkowski authored the affidavit to obtain the warrant to search the Atlas/SpineMed office, and later admitted at the *Franks* evidentiary hearing that he conferred with his supervisor, a prosecutor, Investigator Galeassi and co-workers about the content of the affidavit.

More than four months after obtaining the Admonition Letter, on September 22, 2011, Agent Rutkowski executed the warrant and numerous agents raided the offices of Atlas/SpineMed. The affidavit was 43-pages long and sought to establish probable cause for violations of 18 U.S.C. § 1035 (False Statements Related to Health Care Matters); 18 U.S.C. § 1341 (Mail Fraud); 18 U.S.C. § 1343 (Wire Fraud); 18 U.S.C. § 1347 (Healthcare Fraud); 18 U.S.C. § 2 (Aiding and Abetting); 26 U.S.C. § 7201 (Attempt to Evade or Defeat Tax); 26 U.S.C. § 7206(1) (Filing False Income Tax Returns Under Penalties of Perjury); and 18 U.S.C. § 371 (Conspiracy).

With only one minor exception, all of the healthcare fraud allegations contained in the affidavit came from the DORA administrative investigation of Dr. Carlson and not from any other independent source. However, the affidavit said absolutely nothing about the Letter of Admonition or that DORA had fully and finally resolved Case Number 2008-003722 without making any findings that Dr. Carlson had engaged in healthcare fraud. The affidavit excluded this exculpatory evidence.

The warrant was issued by United States Magistrate Judge Watanabe on September 16, 2011, and executed days later on September 22, 2011. The focus of the affidavit for search warrant was the healthcare fraud allegations, and not the tax offenses, and the majority of the warrant pertained to healthcare fraud.

Almost four years later, a federal grand jury returned an indictment on July 22, 2015, charging Drs. Gehrmann and Carlson with one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and three counts each for filing false tax returns in violation of 26 U.S.C. § 7206(1) for the tax years of 2008-2010. None of them were ever charged with any healthcare fraud offenses.

II. The *Franks* Hearing And The District Court's Suppression Order

The defense moved to suppress all of the evidence seized pursuant to the warrant and argued, *inter alia*, that DORA's resolution of Case Number 2008-003722,

as set forth in the Admonition Letter, was material information that should have been included in the affidavit, and if it had been, it would have resulted in a finding of no probable cause because it exculpated Dr. Carlson from the alleged wrongdoing. The defense also argued that the omission constituted a deliberate falsehood or reckless disregard for the truth. In response, the government argued that the Letter of Admonition was not material and its omission was not material. The government also argued there was no evidence that Agent Rutkowski "had a subjective intent to mislead the magistrate judge" by omitting any reference to the Admonition Letter.

The district court conducted a *Franks* hearing on April 13, 2016. Agent Rutkowski was the only witness called. In addition to examination by the attorneys, the District Court questioned Agent Rutkowski about specifics regarding his decision to omit the Admonition Letter and the findings of DORA.

Two days after the *Franks* hearing, the government filed a "Notice of Clarification" acknowledging the materiality of the Letter of Admonition by conceding that "the warrant affidavit should have included information about DORA's resolution of a claim" and making clear that "the government's focus on materiality [should not be] understood as signaling approval of the agent's decision to omit the letter." (Pet. App. 58-59). However, the government persisted in arguing that, "the omission was the result of poor judgment by a new agent, and nothing more." (Pet. App. 58).

On April 25, 2016, the District Court granted the defense motion to suppress and entered its suppression order. (Pet. App. 37-55). The Court found that the omission of any information about the Admonition Letter was material and that Agent Rutkowski intended to mislead the magistrate by the omission or did so with reckless disregard for the truth. Specifically, the Court found that Agent Rutkowski's various explanations for omitting the Admonition Letter were incredible in several ways.

