NO. _____

IN THE
UNITED STATES SUPREME COURT

LEVI MILLER,
Petitioner,
vs.
UNITED STATES,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 20-2857

APPENDICES

MARK C. MEYER
425 2nd Street SE, Suite 1250
Cedar Rapids, IA 52401
319-365-7529
Fax: 800-351-2493
legalmail@markcmeyer.com

ATTORNEY FOR PETITIONER

INDEX OF APPENDICES

425 2nd Street SE, Suite 1250
Cedar Rapids, Iowa 52401
(319) 365-7529
Fax: 800-351-2493
legalmail@markcmeyer.com

ATTORNEY FOR LEVI MILLER

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 20-2857

United States of America

Plaintiff - Appellee

v.

Levi Farren Miller

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Eastern

Submitted: May 14, 2021
Filed: September 3, 2021

Before SMITH, Chief Judge, SHEPHERD and GRASZ, Circuit Judges.

SMITH, Chief Judge.

Levi Farren Miller entered a conditional guilty plea to possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He now appeals, arguing

that the district court[1] made three reversible errors. First, Miller asserts that the district court erroneously denied his motion to suppress. Second, he argues that the National Firearms Act is unconstitutional. Third, he challenges the court's application of several sentencing enhancements. We affirm.

I. *Background*

A. *Underlying Facts*

Miller possessed a short-barreled shotgun in a house in Waterloo, Iowa. The house consisted of two stories with each floor leased as apartments. Both floors had outside access. One evening, Miller's downstairs neighbor Takeela Latham called law enforcement about an incident with Miller involving a firearm. According to Latham, Miller had placed a suitcase on her back porch. Latham did not want the suitcase there and had her friend Jarrell Cole ("Jarrell") help her move it to Miller's truck. Miller then came down a set of outside stairs and walked towards the back of the house where vehicles were parked. Latham alleged that Miller carried a shotgun and yelled profanities. Latham also claimed that Miller had pointed the shotgun at her and Jarrell.

Waterloo Police Officer Alexander Bovy responded to the call. But when he arrived at the residence, he did not see anyone. A second officer arrived at the residence soon afterwards. The officers then knocked on the back door of the residence. Latham's minor daughter opened the door. She told the officers that her mother had left the residence with some friends to get food. The girl's aunt was also inside the residence. When Officer Bovy asked if the aunt had heard people yelling, the aunt claimed she had not heard anything.

[1]The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

Next, the officers knocked on a neighbor's door. Emmitt Johnson answered and "initially denied knowledge of an altercation, stating he had only recently arrived at his residence." *United States v. Miller* (*Miller II*), No. 6:19-cr-02031-LTS-MAR-1, 2019 WL 7212306, at *2 (N.D. Iowa Dec. 27, 2019). But Johnson eventually explained that he had heard Miller arguing with his wife, Sarabeth Miller ("Sarabeth"), though he had not seen anyone else outside.

The officers made contact with Miller after knocking on his apartment door. Sarabeth and Michele Randall resided in the apartment with Miller. All three told the officers that they went outside in response to a loud noise in the back. Miller and Sarabeth said that Miller carried a large knife when they went downstairs. They also said that they observed Latham arguing with someone. They denied that there was a firearm in the house. Based on his concern regarding the presence of a firearm, Officer Bovy asked Miller if he could search his residence. Miller denied the request. The officers' supervisor instructed them to obtain a search warrant for the suspected firearm.

Before the officers obtained a search warrant, they conducted a non-consensual protective sweep of the residence. Officer Bovy took Sarabeth to the Waterloo Police Department to give a statement. Officer Steven Thomas interviewed the other witnesses—Latham, Jarrell, Chelsea Cole ("Chelsea"), and Kayla Borntreger—also at the police station. With the exception of Sarabeth, these witnesses all recalled Miller holding a shotgun with a brown stock outside his residence while repeating profanities. Throughout her interview, Latham alleged that Miller had pointed the shotgun at her and Jarrell. During his interview, Jarrell stated that Miller held the "shotgun in a position of readiness to fire" and "'pointed' the shotgun[,] but [Jarrell] did not state whether [Miller] pointed the shotgun at any individual." *Id.* at *4. Notably, Borntreger stated that Miller did not point the weapon at anyone. She did, however, indicate that Miller "[w]as carrying the shotgun in a manner that would allow him to shoot quickly if necessary." *Id.* at *5.

After all of the witnesses provided statements, Officer Bovy, consulting with Officer Thomas, drafted an application for a warrant to search Miller's residence for the shotgun that Miller allegedly used to assault Latham. After obtaining the warrant, the officers conducted a search and discovered "a pump action shotgun with a black barrel and brown wood stock and foregrip propped against the door frame inside the kitchen. A T-shirt was covering part of the barrel, and the butt of the gun was in a pan filled with cat food." *Id.* at *6 (citation omitted). The shotgun's barrel was 17 7/8ths inches long. Law enforcement arrested Miller.

B. *Procedural History*

When presented with these facts, a grand jury indicted Miller with possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and possession of a National Firearms Act short-barreled shotgun not registered to possessor, in violation of 26 U.S.C. § 5861(d).

Miller filed several motions, including a motion to suppress, a request for a *Franks*[2] hearing, a motion to dismiss both counts of the indictment, and a second motion to dismiss. The magistrate judge held a single evidentiary hearing on the motions on October 7, 2019. Although the magistrate judge was "somewhat on the fence about [Miller's] entitlement to [a *Franks*] hearing," he decided to "take up all the evidence" in the interest of "judicial economy." Mot. Hr'g Tr. at 2, *United States v. Miller*, No. 6:19-cr-02031-LTS-MAR-1 (N.D. Iowa 2020), ECF No. 63. He asked if either party had any issue with proceeding in that manner. Miller did not object.

After receiving the parties' post-hearing briefs, the magistrate judge issued a report and recommendation (R&R) recommending that the district court deny all of Miller's motions. The district court adopted the R&R and denied all of Miller's motions based on the following rationales.

---

[2]*Franks v. Delaware*, 438 U.S. 154 (1978).

1. Franks *Issues*

In its R&R, the magistrate judge concluded that Miller "failed to satisfy his burden to show he was entitled to a *Franks* hearing." *United States v. Miller* (*Miller I*), No. 6:19-cr-02031-LTS-MAR-1, 2019 WL 8112464, at *13 (N.D. Iowa Nov. 15, 2019). It also explained that Miller "incorrectly interpreted" his decision to "take up all the evidence at the October hearing" to mean that Miller satisfied the burden of showing that he was entitled to a *Franks* hearing. *Id.* at *7. In its order, the district court explained that "any procedural error" in holding a *Franks* hearing, without first determining whether Miller was entitled to it, was harmless, and Miller was not entitled to *Franks* relief. *Miller II*, 2019 WL 7212306, at *10.

Miller made two relevant *Franks* arguments. First, Miller argued that Officer Bovy intentionally or recklessly omitted Borntreger's statement that Miller "did not point the shotgun at anyone because [Miller] could not see her or the other witnesses, as they all watched [Miller] from inside . . . Latham's porch." *Id.* at *5. According to Miller, Borntreger's statements were material to the probable-cause analysis, as they contradicted Latham's accusation that Miller pointed a gun at her.

According to the court, "[t]he record [did] not show [that] Officer Bovy must have entertained serious doubts as to the truthfulness of the affidavit or had obvious reasons to doubt the accuracy of the information he reported" when "multiple witnesses stat[ed] [Miller] was angry and cursing while carrying a shotgun." *Miller I*, 2019 WL 8112464, at *10. Moreover, "Borntreger may not have seen [Miller] 'point' the shotgun, but what she saw was at least consistent with displaying a firearm in a threatening manner," which is also criminalized under Iowa law. *Id.* (citing Iowa Code § 708.1(2)(c)).

