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IN THE
UNITED STATES SUPREME COURT

◆
LEVI MILLER,
Petitioner,

vs.
UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 20-2857

◆
PETITION FOR WRIT OF CERTIORARI

◆
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I. QUESTION PRESENTED

Under *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978), when the police deliberately mislead by omitting material information from an application for a search warrant, is the proper remedy to purge statements that are misleading considering the omitted information or to supplement the affidavit with the omitted information?

II. LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

III. LIST OF PROCEEDINGS

United States v. Miller, 11 F.4th 944 (8th Cir. 2021)

United States v. Miller, No. CR19-2031-LTS (N.D. Iowa Dec. 27, 2019)

Order denying applications for rehearing, filed Jan. 27, 2022.

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IN THE
UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

On the authority of Supreme Court Rule 10(a), Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

VII. OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is:

reported at *United States v. Miller*, 11 F.4th 944 (8th Cir. 2021).

The opinion or relevant order of the United States district court appears at Appendix B to the petition and is.

reported at *United States v. Miller*, No. CR19-2031-LTS (N.D. Iowa Dec. 27, 2019);

VIII. JURISDICTION

The date on which the United States Court of Appeals decided this case was September 3, 2021.

- No petition for rehearing was timely filed in my case.
- Timely petitions for rehearing were denied by the United

States Court of Appeals on the following date: January 27, 2022.

A copy of the order denying rehearing filed on January 27, 2022, appears in the Appendices at p. 76. Mandate was issued on February 3, 2022.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

IX. CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend IV,

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.

X. STATUTES INVOLVED

Not Applicable.

XI. STATEMENT OF THE CASE

Mr. Miller was charged in counts 1 and 2 with being a felon in possession of shotgun with a barrel that was a fraction of an inch shorter than 18 inches in length. [Indictment filed 5/8/2019, ND Iowa FECR19-2031, case Document 2]. The shotgun was an old rusty 20-gauge pump action shotgun. [Tr. Sentencing Hearing on 8/27/2020, 59:16-18 (this is short for page 59, lines 16 to 18)]. This shotgun was seized from the kitchen of Mr. Miller's apartment by police executing a warrant. Mr. Miller entered a conditional plea to Count 1, possession of a firearm as a felon, and was sentenced to serve 84 months in prison. [Judgment in a Criminal Case filed 8/8/2020, Document 87].

Miller's plea agreement allowed him to appeal the adverse ruling on his motion to suppress the evidence derived from the search of his apartment. The search was conducted pursuant to a warrant. Mr. Miller challenged the warrant on the authority of *Franks v. Delaware*, 438 U.S. 154 (1978).

A suppression hearing was conducted. First the Magistrate judge and then the District Court judge denied Mr. Miller's challenge to the warrant. [Appendix D and E, respectively]. He timely appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit issued an opinion affirming the district court judge's ruling, and subsequently, denied his requests for rehearing. [Appendix A and C, respectively].

The events leading to the seizure of the shotgun in question took place at house located at 1005 West Mullan in Waterloo, Iowa, in the evening on February 3, 2019. The police received a call from a person, Ms. Latham, who claimed that Miller, while in possession of a shotgun, had cursed at her. [Application for warrant, Appendix E, Appendices p. 77].

The two main officers who were involved in responding to the call were Officers Bovy and Thomas, from the Waterloo, Iowa police department. Bovy went to the house on West Mullan and knocked on the door at the apartment on the first floor of the house. He talked first with Latham's daughter; Latham was elsewhere. Bovy then spoke with a neighbor, Mr. Johnson, and

then went up the steps to Miller's second floor apartment. There he spoke with Miller, Miller's wife Sarabeth and another person, Ms. Randall. [Defendant's Exhibit 2, a DVD, includes Bovy's body cam video]. The folks in the Miller residence told Bovy that they had heard a loud noise outside the apartment and went to investigate, but that none of them took a gun. They also told Bovy there was no gun inside the apartment.

Officer Thomas also went to the house on West Mullan and had several eyewitnesses come to the Waterloo Police Department to be interviewed, including Ms. Borntreger, Ms. Cole and Mr. Cole, and Latham. [Defendant's Exhibit 2 also includes videos of each of these interviews].

While Officer Bovy was speaking with Miller outside the upstairs apartment, he received word from Officer Thomas that Latham had changed her story and now claimed that Miller had pointed the gun at her. The videos of the interviews at the police department show that none of the other witnesses that Officer Thomas interviewed at the police department backed up Latham's claim that Miller pointed a gun at her. Likewise, Bovy's body

came video shows that Latham's daughter and the neighbor told Bovy before he went to Miller's apartment that they were not aware of any disturbance involving Mr. Miller and Ms. Latham.

Ms. Borntreger and the Coles did tell Thomas at the police department that they saw Miller with a gun, but Ms. Borntreger said they all, including Latham, were inside Latham's porch whereas Miller was outside the house and that Miller never saw any of them, including Latham.

