NO. _____

# In The Supreme Court of the United States

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## BENITEZ AUGUARIUS MOODY,

*Petitioner*,

**v.**

## UNITED STATES OF AMERICA,

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the characterization of deliberate falsehoods in a search warrant affidavit as mere imprecision eviscerates the right of a defendant as enunciated in Franks v. Delaware to challenge the validity of a search warrant.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Benitez Auguarius Moody and the United States of America.

## STATEMENT OF RELATED CASES

Counsel is unaware of any proceedings that are directly related to the present case in this Court.

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## INTRODUCTION

The Fourth Circuit affirmed the convictions of Mr. Moody on drug and weapon charges despite the deliberate and material falsehoods in the search warrant affidavit that underpinned his arrest and prosecution. The Fourth Circuit miscast the deliberate and material falsehoods as mere imprecision in denying Mr. Moody's appeal of the trial court's denial of a hearing under Franks v. Delaware to attack the lack of probable cause. The Fourth Circuit's deviation from the Court's directive in Franks requires the Court's intervention.

## OPINIONS BELOW

The opinion and order of the United States District Court denying Petitioner's Rules 29 and 33 motions for judgment of acquittal, a new trial, and a Franks hearing is reprinted at App.[1] 15a but is not otherwise published. The Fourth Circuit's published decision affirming the judgment (per Richardson, J., joined by Motz, J., and Agee, J.) is published at 931 F.3d 366 (4th Cir. 2019) and reprinted at App. 1a. The Fourth Circuit's denial of the petition for rehearing and rehearing en banc is reprinted at App. 24a. Other pertinent documents are contained in the Joint Appendix in the record of the United States Court of Appeals for the Fourth Circuit.

## JURISDICTION

The Fourth Circuit rendered its decision on July 29, 2019, and denied rehearing and rehearing en banc on August 26, 2019. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

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[1] Citations to the Appendix for this Petition for Certiorari will be noted "App" and citations to the Joint Appendix contained in the record in the Fourth Circuit will be noted "J.A."

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND OTHER TEXTS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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.

## STATEMENT OF THE CASE

Mr. Moody lived at 1212 Lindsay Avenue. On March 24, 2016, Alexandra Hogan, a drug addict who had been hospitalized twice with psychiatric issues and while acting as a police informant for monetary compensation, told police that she called Mr. Moody on the phone to solicit heroin for purchase. Hogan Test., Tr. of Apr. 26, 2017, J.A. at 320-22; Shelkey Test., Tr. of Apr. 26, 2017, J.A. at 279, 319. The same day, Hogan purchased heroin from two women in Portsmouth, Virginia; Mr. Moody was not present. Shelkey Test., Tr. of Apr. 26, 2017, J.A. at 294. Hogan's handler, Detective Shelkey, knew that Mr. Moody was not present. Id. At the time of the controlled buy, no surveillance was in place at 1212 Lindsay Avenue. Id., J.A. at 247; McCoy Test., Tr. of Apr. 25, 2017, J.A. at 29-31.

Shelkey knew that Hogan had never been to 1212 Lindsay Avenue. Hogan Test., Tr. of Apr. 26, 2017, J.A. at 353, 357; Shelkey Test., Tr. of Apr. 26, 2017, J.A. at 247. In fact, Shelkey knew that no one ever met Mr. Moody at 1212 Lindsay Avenue to obtain narcotics. Shelkey Test., Tr. of Apr. 26, 2017, J.A. at 250.

Nevertheless, immediately after the controlled buy, Shelkey executed an affidavit in support of a search warrant for 1212 Lindsay Avenue that stated in relevant part:

> [. . .] During the past 6 months, this affiant and other members of the Portsmouth Police Department SIU have utilized Confidential Informants who have been up to and inside of 1212 Lindsay Ave Portsmouth, VA and purchased quantities of heroin and cocaine from MOODY. During the investigation controlled purchases have been conducted directly from 1212 Lindsay Ave Portsmouth VA and from a 2004 black in color BMW convertible displaying Virginia tags VLD- 9617 reregistered [sic] to MOODY.
>
> During these controlled purchases, these Confidential Informants have observed MOODY in possession heroin, cocaine, and multiple firearms on and around his person. These Confidential Informants have observed MOODY with cutting agents and digitals scales that MOODY is utilizing to weigh different amounts of cocaine and heroin.
>
> Within the past 24hrs this affiant and other members of the Portsmouth Police Department utilized a Confidential Informant who placed a telephone call to MOODY asking to purchase heroin from MOODY. MOODY arranged to meet the Confidential Informant in a pre arranged location. During this controlled purchase, MOODY and other co-conspirators (two unidentified black females) were observed leaving from 1212 Lindsay Ave Portsmouth, VA and surveilled traveling to the pre arranged location and selling the Informant heroin. The heroin was recovered by members of the Portsmouth Police Department Special investigations Unit, field tested and resulted positive for heroin.