First, the Court found that his testimony that he viewed it as a "letter of punishment" was incredible because the agent omitted that had the letter sustained Dr. Carlson he would have included that fact in the affidavit. (Pet. App. 46). Second, the Court found that his explanation that the letter was a "settlement letter" that would not be material was incredible because he recklessly disregarded the fact that DORA did not sustain the healthcare fraud it investigated. (Pet. App. 47). Third, the Court found that Agent Rutkowski's testimony that the Admonition Letter had no bearing on his criminal investigation was incredible because he admitted that the information pertinent to the healthcare fraud allegations in the affidavit was based on information that, in large part, he received from DORA. *Id.* The Court then found that Agent Rutkowski misrepresented the healthcare fraud allegations as though they had not yet been resolved and omitted the Admonition Letter and its findings intentionally, or at the very least recklessly.

In terms of probable cause, after adding the omitted facts and reviewing the affidavit in its entirety, the District Court ruled that had the affidavit included the omitted evidence and the fact that DORA did not sustain the healthcare fraud charges, probable cause to search for that crime would have been vitiated. (Pet. App. 48-51). In terms of probable cause related to the tax offenses, the Court ruled that even though probable cause for the tax offenses alone existed that the warrant was nonetheless invalid because the material omissions negated the required particularity under the Warrant Clause and that the corrected affidavit authorized a search for both crimes, and not just tax offenses. *Id.*

The Court then turned to the question of whether all, or only some, of the evidence seized pursuant to the warrant should be suppressed. Applying the Tenth Circuit's "severability test," it ruled that the government had failed to demonstrate that the categories of evidence to be seized pursuant to the valid (tax) portions of the warrant were sufficiently distinguishable from categories of evidence to be seized pursuant to the invalid (healthcare fraud) portions of the warrant. (Pet. App. 51-54). The Court also concluded that, to the extent the valid and invalid categories of evidence to be seized were distinguishable from one another, the valid portions did not constitute "the greater part of the warrant." (Pet. App. 54). Having found that the valid portions of the warrant could not be severed from the invalid portions, the Court ruled that all of the

evidence seized pursuant to the warrant had to be suppressed.

The government then brought an interlocutory appeal to the Tenth Circuit.

III. The Appeal To The Tenth Circuit

The main issue and sole focus of the briefing on appeal was the applicability of the severability doctrine and whether partial or complete suppression was the appropriate remedy, versus the issue of materiality. Indeed, in its opening brief the government dedicated one page of its 37-page brief to the issue of materiality and briefly argued that the Admonition Letter and its contents were immaterial. In response, the defense argued *inter alia* that government waived the issue based on its "Notice of Clarification" pleading which admitted that the Admonition Letter should have been included in the affidavit. (Pet. App. 58-59). Before the Circuit issued its order, the defense again argued that the government had waived the issue of materiality in the District Court after the government submitted a Rule 28(j) letter to the Court citing a supplemental authority almost a year after oral argument in the case.

The Tenth Circuit erroneously engaged in fact-finding, briefly addressed the issue in a footnote, and found that the Notice of Clarification was not a confession to materiality but instead a confession to the fact that the Admonition Letter was "relevant." (Pet. App. 17-18, fn. 6). With that one exception, the Court then went on to focus solely on the issue of materiality and

ignored the main issue presented by the parties to the Court—the applicability of the severability doctrine.

The Tenth Circuit reversed the District Court on an erroneous application of a *de novo* standard of review, and found that the omitted evidence was not material and held that the corrected affidavit was still supported by probable cause because there was a "fair probability" that evidence of healthcare fraud would be found at Atlas/SpineMed. (Pet. App. 26). The underlying rationale for much of the Court's analysis on these two legal points included its opinion of the meaning and significance of the Admonition Letter, factual findings that disagreed with those drawn by the District Court.

The Tenth Circuit, for instance, found that the District Court erred in construing the Admonition Letter as a "not guilty" finding and as evidence that Dr. Carlson was not inculpated by it for healthcare fraud. (Pet. App. 24-26). The Court then sidestepped the exculpatory nature of the Admonition Letter in finding that a magistrate "could" have still found probable case because a lower standard of proof of preponderance of the evidence applied to the DORA matter and since the affidavit contained other evidence related to healthcare fraud. (Pet. App. 24-32). The Court held as such, even though the "other" evidence was the exact same information that came from DORA, and no other source, as Agent Rutkowski testified to at the *Franks* hearing. (Pet. App. 47).