The court also concluded that the "omission of . . . Borntreger's statement . . . was not clearly critical to the issuing judge's finding of probable cause. Even if Officer Bovy had included her statement, the issuing judge would still have had testimony from

multiple eyewitnesses that [Miller] was angry and cursing while carrying a shotgun." *Id.* at *12. And "[e]ven if . . . Borntreger did not see [Miller] point the shotgun [at Latham and Jarrell], Officer Thomas could reasonably conclude her statement supported the assertion that [Miller] carried the shotgun in a threatening manner." *Id.*

Second, Miller "argue[d] that Officer Bovy acted with reckless disregard for the truth when he omitted Officer Bovy's encounters with [Latham's daughter], the [daughter's] aunt, and . . . Johnson." *Id.* at *10. Again, the court concluded that "nothing in the record indicate[d] Officer Bovy must have entertained serious doubts about the truthfulness of his statements or had any obvious reasons to doubt the accuracy of the information he wrote in the affidavit." *Id.* It reasoned, "Although the aunt denied having heard people yelling and . . . Johnson was hesitant to acknowledge he was aware of a verbal altercation near his residence, these events were not obvious reasons for Officer Bovy to doubt the accuracy of the information he put in his application" because "Officer Bovy testified that, in his experience, he sometimes has difficulty persuading witnesses to provide him information." *Id.* at *11.

These alleged omissions were also not clearly critical to the issuing judge's finding of probable cause because "[n]one of the omissions ha[d] any bearing on the witnesses' consistent statements that Miller came to the back of the house in response to Latham and [Jarrell] moving the bag to his truck, [while] holding a shotgun in a threatening manner and repeatedly saying 'mother***ers.'" *Miller II*, 2019 WL 7212306, at *13.

Thus, the court refused to grant Miller's motion to suppress under *Franks*.

2. *Warrantless Entry*

Next, Miller asked the district court to suppress the shotgun because the police entered his residence without a warrant. The district court denied the request. First, it found that exigent circumstances justified law enforcement's entry into Miller's

residence. It concluded that the exigent circumstances justifying entry were (1) officer safety and (2) destruction of evidence. But the court also explained that even if the entry was unlawful, the inevitable discovery doctrine prevented suppression of the shotgun. It noted that "Miller ma[de] no objection to [the magistrate judge's] analysis [on that issue] and . . . d[id] not argue that the shotgun was fruit of the warrantless entry." *Id.* at *15 n.18.

3. *National Firearms Act*

Next, the district court rejected Miller's argument that the National Firearms Act is unconstitutional under the Second Amendment. The court explained that this argument was foreclosed by the Supreme Court's opinion in *United States v. Miller*, 307 U.S. 174 (1939).

4. *Sentencing*

After the district court denied Miller's motions, Miller entered a conditional guilty plea to the possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

The presentence investigation report (PSR) identified Miller's base offense level as 22 because the offense involved a firearm as described in 26 U.S.C. § 5845(a) and because Miller committed the offense subsequent to sustaining a felony conviction for a controlled-substance offense. The PSR also recommended that the district court apply a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) because Miller possessed the shotgun in connection with the offense of assault by use or display of a dangerous weapon, in violation of Iowa Code § 708.2(3).

Miller objected to both of these PSR recommendations. First, Miller argued that the district court could not have found that he violated § 5845(a) because "there [was] no evidence that [he] knew that [the shotgun barrel] was less than 18 inches." Sent'g Tr. at 4, *United States v. Miller*, No. 6:19-cr-02031-LTS-MAR-1 (N.D. Iowa 2020),

ECF No. 95. The district court overruled Miller's objection, explaining that Miller had not presented "any authority suggesting [that the court] should go the other way," it was "undisputed that the barrel was shorter than 18 inches," and "there is not a knowledge requirement to apply the enhancement." *Id.* at 8. Additionally, it "was obviously a sawed-off shotgun"; "[i]t clearly had been altered by someone." *Id.* at 96–97.

Miller also argued that conspiracy to manufacture methamphetamine is not a controlled-substance offense. However, he raised the issue "purely for error preservation," acknowledging that there was contrary controlling Eighth Circuit precedent. *Id.* at 8. Thus, the sentencing court overruled Miller's objections and concluded that he had a base offense level of 22.

Lastly, Miller objected to the application of the four-level enhancement under § 2K2.1(b)(6)(B) that was based on the assertion that Miller possessed the firearm in connection with a felony offense. The felony offense was Iowa's aggravated misdemeanor of assault by use or display of a dangerous weapon. This offense carries a sentence that qualifies it as a felony under the Guidelines. *United States v. Anderson*, 339 F.3d 720, 724 (8th Cir. 2003).

Latham and Jarrell testified at the sentencing hearing. The court stated that "Latham was one of the worst witnesses [it had] ever seen" and "g[a]ve almost no weight to anything she said." Sent'g Tr. at 80. Although the court could not find "that . . . Miller actually pointed the firearm," it did find that the following facts were consistent with all of the witnesses' testimonies: (1) "[Miller] came outside and he did have a shotgun and it was an angry, hostile situation at that point"; (2) Latham "had been yelling," and there was "a loud noise" from Jarrell throwing Miller's suitcase into his truck; and (3) "Miller didn't [go] out[side] to make polite conversation." *Id.* at 80–81.

The court explained that it had "looked closely at Iowa Code 708.1 . . . and 708.2," which defines assault. *Id.* at 82. And it found by a preponderance of the evidence that Miller committed assault under both Iowa Code § 708.1(2)(b) and (c)[3] "by bringing this shotgun outside with him in a hostile and confrontational situation" and "displaying it in a manner where the other individuals were able to see that he had it." *Id.* Further, witnesses testified that they "felt threatened or concerned about the firearm." *Id.* at 82–83.

Thus, the court applied the four-level enhancement to the base offense level. After concluding that Miller was also entitled to a three-level decrease based on acceptance of responsibility, Miller's total offense level was 23. In conjunction with his criminal history category of V, the Guidelines recommended a sentence of 84 to 105 months' imprisonment. The court sentenced him to 84 months' imprisonment and 3 years' supervised release.

II. *Discussion*

Miller urges us to hold that the shotgun must be suppressed, the National Firearms Act is unconstitutional, and the district court erred at sentencing. We affirm the district court on all accounts.

---

[3]Iowa Code § 708.1 defines assault accordingly:

> A person commits an assault when, without justification, the person does any of the following: . . . .
>
> b. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
>
> c. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

A. *Motion to Suppress*

Miller seeks reversal of the district court's denial of his motion to suppress on two bases. First, he asserts that Officer Bovy omitted material information from the affidavit in support of the warrant to search Miller's residence in violation of *Franks*. Second, he contends that the shotgun must be suppressed because law enforcement entered Miller's home prior to obtaining a search warrant.

We review the denial of a motion to suppress de novo. *United States v. Mayweather*, 993 F.3d 1035, 1040 (8th Cir. 2021), *reh'g denied* (May 19, 2021). But the underlying factual determinations we review for clear error. *Id.*

> We may affirm on any grounds supported by the record and will do so unless the decision is unsupported by substantial evidence, is based on an erroneous view of the applicable law, or in light of the entire record, we are left with a firm and definite conviction that a mistake has been made.

Id. (cleaned up).

1. Franks *Issues*

Miller first argues that the affidavit supporting the warrant application to search his residence violated *Franks* by omitting material evidence.[4] He notes that Officer Bovy's affidavit (1) omitted evidence that contradicted Latham's statement that Miller

[4]After holding a hearing on all of Miller's motions, the magistrate judge "f[ou]nd that [Miller] failed to satisfy his burden to show he was entitled to a *Franks* hearing." *Miller I*, 2019 WL 8112464, at *13. Miller contends that because the magistrate judge *held* a *Franks* hearing, he was *entitled* to a *Franks* hearing. But whether Miller was entitled to the *hearing* is irrelevant because, ultimately, Miller is not entitled to *Franks* relief.

pointed a shotgun at her and Jarrell and (2) did not include information from Officer Bovy's encounters with Latham's daughter, the daughter's aunt, and Johnson.

To succeed on his *Franks* challenges, Miller "must show: '(1) that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading; and (2) that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.'" *United States v. Reed*, 921 F.3d 751, 756 (8th Cir. 2019) (quoting *United States v. Conant*, 799 F.3d 1195, 1200 (8th Cir. 2015)). Even assuming that Officer Bovy intentionally omitted this information from the affidavit, we affirm because Miller has not shown by a preponderance of the evidence that an affidavit including that information could not support a finding of probable cause. We review de novo whether the inclusion of the omitted information would not support a finding of probable cause. *See United States v. Cowling*, 648 F.3d 690, 695 (8th Cir. 2011).