Shelkey Search Warrant Aff., Sect. 4, App. 25a.

Mr. Moody was accused in a criminal complaint on July 18, 2016, and later indicted on September 13, 2016, with three violations of Title 21, namely possession with intent to distribute cocaine base, heroin, cocaine, and fentanyl, and heroin and

fentanyl, respectively, and one violation of Title 18 for possession of a firearm in furtherance of a drug trafficking crime. Docket Sheet nos. 1, 11, J.A. at 4-5. On February 22, 2017, he was charged in a superseding indictment with fifteen counts: possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii); possession with intent to distribute heroin, cocaine, and fentanyl (two counts) in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); possession of a firearm in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A); felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2); and, distribution of heroin (ten counts) in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C). Id. no. 31, J.A. at 7; Superseding Indictment, J.A. at 17.

Other than testimony of the search of 1212 Lindsay Avenue, the items seized, and the chain of custody for items seized during that search, the Government's non-expert case consisted only of Hogan's testimony. There was no testimony at trial that anyone had ever been inside 1212 Lindsay Avenue and seen any drugs, guns, or drug paraphernalia prior to the execution of the search warrant.

At the close of the Government's case, Mr. Moody moved for a judgment of acquittal on all counts, which motion was denied. Docket Report no. 54, J.A. at 9. Mr. Moody presented evidence from the clerk of Portsmouth Circuit Court and from Detective Edward Roesch. Roesch confirmed that he had testified in a post-search and arrest sworn affidavit and before a Federal grand jury that Mr. Moody was not observed leaving 1212 Lindsay Avenue and was not observed traveling to a location to meet Hogan. Edward Roesch Test., Tr. of Apr. 27, 2016, J.A. at 426-28.

After the conclusion of the evidence, Mr. Moody renewed his motion for judgment of acquittal. Docket Report no. 54, J.A. at 9. The trial court denied the motion. Id. The jury returned a verdict of guilty on Counts One through Five and not guilty on Counts Six through Fifteen of the Superseding Indictment. Verdict Form, J.A. at 438-41.

On May 12, 2017, Mr. Moody moved for a Franks hearing, judgment of acquittal on all counts based on insufficient evidence, and in the alternative for a new trial. Docket Report no. 62, J.A. at 10. Mr. Moody based his request for a Franks hearing on Shelkey's trial testimony that contradicted the statements in her affidavit. The trial court denied the motions by opinion and order dated June 23, 2017. Op. & Order, App. 15a. On April 5, 2018, the trial court sentenced Mr. Moody to: imprisonment for a term of 240 months on each of Counts One through Three, each term to run concurrently to the others and to Count Five; a term of 60 months on Count Four, to run consecutively to all other counts; a term of 120 months on Count Five, to run concurrently to Counts One, Two, and Three; and terms of supervised release on each count of varying lengths up to eight years, all to run concurrently. Judgment, J.A. at 464-65. Mr. Moody noticed his appeal from the judgment on April 5, 2018. Not. of Appeal, J.A. at 469.

Following briefing and oral argument, the Fourth Circuit affirmed the trial court's denial of Mr. Moody's motion for a Franks hearing. United States v. Moody, 931 F.3d 366 (4th Cir. 2019). The Fourth Circuit denied Mr. Moody's petition for rehearing and rehearing en banc. Order, App. 24a.

## REASONS FOR GRANTING THE WRIT

### I. THE FOURTH CIRCUIT MISAPPLIED THE COURT'S *FRANKS* DECISION AND THREATENS TO UNDERMINE THE RIGHTS ENUNCIATED THEREIN

A defendant has a right to an evidentiary hearing to challenge the validity of an affidavit supporting a search warrant under certain conditions. Franks v. Delaware, 438 U.S. 154, 171–72 (1978). He or she must present an "offer of proof" that is "more than conclusory" of "deliberate falsehood or of reckless disregard for the truth" as to the specific "portion of the warrant affidavit that is claimed to be false." Id. at 171. "[I]f these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue." Id. at 171-72.

The Fourth Circuit violated the Court's command in Franks by ignoring the deliberate, material falsity in the affidavit of Detective Shelkey. Left unchecked, the Fourth Circuit's opinion undermines the rights of defendants guaranteed by Franks.