The Tenth Circuit made no reference to the District Court's credibility findings, although it was the District Court that heard and observed the live testimony of Agent Rutkowski.

Almost a year and a half later, the Tenth Circuit issued its decision reversing the District Court on April 24, 2018. Thereafter, the defense moved the Court to publish the opinion and stay the mandate pending the filing of this petition and both of those requests were denied.

REASONS FOR GRANTING THE PETITION

This case involves several significant first impression issues that implicate the constitutional rights of criminal defendants and civil plaintiffs in federal and state matters. This case also involves issues that implicate rules that apply to the authority of federal and state appellate courts and rules that should govern the scope of their review.

Challenges to search warrants based on *Franks* involve important Fourth Amendment issues that are litigated in federal and state trial courts all over the country in both civil and criminal cases. Without this Court's guidance, lower courts will continue to create and apply their own unique standards to legal issues under *Franks,* particularly regarding cases that involve material omissions, and the law will continue to be applied in a disparate manner. Because of the frequency in which *Franks* cases are heard in trial courts,

the practical issues presented in this case have nationwide significance, even though Drs. Gehrmann and Carlson stand in a small category of defendants who actually prevailed in a *Franks* challenge and obtained the suppression of evidence. This is particularly true where more often than not, *Franks* cases will involve material omissions as opposed to affirmative misrepresentations contained in the four corners of an affidavit for search warrant.

This case presents this Court with the opportunity to interpret the Constitution and the Court's precedents, for the first time, regarding procedural and substantive law related to material omissions under *Franks* because the Tenth Circuit erroneously ruled that the omitted information was "not so probative," or material, to negate probable cause, even though it found the omitted information was relevant, exculpatory and "should have been included" in the affidavit at issue. (Pet. App. 18, 32). This holding overlooks the exculpatory nature of the omitted evidence and whether a warrant remains valid if probable cause is negated regarding one class of offenses in an affidavit, which is the class of offenses that is the main crux of the government's investigation and is the focus of the affidavit for search warrant.

The Court erroneously also employed *de novo* review to what was a factual question. This misapplication of the standard of review violates this Court's precedent. The Tenth Circuit applied the *de novo* standard so that it could usurp the District Court's findings and re-characterize the nature and

significance of the omitted evidence to what it wanted it to be in order to reverse the District Court and rule for the government. Thus, the Court invented its own erroneous *Franks* standard of review regarding material omissions and probable cause, ignored the legal significance that exculpatory evidence should have on a probable cause determination, and has established dangerous first impression precedent in doing so.

Further, the Tenth Circuit went out of its way to ensure that its decision was unpublished, but that fact should not dissuade this Court from granting review, because the order still has precedential value and will undoubtedly be cited to in the future. Fed. R. App. P. 32.1 (allowing for citation to unpublished opinions). This is particularly true because it is essentially the only federal circuit that has had the occasion to review an interlocutory appeal of a *Franks* suppression order in favor of the defense.

Finally, the Tenth Circuit exceeded the scope of permissible appellate review in applying the wrong standard of review, stepping into the shoes of the trial court and ignoring the issues raised by the parties on appeal. Even though the government admitted that the information omitted by Agent Rutkowski should have been included in the affidavit, the Court focused its entire consideration of this case on the materiality issue and ignored the main issues presented by the parties which involved the application of the severability doctrine to the District Court's suppression order. The questions of governmental waiver here, and whether the Tenth Circuit violated the party

presentation doctrine implicate rules that apply across the board to the power of reviewing courts and limitations that apply to their scope of review.

This case presents compelling issues that impact litigants. Accordingly, this Court should grant review.