"The Fourth Amendment requires probable cause to be shown for the issuance of a warrant." *United States v. Montes-Medina*, 570 F.3d 1052, 1059 (8th Cir. 2009). "Only if the affidavit as supplemented by the omitted material could not have supported the existence of probable cause will suppression be warranted." *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993) (cleaned up). "An affidavit establishes probable cause for a warrant if it 'sets forth sufficient facts to establish that there is a fair probability that contraband or evidence of criminal activity will be found in the particular place to be searched.'" *United States v. Mutschelknaus*, 592 F.3d 826, 828 (8th Cir. 2010) (quoting *United States v. Snyder*, 511 F.3d 813, 817 (8th Cir. 2008)). Whether probable cause exists to issue a search warrant "is a 'commonsense, practical question' to be judged from the 'totality-of-the- circumstances.'" *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007) (quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983)). It "does not require evidence sufficient to support a conviction, nor even evidence demonstrating that it is more likely than not that the suspect committed a crime." *Id.* (quoting *United States v. Mounts*, 248 F.3d 712, 715 (7th Cir. 2001)).

Under Iowa law, it is illegal to "[i]ntentionally point[] any firearm toward another, or display[] in a threatening manner any dangerous weapon toward another." Iowa Code § 708.1(2)(c). Latham stated that Miller pointed a gun at her and Jarrell. In contrast, Borntreger stated that Miller did not point a gun at anyone because Miller did not see them. Miller, therefore, argues that Officer Bovy deliberately omitted Borntreger's contrary testimony from the affidavit, the exclusion of her testimony renders the affidavit misleading, and the inclusion of Borntreger's testimony would not have supported a finding of probable cause.

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. *See Miller II*, 2019 WL 7212306, at *13 ("Even if I found the discrepancies in the witness statements were intentionally omitted or omitted with reckless disregard for the truth, this would not require excising Latham's claims to determine whether the omissions impacted the probable cause analysis as Miller argues. Rather, I must consider whether the affidavit was supported by probable cause if the omitted information *had been included*."); *see also Hunter v. Namanny*, 219 F.3d 825, 830 (8th Cir. 2000) ("[A] reconstructed affidavit must also include material allegedly omitted with reckless disregard for the truth.").

Like the district court, we conclude that if the "full extent of statements from Latham, Borntreger, [Chelsea,] and [Jarrell] had been included in the affidavit, . . . such information would [not] render the affidavit unsupported by probable cause." *Miller II*, 2019 WL 7212306, at *13.

As the district court explained, "the issuing judge would still have had testimony from multiple eyewitnesses that [Miller] was angry and cursing while carrying a shotgun." *Miller I*, 2019 WL 8112464, at *12. Latham, Jarrell, Chelsea—and even

Borntreger—all testified that Miller was cursing in a dispute with Latham while carrying a shotgun. Latham, the alleged victim, stated that Miller pointed a gun at her and Jarrell. And Jarrell confirmed that Miller "'pointed' the shotgun." *Miller II*, 2019 WL 7212306, at *4. Though Chelsea did not corrobarate their stories, she also did not contradict them.

And even though Borntreger stated that Miller had not pointed a gun at Latham and Jarrell, "what she saw was at least consistent with displaying a firearm in a threatening manner," which is also criminalized under Iowa law. *Miller I*, 2019 WL 8112464, at *10 (citing Iowa Code § 708.1(2)(c)). In fact, "Borntreger . . . described [Miller] as carrying the shotgun in a manner that would allow him to shoot quickly if necessary." *Id.* at *6. As the district court emphasized, "Probable cause 'does not require evidence sufficient to support a conviction, nor even evidence demonstrating that it is more likely than not that the suspect committed a crime.'" *Miller II*, 2019 WL 7212306, at *14 (quoting *Donnelly*, 475 F.3d at 954).

Notably, "[a]ll witnesses described being outside and, at some point, going inside Latham's apartment after Miller exited his apartment." *Id.* at *13. They also all "had similar descriptions of the gun, the people involved and the general chain of events." *Id.*

Therefore, Miller is not entitled to suppression of the shotgun under *Franks*.

2. *Warrantless Entry*

Miller argues that the district court erred by concluding that law enforcement's warrantless entry into his residence was justified by exigent circumstances. Without deciding whether exigent circumstances justified the warrantless entry, we affirm the district court because the illegality was not the but-for cause of obtaining the evidence.

"Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule and, therefore, 'cannot be used in a criminal proceeding against the victim of the illegal search and seizure.'" *United States v. Riesselman*, 646 F.3d 1072, 1078 (8th Cir. 2011) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). Evidence that was "obtained as a direct result of an illegal search or seizure" should be excluded, as well as "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Id.* (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)).

But "the 'illegality [must] at least [be] a but-for cause of obtaining the evidence.'" *Id.* at 1079 (quoting *United States v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007)). "[T]he initial burden of establishing the factual nexus between the constitutional violation and the challenged evidence" is on the defendant. *Id.* (citation omitted). Then, "[o]nce the defendant comes forward with specific evidence demonstrating taint, the ultimate burden of persuasion to show the evidence is untainted lies with the government." *Id.*; *see also Hamilton v. Nix*, 809 F.2d 463, 465 (8th Cir. 1987) (en banc) ("[U]nder the 'independent source' doctrine, the challenged evidence will be admissible if the prosecution can show that it derived from a lawful source independent of the illegal conduct. In such a case, there is no reason to exclude the challenged evidence since the police misconduct is not even a 'but for' cause of its discovery." (citation omitted)).

Here, the shotgun was not obtained as a result of an illegal entry. Assuming the officers entered illegally, they did not discover the shotgun until they obtained a search warrant. And the warrant application did not include any information gained as a result of the assumed illegal entry. *Cf. Segura*, 468 U.S. at 814 (holding that suppression was not required when officers illegally entered a residence because the officers did not use any information obtained from the illegal entry to secure a warrant). Moreover, Miller did not meet his burden of "establishing the factual nexus between the constitutional violation and the challenged evidence." *Riesselman*, 646 F.3d at 1079. As the district

court noted, Miller "d[id] not argue that the shotgun was fruit of the warrantless entry."*Miller II*, 2019 WL 7212306, at *15 n.18. On appeal, Miller states that "the fruit of the *Franks* violation includes the shotgun and other evidence seized." Appellant's Br. at 36. But Miller fails to elaborate and, thus, fails to meet his burden.

B. *National Firearms Act*

Miller argues that the National Firearms Act is unconstitutional. At the same time, he acknowledges that the Supreme Court has rejected this argument, *see Miller*, 307 U.S. at 177–78, and thus merely seeks "to preserve the issue," Appellant's Br. at 37.

C. *Sentencing*

As to his sentencing, Miller argues that the district court erred in three ways: (1) it found that Miller had a prior conviction for a controlled substance under U.S.S.G. § 4B1.2(b); (2) it found that the offense involved a firearm that is described in 26 U.S.C. § 5845(a); and (3) it applied a four-level sentencing enhancement based on Miller using a firearm in connection with another felony offense.

"This court reviews sentencing determinations under a deferential abuse of discretion standard, first ensuring that the district court committed no significant procedural error." *United States v. Wood*, 587 F.3d 882, 883 (8th Cir. 2009). "'Procedural error' includes 'failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.'" *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

In determining whether there was a procedural error, "we review the district court's factual findings for clear error and its application or interpretation of the

Guidelines de novo." *United States v. Belfrey*, 928 F.3d 746, 750 (8th Cir. 2019). "A finding is 'clearly erroneous' when, after reviewing the entire evidence, the court is left with the firm conviction that a mistake has been made." *United States v. Thomas*, 565 F.3d 438, 441 (8th Cir. 2009) (quoting *United States v. Marks*, 328 F.3d 1015, 1017 (8th Cir. 2003)).

As relevant here, the United States Sentencing Guidelines instruct courts to apply a base offense level of 22 "if . . . the offense involved a . . . firearm that is described in 26 U.S.C. § 5845(a)[,] and . . . the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a controlled[-] substance offense." U.S.S.G. § 2K2.1(a)(3). And a defendant's sentence will receive a four-level increase if he "used or possessed any firearm or ammunition in connection with another felony offense." *Id.* § 2K2.1(b)(6)(B).