Following is a key passage from the hearing on Mr. Miller's *Franks* motion. The witness being questioned is Officer Bovy, who prepared the application to search Miller's apartment in collaboration with Officer Thomas. The warrant application is Appendix F, Appendices p. 77.

Why did you just put in [in the application for warrant] what Latham said and not what Borntreger said?

A. Because Latham was the initial victim on the call. She's the one that called in about – and she lives at that residence. She's the one that called in about it, so --

Q. So the reason you didn't put that in the application for warrant is because the warrant pertained to a complaint by Latham? Is that what you're saying?

A. That's where the initial call was from, yes.

Q. So when you -- when you prepare applications for warrants, am I fair to conclude that you only put in the stuff that supports what the complaining witness has to say?

A. And with the developments of the crime as we see it.

[Tr. Motions hearings, 101:21-102:13].

As noted, with respect to this testimony, Ms. Lathan is the person who claimed that Miller pointed a gun at her. Her statement was the basis for the officers' request for a warrant to search Miller's apartment. Ms. Borntreger is the eyewitness who directly told Officer Thomas that Miller did not point a gun at Latham; that in fact, he did not even see her.

XII. REASONS FOR GRANTING THE PETITION

Levi Miller relies on Supreme Court Rule 10(a). The panel's opinion is, as explained below, contrary to the holding in *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). It is also contrary to decisions from the Ninth and Third Circuits regarding the application of *Franks* where the application for warrant contains material information that is deliberately withheld from the application.

A. *Franks v. Delaware*

When a defendant makes a substantial preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request. *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978).

[O]missions are made with reckless disregard if an officer withholds a fact in his ken that “[a]ny reasonable person would have known that this was the kind of thing the judge would wish to know.” *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993); *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000).

If, when the 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. But if the remaining content is insufficient, the defendant is entitled under the Fourth and

Fourteenth Amendments to a hearing. *Franks v. Delaware*, pp. 171-172.

B. The police deliberately omitted material facts from the application for warrant

Following is the application for warrant, Appendix E, found in the Appendices at p. 77.

Addendum

Your Affiant is a Certified Police Officer and had been a Police Officer for over four years. Your Affiant is a current member of the Waterloo Police Department and has previously been employed with the Jesup Police department and the Buchanan County Sheriffs Department. During my employment as a Police Officer I have worked several drug cases and gun cases.

On 02/03/19 at about 1817 hours, your Affiant was dispatched to 1005 West Mullan Avenue for a report of a male named Levi came out of his apartment with a shot gun yelling at the reporting party Tequila Lathem due to her taking Levi's items off of her porch and placing in his truck. Levi was described as a white male with dreads wearing a red shirt:

Your Affiant arrived at 1005 West Mullan Avenue and Tequila Lathem had already left the scene due to the altercation. Your Affiant located Levi Miller (08/21/1990) in his apartment 1005 1/2. Miller is a white male with dreads and he was wearing a red shirt. The apartment was also occupied by Sarabeth Miller (02/05/1993) and Michele Randall (02/27/86).

Your Affiant spoke with the three individuals in the apartment and they informed me that all three of them had gone out side and around to the back of the residence after hearing a loud noise because they thought someone was damaging their truck that is parked in the parking lot behind the residence. Sarabeth Miller was the first one to go out side followed by Levi Miller, and then by Michele Randall. Sarabeth Miller stated that she was carrying a broken pool stick and Levi was carrying a large black knife about 11 inches long. Sarabeth walked by the reporting party Tequila Lathem behind the residence and stated Lathem was in an argument with a boy. Sarabeth Miller checked her truck for damage and then they all went back to her apartment.

Levi Miller and Sarabeth Miller informed your affiant that they had a long BB gun in the apartment and showed it to me. The BB gun was blue in color and had a brown stock.

Officer Thomas with the Waterloo Police Department spoke to Tequila Lathem who advised while at her home at 1005 W Mullan, she walked out of her residence and noticed a suitcase on her deck. Lathem advised she did not put the item there and knew her upstairs neighbor Levi Miller has placed items on the deck before with her permission. Lathem advised her friend Jarrell Cole to take the suitcase and place it in Levi Miller's truck which is located in the parking area of the apartment. Lathem then advised she heard someone coming down the stairs from the upstairs apartment. Lathem advised she turned to see Levi Miller walking with a shotgun in his hands and cursing. Lathem advised Miller pointed the gun at her and Jarrell Cole. Lathem described the gun as having a black barrel and wood along the stock. Lathem advised herself and Cole ran back into their apartment.

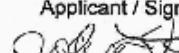
I spoke with witnesses Kayla Bortreger and Chelsea Cole who were also on scene as the incident unfolded. Chelsea Cole and Bortreger advised the gun was black in color and had wood coloring around the stock. Bortreger and Chelsea Cole advised Levi Miller as wearing a red shirt and having dreads in his hair pulled back into a ponytail.