I. The Longstanding Unanswered Questions Regarding Material Omissions Under *Franks* Mandate Review Now After Decades Of Uncertainty And A Disparate Application Of The Law

Unlike other types of challenges to warrants pursuant to the Fourth Amendment, an attack based on *Franks* stands in a class of its own because of the allegations of bad faith on the part of law enforcement that are part and parcel of a *Franks* challenge. The bad faith factor is what motivated this Court to hold that defendants are entitled to a veracity hearing in the first place because, as the Court stated, "it would be an unthinkable imposition" on a magistrate's authority if a warrant affidavit containing deliberate or reckless falsehoods stood beyond impeachment. *Franks*, 438 U.S. at 165. Bad faith is certainly implicated when an affiant intentionally or recklessly omits exculpatory information and presents an inaccurate and skewed portrayal of facts relevant to probable cause in the affidavit presented to the magistrate, as was the case here. For that reason, the exclusion of relevant and exculpatory evidence falls squarely within the type of conduct that *Franks* sought to deter.

Yet, this Court has never addressed any issue related to the interplay of material omissions under *Franks*. Thus, for years now, lower courts have had no guidance as to whether *Franks* applies to material omissions in the first place, and if so, whether a court must consider the exculpatory value of any omitted evidence in making determinations about materiality and probable cause. Lower courts are equally lacking guidance regarding how material omissions based on exculpatory evidence that relate to one class of offenses impacts the overall validity of a warrant under *Franks*, where probable cause is negated for those offenses.

This case presents this Court with the ideal vehicle to answer important unsettled questions regarding *Franks*, that should finally be answered, particularly where the Tenth Circuit established first impression rules that violate the very purpose of the *Franks* doctrine.

1. This Court Should Finally Clarify And Hold That Material Omissions In Search Warrant Affidavits Fall Under The Auspice Of *Franks*

Forty years after *Franks*, the national landscape regarding rules of law that apply to the suppression of evidence under that doctrine remains unclear. Before this Court can assess whether the Tenth Circuit erred in this case by holding that the omitted exculpatory evidence was immaterial, it should answer the

longstanding threshold question of whether *Franks* applies when an affiant omits material information from an affidavit for a search warrant. This case presents the perfect opportunity for this Court to clarify the divergent approaches that courts have taken when it comes to material omissions under *Franks*.

In *Franks*, this Court established a test that applies to veracity hearings where an affiant deliberately or recklessly misleads a magistrate by affirmative misrepresentations in an affidavit for a search warrant. This Court held that a defendant will be entitled to a *Franks* hearing after a substantial preliminary showing that an affiant knowingly or recklessly included a false statement in an affidavit, and that after removing the false statement an affidavit no longer supports a finding of probable cause. *Franks*, 438 U.S. at 156. Suppression will then be warranted if evidence at a hearing shows that the allegation of "perjury or reckless disregard" is established by a preponderance of the evidence and that probable cause no longer exists once the false material is set to one side. *Id.* This Court, however, did not address the situation where a magistrate is misled by way of information that is omitted from an affidavit for a search warrant.

Because this Court did not address material omissions relating to search warrant affidavits in *Franks*, confusion has reigned in lower courts for decades now. Over time, many courts have, in their own discretion, extended the *Franks* doctrine to material omissions. *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985); *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985);

Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990). For the courts that have done so, the basic reasoning is that the "*Franks* rationale applies with equal force where police officers secure a warrant through the intentional or reckless *omission* of material facts." *Ippolito*, 774 F.2d at 1486-87 n.1. Although this approach has become the majority rule, the majority rule was never approved by this Court and this trend has not been applied by all courts. Some jurisdictions have not adopted the norm, and instead cite to other courts, such as the Seventh, Ninth or Tenth Circuits, that have adopted the rule that *Franks* applies to material omissions.

Other courts have simply defied the majority approach and have either refused to apply *Franks* to material omissions, or have refused to answer that question in its entirety. *Massey v. State*, 933 S.W.2d 141 (Tex. Crim. App. 1996); *Solis v. State*, 2002 WL 1480890 (Tex. App. Houston 1st Dist. 2003); *Sanders v. State*, 2004 WL 179188 (Tex. App. Eastland 2004). Therefore, although the application of *Franks* to material omissions has evolved as the majority approach, there is still no real uniformity in the application of *Franks* as it relates to material omissions.