1. *Prior Conviction for a Controlled Substance*

Miller argues that the district court erred by finding that he committed the instant offense after sustaining a felony conviction for a controlled-substance offense. He avers that a controlled-substance offense does not include inchoate offenses. But Miller admits that he is making this argument in order "to preserve it in the event the Supreme Court favorably resolves the Circuit split." Appellant's Br. at 48. Indeed, "[t]his argument is foreclosed by *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc)." *United States v. Merritt*, 934 F.3d 809, 811 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 981 (2020). And "[o]ur panel may not overrule a decision of the en banc court." *Id.*

2. *Shotgun Barrel Length*

Next, Miller argues that the sentencing court erred by concluding that the offense involved a firearm that is described in 26 U.S.C. § 5845(a). Specifically, the district court found that the firearm was "a shotgun having a barrel or barrels of less than 18 inches in length," as defined in § 5845(a). *Miller I*, 2019 WL 8112464, at *18. Though

Miller concedes that the shotgun has a barrel of less than 18 inches, he argues that he did not *know* that the barrel was less than 18 inches.

However, the Guidelines do not require "knowledge" for this enhancement to apply. *See* U.S.S.G. § 2K2.1(a)(3). Though we have yet to consider this precise argument,[5] we have stated that "[t]he Sentencing Commission understands the difference between actus reas and mens rea and specifically includes a scienter element within a guideline when it intends mens rea to be considered." *United States v. Gonzalez-Lopez*, 335 F.3d 793, 798 (8th Cir. 2003). We "have refused to read scienter elements into guidelines where the Sentencing Commission has not provided them." *Id.* Thus, we decline to read "knowledge" as an element into § 2K2.1(a)(3) of the Guidelines where the Sentencing Commission has not included it.

We have rejected a similar argument. *See United States v. Amerson-Bey*, 898 F.2d 681, 683 (8th Cir. 1990) (holding that the enhancement for illegal possession of a stolen firearm "does not require knowledge that the firearm was stolen"). And several

---

[5]In *United States v. Rohwedder*, a district court enhanced a defendant's sentence pursuant to § 2K2.1(b)(3) because the offense involved a firearm as defined in 26 U.S.C. § 5845(a). 243 F.3d 423, 425 (8th Cir. 2001). The defendant argued that the court erroneously applied the enhancement because "he did not know that the shotgun was shortened." *Id.* We noted "that to convict a defendant for possessing a firearm as defined in § 5845(a), the government 'must prove that the defendant knew of the features of the weapon that brought it within the scope of' unlawful possession, in particular, of a reduction in barrel and overall length." *Id.* at 426 (quoting *United States v. Otto*, 64 F.3d 367, 370 (8th Cir. 1995)). We assumed that the same knowledge requirement applied to sentencing enhancements under § 2K2.1(b)(3), *cf. id.* at 426 n.2, and "f[ou]nd no clear error in the district court's conclusion that [the defendant] knew that the shotgun had been shortened." *Id.* at 426. In so holding, we did "not squarely address[]" whether § 2K2.1(b)(3) actually required a mens rea finding, so "we are not bound by . . . *stare decisis*" from concluding that knowledge is not an element of § 2K2.1(a)(3). *Passmore v. Asture*, 533 F.3d 658, 660 (8th Cir. 2008).

of our sister courts have addressed the issue and rejected Miller's argument. *See, e.g.*, *United States v. Fry*, 51 F.3d 543, 546 (5th Cir. 1995) ("[T]he language of [§] 2K2.1(a)(3) makes no reference to the defendant's mental state. The section is plain on its face and should not, in light of the apparent intent of the drafters, be read to imply a scienter requirement."); *United States v. Williams*, 828 F. App'x 209, 210 (5th Cir. 2020) (unpublished per curiam) ("Although § 2K2.1(a)(3) has been amended since *Fry*, nothing in the text or commentary of § 2K2.1(a)(3) imposes a *mens rea* requirement."); *United States v. Bryant*, 131 F.3d 136, 136 (4th Cir. 1997) (unpublished per curiam) (agreeing with the Fifth Circuit's holding in *Fry* that § 2K2.1(a)(3) does not imply a scienter requirement); *United States v. Saavedra*, 523 F.3d 1287, 1289 (10th Cir. 2008) (rejecting the defendant's argument that the § 2K2.1(a)(5) sentencing enhancement did not apply because the government did not prove that the defendant knew that he possessed a firearm as described in 26 U.S.C. § 5845(a)).

Miller cites *Staples v. United States*, 511 U.S. 600 (1994), and *Rehaif v. United States*, 139 S. Ct. 2191 (2019), for support. However, those cases are inapposite because they explain that knowledge is a necessary element for certain *convictions*. They do not discuss a *sentencing enhancement*. *See Bryant*, 131 F.3d at 136 (explaining that the defendant's reliance on *Staples* for imposing a scienter element to § 2K2.1(a)(3) was "misplaced" because "the statute in *Staples* was a criminal statute, while the provision at issue in this case is a sentencing enhancement without the same risk of conviction of an innocent party").

Because the gun was in fact less than 18 inches (17 7/8ths inches), the district court did not err. And even if knowledge was needed, the district court concluded that

> this was not a situation where [the shotgun] was barely under 18 inches and something that came out of a factory in that format. *It clearly had been altered by someone*. I don't know if it was Mr. Miller, and it doesn't

> matter if it was him. But he was in possession of a firearm that *clearly* had been modified to reduce the barrel length.

Sent'g Tr. at 97 (emphases added).

3. *Possessing a Firearm in Connection with Another Felony Offense*

Last, Miller argues that the district court erred in finding that he committed assault; therefore, it erroneously applied the four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B). "When the proposed enhancement is based upon an offense for which there was no prior conviction[,] the government must prove at sentencing (by a preponderance of the evidence) that the defendant committed it." *Thomas*, 565 F.3d at 441 (cleaned up). "A district court's finding regarding a defendant's purpose in possessing a firearm is a finding of fact," which we review for clear error. *Id.* (quoting *United States v. Harper*, 466 F.3d 634, 649 (8th Cir. 2006)).

Iowa Code § 708.1(2) provides four definitions of assault. Per § 708.1(2)(b), "[a] person commits an assault when, without justification, the person does . . . [a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act." Under § 708.1(2)(c), "[a] person commits an assault when, without justification, the person . . . [i]ntentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another."

After hearing several witnesses testify, the district court found by a preponderance of the evidence that Miller committed assault under both definitions when he "brought a shotgun outside with him in the middle of a hostile, angry, confrontational situation" and "display[ed] it in a manner where the other individuals were able to see that he had it." Sent'g Tr. at 81–82.

Miller argues that the district court misunderstood Iowa assault law and read the "toward another" element out of the statute. We disagree. The district court stated, "I've looked closely at Iowa Code 708.1 . . . and 708.2" and emphasized that witnesses testified that "they were concerned" and "felt threatened." *Id.* at 82. The record does not support a conclusion that the district court misinterpreted Iowa law.

Miller cites *State v. Mott*, No. 00-575, 2001 WL 433395 (Iowa Ct. App. Apr. 27, 2001) (unpublished). In *Mott*, the defendant challenged the sufficiency of the evidence for his conviction for assault under § 708.1. *Id.* at *1. The court concluded that there was sufficient evidence to support the assault conviction when the defendant entered an office angrily, demanding to know his girlfriend's location. *Id.* at *2. The assault victim was in the office and denied knowing the whereabouts of the girlfriend. *Id.* The defendant had a knife in his hand and stabbed a calculator with it. *Id.* He also stabbed a desk, though it was not the desk where the victim was sitting. *Id.* The defendant's actions scared the victim, and "[t]he fact that he did not touch [the victim] with the weapon or hold it directly to him [wa]s not dispositive." *Id.*

Mott supports our decision.[6] As in *Mott*, Miller did not have to point the shotgun directly at anyone. Contrary to Miller's assertion, the district court did not find that "by simply carrying the gun without pointing it at anyone Miller committed [assault]." Appellant's Br. at 44. Rather, the court found that Miller brought the shotgun into a heated situation and clearly displayed it and the victims felt threatened. Even though

---

[6]*See also Thomas*, 565 F.3d at 440, 442 (concluding that the defendant committed assault under Iowa law by a preponderance of the evidence by intentionally displaying a dangerous weapon in a threatening manner when the defendant entered an apartment "with a gun 'in his right hand'" that he "held . . . 'straight down at his side'" but "with his hand near the trigger"); *Anderson*, 339 F.3d at 722, 724–725 (holding that there was sufficient evidence that the defendant displayed a firearm in a threatening manner in violation of Iowa law based on testimony that he was walking along the shoulder of an interstate "waving the gun").

the witnesses' testimonies were not consistent as to whether Miller pointed the gun at any individuals, they were consistent as to Miller holding the gun in a position ready to shoot. Furthermore, *Mott* required proof of assault beyond a reasonable doubt, as it involved a conviction. Here, proof of assault only by a preponderance is required, as it involves a sentencing enhancement.