#### A. The Falsity Was Material, Intentional, And Crucial To A Finding Of Probable Cause

To appreciate the significance of the Fourth Circuit's error and the imperative that the Court grant this Petition to rectify it, it is necessary to review preliminarily the scope of the falsity upon which the finding of probable cause to search 1212 Lindsay Avenue was based.

Detective Shelkey's affidavit states: "Confidential Informants who have been up to and inside of 1212 Lindsay Avenue Portsmouth, VA and purchased quantities of heroin and cocaine from Moody . . . . controlled purchases have been conducted directly from 1212 Lindsay Ave . . . .", Shelkey Aff. of Mar. 24, 2016, Sect. 4, J.A. at 446, and "These Informant(s) positively identified MOODY as being the individual who distributes heroin and cocaine from inside of 1212 Lindsay Ave Portsmouth, VA," id., Sect. 7, J.A. at 447. All of these statements were false. On direct examination, Shelkey testified that Mr. Moody did not meet people at 1212 Lindsay Avenue. Shelkey Test., Tr. of Apr. 26, 2017, J.A. at 250. Shelkey omitted this key evidence that Mr. Moody did not meet anyone at the house to conduct narcotics transactions and affirmatively misrepresented the opposite.

Shelkey likewise lied about the number of "controlled purchases" and fabricated the circumstances of these imagined controlled purchases. The affidavit falsely swore to multiple purchases, multiple informants, and then attributed observations to non-existent informants. Shelkey Aff., Sect. 4, App. 25a. At trial, she testified there was but one controlled purchase, by one informant, the one by Hogan on March 24, 2016, and that single controlled purchase did not take place at 1212 Lindsay Avenue. Id., J.A. at 246. These statements in the affidavit were all a complete fabrication.

That is not the full extent of her falsity. In her affidavit, Shelkey swore that Mr. Moody and two unidentified black females "were observed leaving from 1212 Lindsay Ave Portsmouth, VA and surveilled travelling to the pre arranged location

and selling the Informant heroin." Id. Yet at trial, Shelkey admitted Mr. Moody was not at any controlled buy. Hogan testified that Mr. Moody was not present when she purchased heroin on March 24, 2016, Hogan Test., Apr 26, 2017, J.A. at 359, and Shelkey admitted she spoke to Hogan thereafter, Shelkey Test., Tr. of Apr. 26 2017, J.A. at 292.

Shelkey also testified that there had been no surveillance in place before the Hogan purchase, ergo, there was no basis to affirm in the affidavit that anyone had seen anyone leave 1212 Lindsay Avenue to meet Hogan. Shelkey Test., Tr. of Apr. 26 2017, at 247. According to Shelkey, the surveillance was established *after* the controlled purchase from the two women: first was the controlled buy; second, the surveillance teams were put in place; and, third, she obtained and executed the warrant. Id. This was confirmed by the officer conducting the surveillance, McCoy, who testified that the surveillance was in preparation for the execution of the search warrant. McCoy Test., Tr. of Apr. 25, 2017, J.A. at 29-31. McCoy did not *continue* surveillance, he *established* surveillance after the controlled buy.

The omissions and false statements all had the same purpose: to mislead the magistrate into believing 1212 Lindsay Avenue was used for drug distribution despite the lack of evidence to support a finding of probable cause that it did. Taken in context, the false statements and omissions were intentional or, at a minimum, made with reckless disregard as to whether they would mislead the magistrate to believe otherwise. Critically, stripped of the false statements, Shelkey's affidavit is insufficient to support probable cause of a search of 1212 Lindsay Avenue. Cf. United

States v. Tate, 524 F.3d 449 (4th Cir. 2008) (holding "What would have remained [after removing material misstatements] was evidence that 709 North Longwood Street was commonly known to store marijuana and that '[d]uring the month of December, [Agent Manners] received information that Mr. Davon Lee Tate . . . who lives at 709 North Longwood [was] selling illegal narcotics' from that location. The affidavit provided no details regarding the source or context of this information, and standing alone, such information surely was not sufficient for a judge to exercise his independent judgment on issuing a search warrant."); Bennett, 905 F.2d at 934 (holding "After excising the affidavit's false statements, all that remains in the affidavit is that an informant told Officer Horn that he saw 'paraphernalia which is used in the sale of marihuana' in Bennett's house, and an anonymous informant claimed that Bennett was selling drugs from his residence and was bringing in a shipment the night of April 1, 1988. We hold that these statements are not sufficient to provide reasonable grounds to believe that sheriff's officers would find marihuana at Bennett's residence on April 8, 1988.").