Moreover, some courts have imposed a higher burden on defendants who raise *Franks* challenges based on material omissions, as opposed to affirmative misrepresentations in the affidavit itself. The Fourth Circuit, for instance, has specifically held that the *Franks* standard is even higher for defendants making claims of omissions rather than affirmative false

statements. *United States v. Clenney*, 631 F.3d 658 (4th Cir. 2011). The Sixth Circuit has implied that that the same higher burden applies. *United States v. Atkin*, 107 F.3d 1213 (6th Cir. 1997). Yet, other courts like the Tenth Circuit, apply the same standard to cases involving material omissions and affirmative misstatements. *See Stewart*, *supra.* Thus, not only is there still confusion as to whether *Franks* applies to material omissions, but there is a split in approaches employed by federal circuits as to what burden applies to a challenge involving material omissions.

Another example of nationwide confusion that has developed over time is the split in federal circuits that has emerged regarding the standard of review that applies to the denial of a *Franks* hearing in the first instance.[2]

Due to the ambiguity that has evolved over decades after this Court's decision in *Franks* on many

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[2] The Fourth, Fifth and Ninth Circuits employ a mixed standard and legal determinations *de novo* and any supporting factual findings for clear error. *United States v. Allen,* 631 F.3d 164, 171 (4th Cir. 2011); *United States v. Martin,* 332 F.3d 827, 833 (5th Cir. 2003); *United States v. Chavez–Miranda,* 306 F.3d 973, 979 (9th Cir. 2002). The Second Circuit seems to side with the mixed standard of review. *United States v. Cahill,* 355 Fed. Appx. 563, 565 (2d Cir. 2009). In contrast, the First, Sixth, and Seventh Circuits review a district court's decision for clear error. *United States v. Smith,* 576 F.3d 762, 764 (7th Cir. 2009); *United States v. Reiner,* 500 F.3d 10, 14 (1st Cir. 2007); *United States v. Stewart,* 306 F.3d 295, 304 (6th Cir. 2002). The Eighth Circuit has chosen its own path and will review a District Court's decision for abuse of discretion. *United States v. Kattaria,* 553 F.3d 1171, 1177 (8th Cir. 2009).

fronts, but specifically in regard to material omission cases, this Court should in the first instance finally clarify that *Franks* does in fact apply to material omissions and uphold the majority approach.

2. This Court Should Finally Address Whether Material Omissions That Constitute Exculpatory Evidence Vitiates Probable Cause And Whether A Warrant Remains Valid Under *Franks* If Probable Cause Is Negated For The Offenses That Relate To The Majority Of The Warrant

Relatedly, this Court should grant review in order to decide whether the omission of exculpatory evidence vitiates probable cause under *Franks* for the offenses it relates to due to the fact that exculpatory evidence establishes a *less than* "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Further, if such is the case, this Court should grant review to decide whether a warrant remains valid under *Franks* if probable cause for offenses that relate to a majority of the warrant is negated by exculpatory evidence.

Exculpatory evidence is evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83 (1963). In this case, the Admonition Letter and the findings of DORA were exculpatory and established that the probability that law enforcement would find evidence of healthcare fraud offenses at Atlas/SpineMed was *de*

minimus. This evidence showed that, not even in an administrative capacity, could the allegations of healthcare fraud against Dr. Carlson be sustained, yet, Agent Rutkowski deprived the magistrate of this significant information. Dr. Gehrmann was never even a target of the DORA investigation. The healthcare fraud offenses were the driving force of the state and federal investigations, and constituted the overwhelming majority of the affidavit discussion of its probable cause. Alternatively, the tax offenses were the secondary aspect of the affidavit and were not the thrust of the investigation. In the end, Drs. Gehrmann and Carlson were never indicted for any type of healthcare fraud offense.

The Tenth Circuit erroneously overlooked all of this and that the exculpatory nature of evidence is a factor that weighs *in favor* of materiality under *Franks* because exculpatory evidence is proof of a *lack* of criminal activity, and is not the type of information that bolsters probable cause to believe criminal activity is afoot. To the contrary, exculpatory evidence does the exact opposite and this is particularly true in an investigation into any type of conspiracy, where two or more people are alleged to have actually reached an agreement to violate the law, which was the case here.