III. *Conclusion*

For the foregoing reasons, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LEVI FARREN MILLER, Defendant.	No. CR19-2031-LTS **MEMORANDUM OPINION AND ORDER ON REPORT AND RECOMMENDATION**

This matter is before me on a Report and Recommendation (R&R) (Doc. No. 57) in which the Honorable Mark A. Roberts, United States Magistrate Judge, recommends that I deny defendant's motion (Doc. No. 11) to suppress/request for *Franks* hearing, motion (Doc. No. 12) to suppress, motion (Doc. No. 14) to dismiss Counts 1 and 2 of the Indictment and second motion (Doc. No. 17) to dismiss. Miller filed timely objections (Doc. No. 62) to the R&R.

I. BACKGROUND

A. Procedural History

On May 8, 2019, the grand jury returned an Indictment (Doc. No. 2) charging Miller with two counts: possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) and possession of a National Firearms Act short-barreled shotgun not registered to possessor in violation of 26 U.S.C. § 5861(d).

On August 1, 2019, Miller filed a motion (Doc. No. 11) to suppress/request for a *Franks* hearing, a motion (Doc. No 12) to suppress and a motion (Doc. No. 14) to dismiss Counts 1 and 2 of the Indictment. He then filed a second motion (Doc. No. 17) to dismiss on August 12, 2019. The Government filed resistances on August 19, 2019. *See* Doc.

Nos. 30, 32, 33, 34. Miller filed a reply (Doc. No. 41) regarding his motion to suppress/request for *Franks* hearing.

Judge Roberts held a hearing on October 7, 2019. Doc. No. 53. The Government presented testimony from Officers Jeremy Berryman, Alexander Bovy, Steven Thomas and Joseph Saunders of the Waterloo Police Department. Doc. No. 53-1. Judge Roberts admitted Government Exhibits 1 through 11. He also admitted Defense Exhibits 1 through 6. *Id.* Defendant later submitted Exhibit 7 and the parties submitted post-hearing briefs. *See* Doc. Nos. 55, 56.

Judge Roberts issued his R&R (Doc. No. 57) on November 15, 2019. Miller filed his objections (Doc. No. 62) on November 25, 2019. Trial is currently set to commence during the two-week period beginning January 21, 2020. *See* Doc. No. 61.

B. Relevant Facts

Judge Roberts made the following findings of fact:

> This case involves Defendant's alleged possession of a short-barreled shotgun. Defendant's neighbor, Takeela Latham, called law enforcement to report Defendant possessing a shotgun and yelling at Ms. Latham for removing items from her porch and placing them in Defendant's truck. (Gov. Ex. 1 at 4.) Ms. Latham claimed Defendant pointed the shotgun at her and Jarrell Cole, after which she and Mr. Cole ran back into Ms. Latham's apartment. (*Id.*) Officer Alexander Bovy, a police officer with the Waterloo Police Department, was the first to respond to the call regarding the alleged confrontation between Ms. Latham and Defendant. Defendant resided in the upstairs apartment of 1005 West Mullan Avenue in Waterloo, Iowa. (Bovy Oct. 7, 2019 Hr'g Test.) Ms. Latham and her daughter resided on the ground floor of the same residence. (Gov. Ex. 1 at 4.)
>
> ### *A. Officers Bovy and Payne's Initial Contact with Ms. Latham's Daughter and the Daughter's Aunt at 1005 West Mullan Avenue*
>
> Officer Bovy arrived at 1005 West Mullan Avenue at approximately 6:20 p.m. on February 3, 2019. (*Id.*) When Officer Bovy first arrived at the residence, he walked to the back of the residence but did not see anyone

(Doc. 24 at 1.) Officer Payne arrived at the residence shortly after Officer Bovy. (*Id.*; Berryman Hr'g Test.) Officers Bovy and Payne then knocked on the back door at 1005 West Mullan Avenue to contact residents. (Doc. 24 at 1; Def. Ex. 2 at 5:45.)

After knocking on the back door, Officers Payne and Bovy first made contact with a girl who identified herself as a ten-year-old resident who lives at 1005 West Mullan Avenue with her "auntie" ("the aunt"). (Def. Ex. 2 at 5:50.) The girl later identified herself as Ms. Latha[m]'s daughter, and stated that Ms. Latham left with her friends to get some food. (*Id.* at 7:45-8:00.) The aunt consented to Officers Bovy and Payne entering the apartment. (*Id.* at 6:18.) Officer Bovy asked if the aunt heard people yelling, but she denied having heard anything. (*Id.* at 6:30-6:46.)

B. Officers Bovy and Payne's Contact with Ms. Latham and Defendant's Neighbor Emmitt Johnson

Officers Bovy and Payne next contacted Ms. Latham and Defendant's neighbor, Emmitt Johnson. The officers knocked on Mr. Johnson's door to initiate contact. (*Id.* at 10:22.) Mr. Johnson initially denied knowledge of an altercation, stating he had only recently arrived at his residence (*Id.* at 10:40.) Mr. Johnson eventually acknowledged he heard Defendant and Defendant's wife Sarabeth Miller arguing but stated no one else was outside and there was no physical altercation. (*Id.* at 10:40-11:35.)

C. Law Enforcement Contact with Defendant, Ms. Miller, and Ms. Randall

In addition to Defendant, Ms. Miller and Michele Randall also reside at 1005 ½ West Mullan Avenue. (Gov. Ex. 1 at 4.) Officer Bovy knocked on Defendant's apartment door, and Defendant answered. (Bovy Hr'g Test.) Defendant spoke with the officers about a number of issues, including a prior incident involving the discovery of a pipe bomb at a different residence of Defendant and an altercation where Defendant asserted he had been beaten by the police. (*Id.*) Defendant, Ms. Miller, and Ms. Randall stated they all went to the back of the residence after hearing a loud noise because they were concerned someone was damaging their truck in the back parking lot. (Gov. Ex. 1 at 4.) Ms. Miller told Officer Bovy she was carrying a broken pool stick and Defendant was carrying a large knife when they checked the truck. (*Id.*) Defendant also

stated he was carrying a large fixed blade knife when he checked the truck with Ms. Miller. (Doc. 23-2 at 1.) Ms. Miller claimed they walked past Ms. Latham behind the residence, where Ms. Latham was in an argument with an unidentified male. (Gov. Ex. 1 at 4.)

Officer Bovy requested Defendant consent to a search of the residence, but Defendant declined. (Bovy Hr'g Test.) Officer Bovy then spoke with Officer Thomas, who had been dispatched to 123 Elmwood Street, where Ms. Latham was located, at approximately 6:45 p.m. (Thomas Oct. 7, 2019 Hrg' Test.) While at 123 Elmwood Street, Officer Thomas spoke with Ms. Latham, Mr. Cole, Chelsea Cole, and Kayla Borntreger, who all reported seeing Defendant with a gun. (Gov. Ex. 1 at 4; Bovy Hr'g Test.) Ms. Borntreger and Ms. Cole state Defendant was wearing a red shirt and had dreadlocks pulled into a ponytail. (Gov. Ex. 1 at 4.) Officers Thomas and Bovy called their sergeant supervisor, who advised them to obtain a search warrant. (Thomas Hr'g Test.)

After deciding to obtain a search warrant, law enforcement secured the residence to make sure no one was present other than those with whom law enforcement already made contact, Ms. Miller, Ms. Randall, and Defendant. (*Id.*) The officers decided that securing the residence required them to enter and conduct a protective sweep of the residence, only looking in areas large enough for people to hide. (Bovy Hr'g Test.)

Officers Berryman and Bovy testified they believed Defendant, Ms. Miller, and Ms. Randall could have left the residence if they desired but did not explicitly tell Defendant and the other residents they were free to leave. (*Id.*; Berryman Hr'g Test.) Officer Berryman testified he was not told Defendant and the residents were required to stay. (Berryman Hr'g Test.) Special Agent Saunders, who was not present when law enforcement secured the residence, reviewed video of officers securing the residence and could not recall officers instructing the residents that they were free to leave if they wanted. (Saunders, Oct. 7, 2019 Hr'g Test.) Defendant briefly left the residence to look at his truck. Officer Berryman accompanied him as a precautionary measure for officer safety. (Berryman Hr'g Test.) If Defendant, Ms. Miller, or Ms. Randall left the residence, law enforcement would not have allowed them back in. (Bovy Hr'g Test.) However, law enforcement did not tell Defendant, Ms. Miller, or Ms. Randall they were free to leave with the condition that they could not reenter the residence until a search was completed.