SUBSCRIBED AND SWORN TO BEFORE ME BY:

Alex Bovy
Applicant

This 3rd Day of February, 2019

Page 1 of 2


Applicant / Signature

Magistrate / Judge

WPD-000021

As was stated by Officer Bovy, as set forth above, the officer-affiants deliberately did not include any information in the

application that was inconsistent with their request to search Mr. Miller's home. Accordingly, the judge to whom the application was presented was led to believe that Mr. Miller left his apartment with a shotgun and pointed it at Ms. Latham outside the residence.

The judge was misled because the information deliberately omitted from the application included that Borntreger, a person who was with Ms. Latham when Miller supposedly pointed a gun at Latham, told the police both she and Latham were inside the house and Mr. Miller did not see either of them. Excising the misleading information relating to Ms. Latham's statements that Miller pointed a gun at her, there was not probable cause to issue a warrant to search Miller's apartment.

C. *Applying a “purged-of” test is consistent with Franks. The Eighth Circuits “supplement-to” test is not.*

The Eighth Circuit panel's opinion found that Mr. Miller was wrong when he asserted that the subject matter associated with the information that was withheld from the warrant application should be purged from the warrant application and the

information in the warrant application reevaluated with that subject matter set aside. Instead, the panel found, what should be done is to supplement the warrant application with the omitted information to determine if there is probable cause. [Opinion, Appendix A, at p. 12]. As stated in the opinion,

Miller further contends that “[a]ny information in the application for [the] warrant originating from Latham should be excised because the judge was not told about the many things that contradicted what she said.” Appellant’s Reply Br. at 14. Miller is wrong. The proper course is to consider the affidavit as if the omissions had been included, as the district court explained.

The panel’s approach is contrary to the holding in *Franks v. Delaware*. Specifically, in the case of false statements, here is exactly what *Franks* had to say about that:

[If] with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155-156.

Pursuant to *Franks*, then, it is not enough to just add the omitted information to the affidavit. This is because "deliberate or reckless omissions of facts that tend to mislead" are false

statements for *Franks* purposes. *Jacobs*, 986 F.2d 1231 at 1235 and *Russo*, 212 F.3d 781 at 788. And false statements must be excised.

The Eighth Circuit's current stance is contrary to its initial cases which held that the same analysis is applicable whether information is misrepresented or omitted. See *United States v. House*, 604 F.2d 1135, 1141 & n. 9 (8th Cir. 1979) ("Usually information is misrepresented rather than omitted. However, the same analysis is applicable [citations omitted]."). Using the same approach for misrepresentations and material omissions makes sense because either way the application is misleading, and therefore, to be consistent with *Franks*, the subject matter of misrepresentations and omissions should be set aside for the purpose of reevaluating probable cause.

One of, if not the first Eighth Circuit cases, counsel believes, that stopped applying the "purged-of" approach is *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986). *Reivich* cited a Ninth Circuit case, *United States v. Stanert*, 762 F.2d 775, 782 (9th Cir.),

amended, 769 F.2d 1410 (9th Cir. 1985). However, *Reivich* only partially followed *Stanert*.

Specifically, *Stanert* held, that, “[a] defendant challenging an affidavit must also show that the affidavit purged of those falsities and supplemented by the omissions would not be sufficient to support a finding of probable cause. *Franks*, 438 U.S. at 171-72. The effect of the misrepresentations and omissions on the existence of probable cause is considered cumulatively.” *Stanert*, 762 F.2d at 782.

Reivich, although quoting *Stanert*, dropped the “purged of falsities” language in *Stanert* and concluded that *Reivich* had to show that, “the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause.” In other words, although *Reivich* cited *Stanert*, *Reivich* changed the part of the *Stanert* test that made it consistent with *Franks*, thereby creating a circuit split on this subject.

As demonstrated by the panel opinion in Mr. Miller's case, the Eighth Circuit continues to apply the "supplemented-with" test rather than the "purged-of" test.

D. Circuit Split

Stanert and the "purged-of" test is still good law in the Ninth Circuit, so there is a Circuit split on how to apply *Franks* where there is material information that is deliberately omitted from an application for warrant.

The Third Circuit also applies a "purged-of" test, as follows: "To determine the materiality of the misstatements and omissions, we excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the "corrected" warrant affidavit would establish probable cause." *Russo*, 212 F.3d at 789.

E. Relief Requested

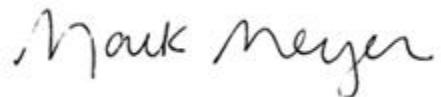
Mr. Miller requests that this Court grant certiorari to review the issue presented in this case.

XIII. CONCLUSION

For the reasons and upon the authority set forth above, Levi Miller requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

Levi Miller, by counsel:



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