The Tenth Circuit completely overlooked the District Court's findings related to the intentional and reckless conduct of Agent Rutkowski, and erroneously afforded no significance to the exculpatory value of the Admonition Letter that he intentionally kept from the

issuing magistrate. Specifically, the Court circumvented the exculpatory nature of the Admonition Letter in holding, without any rationale, that probable cause in a criminal sense somehow requires a more significant showing than the administrative preponderance of the evidence burden that applies to a DORA case. The Court was only able to arrive at such a conclusion because, as will be discussed below, it erroneously employed a *de novo* standard of review.

It is time for this Court to create a rule so that lower courts are instructed that omissions based on exculpatory evidence are, by their very nature, material to a *lack* of probable cause as opposed to the other way around. Likewise, this Court should reverse the Tenth Circuit and create a rule that requires lower courts to construe omissions to an affidavit which are based on exculpatory evidence as material omissions that do not support probable cause.

Further, it is time for this Court to decide whether a warrant remains valid under *Franks* where material omissions vitiate probable cause for a majority of the offenses focused on in an affidavit for search warrant. This question is critical because of the unique role that *Franks* challenges play due to the inherent bad faith on the part of government actors that exists when *Franks* is violated. If an affiant acts in bad faith to deceive a judicial officer into issuing a search warrant, why would any part of that warrant remain valid after a sufficient showing of proof that that is indeed the case? *Franks* involves a deterrent component, which is rendered meaningless if a warrant still stands after

probable cause is destroyed by material omissions that relate to one class of offenses, but not others. This is particularly true where probable cause is negated for the offenses that were the main target of the investigation and subsequent affidavit and search warrant. Accordingly, this Court should grant review to uphold the purpose and spirit of *Franks* to prevent bad faith behavior on the part of law enforcement and should determine whether a warrant remains valid under *Franks* after it has been established that material omissions negate probable cause for offenses that form the main basis of an affidavit for search warrant.

II. As A Matter Of First Impression The Tenth Circuit Erroneously Applied *De Novo* Review To A Factual Determination Of Materiality Under *Franks*

As a matter of first impression, the Tenth Circuit created an erroneous rule in holding that the *de novo* standard applies to a review of the determination of materiality under *Franks*. This holding is simply wrong, and stands in direct conflict with the precedent of this Court, because materiality determinations necessarily require trial courts to engage in fact-finding. The question of whether evidence is material to a probable cause determination is a factual question, even though the ultimate probable cause determination is a question of law. It goes without question that trial courts must assess facts to classify the significance of information that is omitted from a search warrant affidavit.

Franks did not provide any guidance governing the standard of review that applies to appellate review of a District Court's determination of whether omissions in an affidavit for search warrant are material for purposes of a *Franks* challenge. This Court has, however, made very clear that the clear error standard of review applies to questions of fact, whereas *de novo* review applies to questions of law. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). *De novo* review is favored only "where this a need for appellate courts to control and clarify the development of legal principles, and where considered, collective judgment is especially important." *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

Indeed, this Court again recently reinforced the rule that clear error applies to findings of fact in *Teva Pharmaceuticals v. Sandoz*, 135 S.Ct. 831 (2015). Specifically, in reviewing the meaning of "clear error" for purposes of Rule 52 of the Civil Rules of Procedure, this Court has held that a reviewing court will overstep its bounds if it undertakes to duplicate the role of the lower court even when the lower court's findings rest on physical or documentary evidence or inferences from facts, in addition to just credibility determinations. *Anderson*, 470 U.S. at 575.

The *Anderson* rationale governs here and the Tenth Circuit inappropriately usurped the District Court's role by employing *de novo* review. Although the Court properly acknowledged that *de novo* review applies to the ultimate legal determination of probable cause, it improperly extended that rule by holding that

de novo "governs our review of a district court's obverse ruling that the omitted information, which is incorporated into the corrected affidavit, is material." (Pet. App. 16). This holding is contradicted by the reality that a court's characterization and evaluation of extrinsic evidence that has been omitted from a warrant requires that court to engage in fact-finding to determine whether the evidence is material. The question of materiality also requires courts to engage in fact-finding as to why evidence was omitted from an affidavit for search warrant in the first place.