After informing Defendant, Ms. Miller, and Ms. Randall that law enforcement intended to obtain a search warrant for the residence, Ms. Miller told Officer Bovy she was willing to go to the police department and provide a statement. (Bovy Hr'g Test.) Defendant and Ms. Randall were unwilling to provide statements. (*Id.*) Officer Bovy took Ms. Miller to the Waterloo Police Department so she could make a statement. (*Id.*) Officer Thomas returned to 123 Elmwood Street to bring Ms. Latham, Mr. Cole, Ms. Borntreger, and Ms. Cole to the Waterloo Police Department for interviews. (Doc. 23-1 at 1.) Each witness except Ms. Miller stated Defendant was holding a shotgun when he exited his residence. The witnesses provided somewhat differing accounts of whether Defendant pointed the shotgun at the witnesses, whether Defendant could see the witnesses, and where the witnesses were located when Defendant exited his apartment while holding the shotgun.

D. Police Interview with Ms. Latham

Officer Thomas interviewed Ms. Latham at the Waterloo Police Department on February 3, 2019. (Doc. 23-1 at 1; Def. Ex. 2, video of Ms. Latham.) During this interview, Ms. Latham described plans for Ms. Borntreger to give her a ride to the grocery store prior to the alleged incident. (Def. Ex. 2, video of Ms. Latham, at 1:05.) Ms. Latham stated that as she was leaving her apartment to get into Ms. Borntreger's car, Ms. Latham noticed a suitcase sitting on her porch, directly outside the back door that leads into her kitchen. (*Id.* at 1:18.) Ms. Latham believed this suitcase belonged to her upstairs neighbors, including Defendant. (*Id.* at 1:45.) Ms. Latham asked Mr. Cole to place the suitcase in Defendant's truck located behind the apartment building. (*Id.*) She then stated that Defendant exited his apartment while Ms. Borntreger was still sitting in her car and Mr. Cole and Ms. Latham had not yet reached Ms. Borntreger's car (*Id.* at 2:30-2:53.) Ms. Latham claimed to have witnessed Defendant and an unidentified woman walking towards the pickup truck. (*Id.* at 3:10.) Ms. Latham stated that Defendant, carrying a shotgun, pointed it directly at her and Mr. Cole. (*Id.* at 3:45.) She stated she could hear Defendant say, "These motherfuckers," as he walked toward the pickup truck. (*Id.* at 3:10.) She stated this scared her, so she and Mr. Cole started to quickly walk back to her apartment. (*Id.* at 3:28.) Ms. Cole followed closely behind them from the direction of Ms. Borntreger's car, although the interview does not provide a clear picture of whether Ms. Cole was sitting inside Ms. Borntreger's car prior to walking towards Ms. Latham's apartment or had walked with Mr. Cole and Ms. Latham from Ms.

Latham's apartment towards Ms. Borntreger's car. (*Id.*). Ms. Latham stated that Defendant relaxed his shotgun's position, allowing the barrel to angle down towards the ground as she and Mr. Cole hurriedly walked back to her apartment. (*Id.* at 3:40.)

Ms. Latham described Defendant's shotgun as "brown" but stated Ms. Borntreger had a better angle to see the gun because she remained outside while the others hurried towards Ms. Latham's apartment. (*Id.* at 7:00-7:10.) Ms. Latham reiterated that Ms. Borntreger was in a car during the alleged incident, noting she could have driven away if Defendant started shooting. (*Id.* at 7:20.)

Ms. Latham later stated she had the door to Ms. Borntreger's car partially open when she heard Defendant come down the stairs from his apartment. (*Id.* at 7:38.) This differed from her prior statement that she was not by the vehicle when Defendant started to come down. (*Id.* at 3:20.)

Ms. Latham acknowledged she has a poor relationship with Defendant and dislikes him. (*Id.* at 8:55.) She noted this was not her first encounter with Defendant, and she had previously called the police about her neighbors. (*Id.* at 8:15.) She had previously called the police to complain that Defendant purposefully moved the bathtub in his apartment and continuously ran the water, causing her daughter's bedroom ceiling to collapse. (*Id.* at 8:28.) She had also called the police to complain that Defendant yelled racial slurs at her children. (*Id.* at 8:44.)

E. Police Interview with Mr. Cole

Officer Thomas interviewed Mr. Cole at the Waterloo Police Department on February 3, 2019. (Doc. 23-1 at 1; Def. Ex. 2, video of Mr. Cole.) During this interview, Mr. Cole described Defendant descending the stairs from his apartment with a shotgun in hand. However, he did not clearly describe how Defendant held the shotgun or who was present with him during the alleged incident.

Mr. Cole stated he and Ms. Latham were leaving her apartment building when she noticed a bag that did not belong to her on her porch. (Def. Ex. 2, video of Mr. Cole, at 1:05) Ms. Latham asked Mr. Cole to move the bag to her neighbor's pickup truck. (*Id.* at 1:35) Mr. Cole did not state whether he actually placed the suitcase in the pickup truck. (*Id.*)

He stated Defendant's apartment windows were open, which allowed Defendant to hear him talking with Ms. Latham. (*Id.* at 1:45.)

Mr. Cole stated "they" came downstairs, referring to Defendant and at least one other person, but he did not identify who accompanied Defendant. (*Id.* at 1:45.) Defendant was allegedly carrying a shotgun as he walked down the stairs from his residence, saying, "Motherfuckers, motherfuckers, motherfuckers." (*Id.*; *Id.* at 2:30, 3:00.) Mr. Cole described how Defendant held the shotgun, stating Defendant "had [the shotgun] like this," as he mimicked how Defendant held the shotgun. (*Id.* at 1:50.) Mr. Cole positioned his hands to demonstrate holding the shotgun in both hands across his body. The butt of the weapon is not raised to his shoulder. Mr. Cole demonstrated holding a shotgun in a position of readiness to fire, not as one might carry a shotgun to merely transport it or to avoid a discharge. (*Id.*) Mr. Cole stated Defendant "pointed" the shotgun but did not state whether Defendant pointed the shotgun at any individual. (*Id.* at 2:30.) Mr. Cole described the shotgun as having a black barrel and brown, "wood-like" stock. (*Id.* at 2:00-2:06) He described Defendant as wearing a red shirt and having dreadlocks pulled back into a ponytail. (*Id.* at 2:10.)

Mr. Cole stated that after seeing Defendant descend the stairs with the shotgun, "we all hurried back in the house." (*Id.* at 2:45.) He did not state who is included in the term "we." (*Id.*) Mr. Cole stated he could hear Defendant walk back up to his apartment after Mr. Cole returned to Ms. Latham's apartment. (*Id.* at 3:55.)

Mr. Cole acknowledged an existing animosity between Ms. Latham and her friends and Defendant. (*Id.* at 3:20.) He stated that Defendant has called Ms. Latham and her friends racial slurs in the past but stated this was the first time he saw Defendant carrying a gun. (*Id.*)

F. Police Interview with Ms. Cole

Officer Thomas interviewed Ms. Cole at the Waterloo Police Department on February 3, 2019. (Doc. 23-1 at 1; Def. Ex. 2, video of Ms. Cole.) Ms. Cole described how she witnessed the alleged incident from inside Ms. Latham's porch.

Ms. Cole stated she and Ms. Latham were on Ms. Latham's porch, Ms. Borntreger was in her car, and Ms. Cole was walking from inside Ms.

Latham's apartment towards the porch immediately before the alleged incident. (Def. Ex. 2, video of Ms. Cole, at 1:05; 2:20.) Ms. Cole stated Defendant held a gun as he stood outside with two women, repeatedly saying, "Motherfuckers." (*Id.* at 1:15; 2:10) Ms. Cole did not elaborate on the term "outside," so it is unclear whether this means outside on the porch, outside by the pickup truck, or in another location outside of the apartment building. She observed Defendant and the two women from Ms. Latham's porch, as she could look through the porch's glass door. (*Id.* at 2:00)

Ms. Cole described the gun Defendant held as a brown shotgun. (*Id.* at 1:35; 3:15.) She stated she was unsure whether Defendant pointed the gun at anyone. (*Id.* at 2:25.) After seeing Defendant outside with a gun, Ms. Cole stated that she and Ms. Latham returned to Ms. Latham's apartment, and Defendant walked up the stairs back to his apartment. (*Id.* at 2:40.)