This evidence of intentional falsity and material omissions, based on the sworn testimony of witnesses at trial, was robust and satisfied the preliminary showing required of Mr. Moody under Franks. Franks, 438 U.S. at 171-72.

### B. Equating Intentional Falsity With Permissible Imprecision Eviscerates The Safeguards Of The Fourth Amendment

The Fourth Circuit excused the falsity in the affidavit by miscasting it as imprecision, a decision that, if it stands, undermines the Court's opinion in Franks and the right enunciated therein of criminal defendants to challenge wrongfully

obtained search warrants. The Fourth Circuit's opinion is in conflict with the law in other circuits and disregards the Court's imperative in Franks.

> The bulwark of Fourth Amendment protection, of course, is the Warrant Clause . . . . Judge Frankel, in United States v. Halsey, 257 F.Supp. 1002, 1005 (S.D.N.Y.1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks, 438 U.S. at 164–65. See also United States v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990) (holding "When affiant's testimony establishes that material statements in the affidavit are untrue, it is error to fail to find that there were no intentionally false statements or statements made with reckless disregard for the truth"); United States v. Davis, 714 F.2d 896, 899 (9th Cir. 1983) (holding "Franks teaches that when, as in this case, [a material omission] is intentional the warrant must be invalidated"). Shelkey did not believe that her affidavit included only truthful information, and the Fourth Circuit by miscasting her intentional falsity as mere imprecision represents a severe undermining of the Fourth Amendment's protection against unlawful searches.

Shelkey's affidavit is not an example of a "lack of precision" as characterized by the Fourth Circuit, Moody, 931 F.3d at 371, but of a complete lack of factual

foundation for the entire premise of the existence of probable cause to search 1212 Lindsay Avenue. None of the "three different meanings" the panel hypothesized, id. at 371-72, are true. Since there was no surveillance, no one saw anyone leave 1212 Lindsay Avenue before the controlled buy. It follows that no one surveilled anyone travelling to the controlled buy either. And it is clear that no one saw Mr. Moody at the controlled buy. Similary, there were no confidential informants up to and inside 1212 Lindsay Avenue and no controlled purchases from the house. This is not imprecision but intentional falsity. This Petition offers the Court the opportunity to buttress and safeguard the holding in Franks against erosion such as that embodied in the Fourth Circuit's opinion below.

Falsity in search warrant affidavits is likely underappreciated. One commentator has described the prevalence and danger of this phenomenon.

> The assumption that police perjury in warrant affidavits is rare and effectively deterred by the warrant application process is counter-intuitive and contradicted by all available evidence. Inasmuch as lies and deception are an acceptable feature of much routine law enforcement activity, it should come as no surprise that scholars have found that law enforcement officers frequently lie to their own superiors in police reports and even perjure themselves in testimony at criminal trials. The general consensus among scholars notes the pervasiveness of police perjury at suppression hearings. Indeed, substantial evidence demonstrates that police perjury is so common that scholars describe it as a "subcultural norm rather than an individual aberration." There is no reason to believe that police perjury does not also present a serious problem in warrant affidavits. In fact, many of the same empirical investigations upon which scholars base their conclusion that police perjury constitutes a serious problem in these other contexts also document widespread perjury by law enforcement officers in warrant affidavits.

Stephen W. Gard, Bearing False Witness: Perjured Affidavits and the Fourth Amendment, 41 Suffolk U. L. Rev. 445, 447-48 (2008) (citations omitted). Professor Gard also laments what he describes as the "many critical issues [left] unresolved" by Franks that have allowed lower courts to act to "fill[] this vacuum with conflicting and unjustifiably restrictive decisions." Id. at 462.

Forestalling challenges to falsity in search warrant affidavits poses a threat to the constitutional rights of defendants. The Fourth Circuit's opinion here is a prime example. By conflating intentional falsity with "[m]ere imprecision," Moody, 931 F.3d at 372, the Fourth Circuit eviscerates the right to challenge material falsehoods in search warrant affidavits guaranteed by Franks. Permitting rank falsity in a search warrant affidavit to go unchecked sabotages the probable cause requirement mandated by the Fourth Amendment and this Court's case law. The Fourth Circuit's opinion creates a dangerous precedent, is a departure from the accepted and usual course of judicial proceedings, and calls for the Court to exercise its supervisory powers.

## CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted this the 22d day of November, 2019.

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