That is exactly what occurred in this case. The District Court heard the testimony of Agent Rutkowski about how he obtained the Admonition Letter, why he omitted its existence and DORA's ultimate findings when he knew about all of this information, and what his take was on the significance of this evidence. The Court even asked its own questions of Agent Rutkowski. Like a jury reviewing exhibits in a trial, the Court reviewed exhibits at the *Franks* hearing that related to that testimony, the characterization and meaning of the Admonition Letter, its *factual* significance and the impact of its omission on the magistrate. In the end, like a jury who finds facts, assesses the weight of evidence and makes credibility determinations in order to render a verdict, the District Court engaged in the exact same process and determined that the Admonition Letter constituted a material omission that vitiated probable cause. In doing so, the Court found Agent Rutkowski's testimony incredible regarding his three explanations for not including the Admonition Letter

and the DORA findings and made factual findings about the characterization of that evidence, namely that it was essentially exculpatory, in order to arrive at its ultimate conclusion regarding materiality. (Pet. App. 45-48).

Accordingly, there is no question here that clear error applied to this determination on appeal, that the Tenth Circuit applied the wrong standard of review and violated this Court's decision in *Anderson* because "a reviewing court may not substitute its view for that of the district court." *Anderson*, 470 U.S. at 573-74.

This error is further illustrated by a previous opinion issued by a different panel of the Tenth Circuit in *United States v. Garcia-Zambrano*, 530 F.3d 1249 (10th Cir. 2008). In *Garcia-Zambrano*, the Court held that a clear error standard of review applies where a district court relies on extrinsic evidence to determine the meaning of affidavit language in a *Franks* challenge involving misstatements in an affidavit, and alternatively that *de novo* review only applies where a court makes the determination through interpretation of the written words in the affidavit alone. *Garcia-Zambrano*, 530 F.3d at 1256. By way of analogy, the logic of *Garcia-Zambrano* establishes the District Court's materiality determination here should have been reviewed under clear error because the Court relied upon extrinsic evidence to make its finding.

The standard of review that applies to materiality determinations under *Franks* is an important question of federal constitutional law, and this Court should

exercise review to correct the erroneous first impression rule created by the Tenth Circuit. The Tenth Circuit's holding presents a significant problem that must be corrected since it will certainly have precedential value in the future since that court is the first circuit to address this important issue. Denying review will open the door for appellate courts to engage in their own fact-finding and usurp the role of trial court whenever a case involving material omissions is reviewed on appeal.

Also, from a practical standpoint this is an important question because the standard of review that courts of appeals apply in examining both questions of law and fact is a crucial aspect to any litigant in every appellate case. This Court should ensure that appellate courts are doing the right job in this capacity. Standards of review, for instance, have been described as "the prism applied by the appellate courts through which a trial court's decisions are examined for error." Ann Crawford McClure & J. Christopher Nickelson, *The Difference is Deference: Appellate Standards of Review*, 36 Fam. Advoc. 45, 46 (2014). The standard of review is like a "yardstick" against which an appellate court will measure "the facts and the law in order to reach its decision." Lynn S. Kuriger & J. Patrick Hazel, *Standards of Appellate Review*, 14 Advocate Tex. 69, 69 (1995). Thus, the particular standard chosen by an appellate court can change the entire outcome of a case, as was the situation here. In other words, before any court will reach the merits of a case, the success of all

appeals primarily rises and falls with what standard of review will apply.

Ensuring that courts of review apply the proper standard of review impacts the overall administration of justice in terms of striking a proper balance between the role of trial courts and appellate courts. In terms of judicial economy as it relates to both time and resources, standards of review help dictate which issues deserve more significant attention from the appellate court in terms of *de novo* review, as opposed to those which should be left primarily up to the trial courts, under a clear error or abuse of discretion standard, because those courts are at the front-line and observe witnesses live, hear their testimony and consider the evidence in real time as it is admitted at hearings and trials. This is one of the main reasons the concept of a standard of review was created in the first place.