Ms. Cole described Defendant as wearing a red shirt and black or blue sweatpants. (*Id.* at 1:40.) She further described Defendant as having his hair pulled back in a ponytail. (*Id.*)

Officer Bovy's affidavit in support of the search warrant incorrectly states, "I spoke with" Ms. Cole. (Gov. Ex. 1 at 4.) Officer Thomas actually spoke with her. (*Id.*; Bovy Hr'g Test.) The officers' testimony was contradictory regarding how this misstatement occurred. Officer Bovy stated that he and Officer Thomas each typed a portion of the document. Officer Bovy stated that Officer Thomas typed "I spoke with" Ms. Cole, but Officer Bovy signed the document so it should have stated, "Officer Thomas spoke with" Ms. Cole. (Bovy Hr'g Test.) Officer Thomas stated Officer Bovy typed while he dictated. (Thomas Hr'g Test.)

G. Police Interview with Ms. Borntreger

Officer Thomas interviewed Ms. Borntreger at the Waterloo Police Department on February 3, 2019 (Doc. 23-1 at 1; Def. Ex. 2, video of Ms. Borntreger.) Ms. Borntreger's statements did not align with aspects of the other witnesses' statements, especially regarding where witnesses were located during the incident.

Ms. Borntreger stated Ms. Latham called her for a ride to the grocery store. (Def. Ex. 2, video of Ms. Borntreger, at 1:05.) She then drove to

Ms. Latham's apartment and parked behind the apartment. (*Id.* at 1:15.) She entered Ms. Latham's apartment and waited for Ms. Latham to finish getting ready. (*Id.* at 1:20.) Ms. Borntreger stated Ms. Latham saw Defendant's suitcase on the porch as she, Ms. Latham, Mr. Cole, and Ms. Cole walked out of Ms. Latham's apartment. (*Id.* at 1:20; 4:45.) Ms. Latham and Mr. Cole then put the suitcase into the truck parked behind the apartment. (*Id.* at 1:35.) Ms. Latham and Mr. Cole then returned to Ms. Latham's apartment. (*Id.*)

Shortly after Ms. Latham and Mr. Cole returned to the house, Ms. Borntreger heard Defendant and two women come down the stairs outside of the apartment. (*Id.* at 1:42.) Ms. Borntreger stated that she, Ms. Latham, Mr. Cole, and Ms. Cole stayed in the front porch to watch Defendant and the two women. (*Id.* at 1:55.) She said that Defendant was carrying a gun while mumbling, "Fuck motherfuckers," and walking behind the apartment building. (*Id.* at 2:05; 3:00.) Ms. Borntreger told Officer Thomas that as Defendant walked around the apartment building, she, Ms. Latham, Mr. Cole, and Ms. Cole decided to exit the apartment building through Ms. Latham's back door and go to Ms. Borntreger's residence to call the police. (*Id.* at 2:15.)

Ms. Borntreger described the gun Defendant was holding as "a regular shotgun" with a wood-grain grip and stock and a black barrel. (*Id.* at 2:35-2:50.) She stated Defendant did not point the shotgun at anyone because Defendant could not see her or the other witnesses, as they all watched Defendant from inside Ms. Latham's porch. (*Id.* at 4:27-5:00.) Ms. Borntreger instead described Defendant as carrying the shotgun in a manner that would allow him to shoot quickly if necessary. (*Id.*)

Ms. Borntreger described one of the women with Defendant as approximately the same age as Defendant, with dark hair, while the other woman appeared to be several years older than Defendant. (*Id.* at 3:15.) The woman who was approximately the same age as Defendant wore a gray and white striped coat, while the older woman wore a gray or black T-shirt and jeans. (*Id.* at 3:40.)

Ms. Borntreger described Defendant as wearing a red T-shirt with the sleeves cut off and pants that were either camouflage or had another pattern. (*Id.* at 3:50.) She stated Defendant had dark hair in dreadlocks pulled into a ponytail. (*Id.* at 4:00.)

Officer Bovy's affidavit in support of the search warrant contains the same misstatement regarding Ms. Borntreger's interview as the misstatement regarding Ms. Cole's interview. Officer Bovy wrote "I spoke with" Ms. Borntreger, but Officer Thomas actually spoke with her. (Gov. Ex. 1 at 4; Bovy Hr'g Test.) The explanations for the discrepancy are the same as above. (Bovy Hr'g Test.; Thomas Hr'g Test.)

H. Search of 1005 ½ West Mullan Avenue and Subsequent Arrest of Defendant

After Ms. Miller provided a statement at the Waterloo Police Department, Officer Bovy drove her back to the residence. (Bovy Hr'g Test.; Gov. Ex. 1 at 1.) Officer Bovy then finalized the affidavit and presented it to a judge who issued a search warrant for 1005 ½ W. Mullan Avenue at approximately 9:36 p.m. (*Id.*) At the time Officer Bovy applied for the search warrant, he believed law enforcement was investigating a possible assault involving a shotgun. (Bovy Hr'g Test.) Officer Bovy thus sought the search warrant to find the firearm allegedly used in the assault. (*Id.*) Officer Bovy returned to the Waterloo Police Department to make a copy of the signed warrant, and then returned to the residence to execute the warrant. (*Id.*) The application describes Defendant "walking with a shotgun in his hands and cursing," as well as having "pointed the gun" at two people. (Gov. Ex. 1 at 4.)

Officer Bovy read the warrant to Defendant, Ms. Miller, and Ms. Randall when he returned to the residence, and the officers began the search. (*Id.*) Officer Thomas found a pump action shotgun with a black barrel and brown wood stock and foregrip propped against the door frame inside the kitchen. (Doc. 23-1 at 1; Gov. Ex. 3 at 12.) A T-shirt was covering part of the barrel, and the butt of the gun was in a pan filled with cat food. (Doc. 23-1 at 1; Gov. Ex. 3 at 12.)

Following the search, Defendant was placed under arrest. (Bovy Hr'g Test.; Doc. 24 at 2.) Upon arrest, Officer Bovy searched Defendant and found a red plastic straw with white powder residue and two plastic bags containing suspected methamphetamine. (Doc. 21-1 at 1; Doc. 24 at 2.) Defendant was indicted with two federal criminal counts, Possession of a Firearm by a Felon and Possession of a National Firearms Act Short-Barreled Shotgun Not Registered to a Possessor. (Doc. 2 at 1.)

I. Conclusions from the Bureau of Alcohol, Tobacco, Firearms and Explosives Regarding the Shotgun Seized at 1005 ½ West Mullan Avenue

> The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") concluded the shotgun found in Defendant's residence is properly classified as a short-barreled shotgun as defined in 18 U.S.C. Section 921(a)(6). (Gov. Ex. 9 at 3.) Cody J. Toy, a Firearms Enforcement Officer with ATF, examined and tested the shotgun before sending a report to Special Agent Joseph Saunders classifying the firearm as a short-barreled shotgun. (Gov. Ex. 9.) Officer Toy measured the barrel length by placing the shotgun on a flat surface, closing the bolt, and inserting a cylindrical scale into the barrel's muzzle until the scale touched the bolt face. (*Id.* at 2.) Officer Toy measured the barrel and found it to be 17-7/8 inches long. (*Id.* at 2-3.) Photos show the barrel is not of uniform length, the entire barrel also appears to be less than eighteen inches long. (*Id.* at 14.)
>
> Special Agent Joseph Saunders is a police officer with the Waterloo Police Department and a task force officer with ATF. (Saunders Oct. 7, 2019 Hr'g Test.) He was not directly involved in the search of Defendant's residence, but was the recipient of ATF's report on the seized shotgun. (Gov. Ex. 9 at 1.)

Doc. No. 57 at 4-15 (footnotes omitted).

II. STANDARD OF REVIEW

A district judge must review a magistrate judge's R&R under the following standards:

> Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b). Thus, when a party objects to any portion of an R&R, the district judge must undertake a de novo review of that portion.