Further, just like they impact judicial economy, standards of review also impact the time and resources of the parties to litigation. For instance, a party may choose to forego dedicating time and resources to raising a certain claim on appeal due to any particular standard of review that may be disadvantageous or potentially lethal to that claim. As noted by the Seventh Circuit, the applicable standard of review is a factor that a competent appellate lawyer will consider when determining whether to raise any particular issue on appeal because issues governed by doctrines like harmless error or the standard of review of jury verdicts have "no chance" on appeal. *Howard v. Gramley*, 225 F.3d 784, 791 (7th Cir. 2000).

Therefore, for many reasons, it is crucial that appellate courts conduct their business accordingly and employ the appropriate standard of review in all cases. Because the Tenth Circuit clearly did not do this here, this Court should exercise review now in order to prevent other courts from relying upon this erroneous first impression rule, to uphold the administration of justice and to keep appellate courts in check and on the right track.

III. The Tenth Circuit Decided This Case Based On An Issue That Was Waived By The Government And Ignored The Main Issues On Appeal That Were Presented By The Parties

Finally, this Court should also grant review because the Tenth Circuit departed from the accepted and usual course of judicial proceedings when it decided the important Fourth Amendment issue based on issues, argument and a rationale that was not presented by the parties. The Court decided this case based on an issue that had been waived by the Government, and based on what it wanted to talk about as opposed to what issues were presented to it. This departure involves a violation of the party presentation doctrine and rules regarding waiver that have been established by this Court. This error on the part of the Tenth Circuit warrants review now in order to ensure that reviewing courts do not exceed their jurisdiction, and to prevent reviewing courts from exceeding the scope of their permissible review in the future.

This Court has held that the principle of party presentation mandates that courts are the "neutral arbiter" of issues that are presented by the parties to a case. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). As Justice Scalia once put it in a concurring opinion: "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003). Here, there is no question that the Tenth Circuit ignored the main issues briefed involving the applicability of the severability doctrine to the District Court's suppression order, and instead chose to render its decision based on arguments that were not presented to the Court.

The entire decision here rests on materiality, and the government devoted one page of its opening brief to the issue of materiality, and in response the defense maintained that the government had waived this issue. Indeed, in that one page, the *only* substantive materiality issue it raised was the claim that the District Court's finding that the DORA Admonition Letter was material was a finding based upon the incorrect "assumption" that the letter meant DORA "decided not to sustain the health care fraud charges" and was equivalent to a "not guilty" finding. That one substantive point pales in comparison to the numerous other *sua sponte* arguments that the Tenth Circuit relied on in its order to reverse the District Court.

Further, and notwithstanding that one substantive point, the government had already confessed that

the Admonition Letter should have been included by Agent Rutkowski in the Notice of Clarification pleading it filed two days after his testimony at the *Franks* hearing. (Pet. App. 58-59). Thus, the issue of materiality had already been waived by the government because, as established by this Court, an issue will be waived on appeal when a party intentionally relinquishes, or abandons, or concedes the issue in the trial court. *United States v. Olano*, 507 U.S. 725, 733 (1993). The Tenth Circuit, again, improperly engaged in fact-finding in holding that the government did not waive this issue. (Pet. App. 17, fn. 6).

This glaring error on the part of the Tenth Circuit is worthy of certiorari review because appellate courts should not be allowed to operate in an unchecked *sua sponte* fashion and create issues that it deems worthy or wants to address, as opposed to those put before the court. Appellate review would be meaningless if reviewing courts could pick and choose to render opinions about any issue they choose. It would equally render the lawyer's role in an appeal meaningless as researching and briefing appellate issues would be rendered an exercise in futility. The system simply is not supposed to work that way, and not supposed to work the way it did here, and the Tenth Circuit violated the permissible scope of its review.

As such, this Court should grant review and reverse the Tenth Circuit in order to clarify the bounds of an appellate court's jurisdiction and to illustrate for other appellate courts all over the country that they must uphold the party presentation doctrine as

established by this Court, principles of waiver and the overall administration of justice.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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