Any portions of an R&R to which no objections have been made must be reviewed under at least a "clearly erroneous" standard. *See, e.g.*, *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (noting that when no objections are filed "[the district court judge] would only have to review the findings of the magistrate judge for clear error"). As the Supreme Court has explained, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). However, a district judge may elect to review an R&R under a more-exacting standard even if no objections are filed:

> Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under a *de novo* or any other standard.

Thomas v. Arn, 474 U.S. 140, 150 (1985).

III. DISCUSSION

A. Objections to Findings of Fact

Miller makes the following objections to the findings of fact:

- The lack of reference to Officer Bovy's testimony at the hearing that he deliberately omitted information from the warrant application that contradicted Latham's claim that Miller pointed the shotgun at her.[1]

[1] Bovy testified that he did not know Latham's claim was contradicted by any other evidence. *See* Doc. No. 63 at 16. Any such evidence from Bovy was also not a part of Miller's preliminary showing and is therefore inappropriate to consider for purposes of Miller's request for a *Franks* hearing. *See infra,* section III(B)(1)(a). This objection is overruled.

- The suggestion that Borntreger's description of events is inconsistent with the other eyewitness statements. Ms. Cole's statement is consistent with Borntreger's that she did not recall seeing Miller point a gun at anyone and indicated she, Latham and Borntreger were inside the porch, not outside. Latham stated Borntreger had the best view of what occurred.[2]

- Any statement that the suitcase was on "porch" rather than the back "deck."[3]

- With regard to Bovy's interaction with Latham's daughter and the daughter's auntie, one of them said no one was yelling "here" (meaning back of the house) and there is only one door out of the upstairs apartment where Miller lives. Bovy had a discussion with dispatch asking them to contact Latham to determine where the guy she complained about came from because it sounded like she was in the apartment.[4]

- With regard to Bovy's interaction with Johnson, Johnson told Bovy that he saw Miller and his wife Sara outside his apartment, but there was no one else out there with them.[5]

- With regard to Miller's truck (which is actually his father-in-law's truck according to what Miller told Bovy when standing outside his apartment), Bovy's body cam shows the truck on the side of the house rather than the

---

[2] This objection is overruled. Ms. Cole stated Borntreger was in her car, not inside. *See* Def. Ex. 2, video of Ms. Cole. Borntreger is the only witness who stated they were all inside at the time Miller came to the back of the house.

[3] This objection is overruled. Latham and others refer to the area to the back of Latham's apartment as a porch rather than a deck. Borntreger is the only witness who refers to the front porch of Latham's apartment. *See* Def. Ex. 2.

[4] I do not find these facts to be material. This objection is overruled.

[5] I do not find this fact material. This objection is overruled.

back. Bovy also commented that he had been to this house before.[6]

- The omission that the police did not make a protective sweep when entering the apartment indicating the lack of concern that other people were present. He contends Defense Exhibit 7 shows that the police stayed in the living room and hallway with Miller, his wife and Ms. Randall while the warrant was obtained and that there were other rooms in the apartment.[7]

- The statement that all witnesses said they saw Miller holding a shotgun when he exited his apartment. Borntreger and Ms. Cole said they saw Miller with a gun, but were inside Latham's enclosed porch and saw the gun as he walked by.[8]

- That Latham said there was a suitcase on the porch outside her back door. Miller notes that there is an enclosed "porch" at the front of the house and that Borntreger and Ms. Cole said they were inside the "porch" when Miller walked by. Miller notes the "deck" at the back of Latham's apartment is open and the enclosed "porch" is at the front.[9]

- With regard to Mr. Cole's statement, the "porch" is at the front and the "deck" is in the back. The R&R is correct that it would be difficult if not impossible to see Miller come down the stairs from the back of the house

---

[6] Whether Bovy had been to this house before is immaterial. I also find the exact placement of the truck to be immaterial as it was behind the house even if to the side rather than directly behind. This objection is overruled.

[7] Defense Exhibit 7 speaks for itself. That exhibit does appear to show that officers did not enter any other rooms in the residence, but stayed in the main living area with the three occupants. The objection is sustained to the extent it seeks to make this point. It is overruled to the extent it suggests the officers' conduct was insufficient to secure the residence as Miller did not present any evidence on that point.

[8] This objection sustained. All witnesses except Ms. Miller said they saw Miller holding a gun, but not all witnesses said they saw him holding the gun "when he exited his residence." *See* Doc. No. 57 at 8. This distinction has little, if any, relevance however as all witnesses except Ms. Miller saw Miller with the shotgun shortly after exiting his apartment.

[9] *See supra,* note 3.

where Latham's deck is or the side of the house, where Miller's truck was located.[10]

- With regard Ms. Cole's statement, all her observations were from inside the apartment from the enclosed porch at the front of the residence. At about the 2:00 mark in the video of her statement she states she could see through the glass door on the porch and that Latham and Mr. Cole were with her inside the porch. She also said that Borntreger was outside in her car. Cole did say as "they" were coming back in the house, Miller went upstairs. This means that Latham and Mr. Cole were coming back into the house from the enclosed front porch.[11]

See Doc. No. 62-1 at 35-38, n.i. I do not find that any of Judge Roberts' findings of fact are unsupported by the record and do not find that they need to be modified based on Miller's objections, except as noted. I will take those factual objections into account in discussing Miller's legal objections and will discuss them in greater detail below to the extent I find they are relevant.

B. Objections to Conclusions of Law

1. Motions to Suppress

a. **Franks** *Hearing*

Miller argues he is entitled to a *Franks* hearing because of "the highly relevant nature of the information that Officer Bovy omitted" from the warrant application and the last paragraph in the application, which suggests that Borntreger and Ms. Cole saw Miller point a gun at Latham, when their statements contradict that. *See* Doc. No. 62-1 at 10. He objects to any findings in the R&R to the contrary and contests the finding that the omitted information did not make the affidavit misleading. Miller alleges the police deliberately omitted facts with reckless disregard of whether they made the affidavit misleading and that they should have left it to the judge to make credibility

[10] *See supra*, note 3.

[11] *See supra*, note 3.

determinations. He contends the omitted information undermined a finding of probable cause. Miller also objects to the procedure used by Judge Roberts in taking evidence, but later determining Miller was not entitled to a *Franks* hearing. I will address the procedural issue first.

Judge Roberts stated at the hearing that he had doubts whether Miller had made a sufficient showing entitling him to a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Over the Government's objection, he decided that he would take up all the evidence at the hearing, hold a *Franks* hearing and then determine whether Miller was entitled to the *Franks* hearing. *See* Doc. No. 57 at 15. He notes Miller incorrectly interpreted this to mean that he had satisfied the burden that he was entitled to a *Franks* hearing. *Id.*

Miller argues in his objections that Bovy and Thomas testified at the hearing and the prosecution presented evidence regarding the omissions from the warrant application. Doc. No. 62-1 at 11. Miller contends that if a *Franks* hearing was held, then that must mean he was entitled to one. He argues that if Judge Roberts intended to conduct a "pre-*Franks*" hearing, he should not have given the Government an opportunity to present evidence on the validity of the warrant. *Id.* at 12 (citing *United States v. McMurtrey*, 704 F.3d 502 (7th Cir. 2013)). He contends that he met the *Franks* standard by proving evidence was omitted from the warrant application that the judge needed to evaluate the credibility of Latham's claims and that such evidence was necessary to the probable cause finding. *Id.* at 13.

To be entitled to a *Franks* hearing, a defendant must make "a substantial preliminary showing that a false statement [or omission] knowingly and intentionally, or with reckless disregard for the truth, was included [or omitted] by the affiant in the warrant affidavit" and that "the allegedly false statement [or omission] is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. In *McMurtrey*, the Seventh Circuit acknowledged that it is sometimes difficult to determine whether a defendant has made a sufficient preliminary showing under *Franks*. *McMurtrey*, 704 F.3d at 509.

Therefore, it stated that courts may utilize "pre-*Franks*" hearings to give defendants "opportunities to supplement or elaborate on their original submissions." *Id.* The Seventh Circuit emphasized that a pre-*Franks* hearing should not allow the Government to present new evidence to explain any discrepancies identified by the defense without giving the defense the opportunity to challenge or rebut the evidence. *Id.* It noted that the Government is entitled to present evidence and the defendant cross-examine that evidence in a full *Franks* hearing. *Id.* The important part is that the court not rely on new evidence from the Government in determining whether the defendant has made his substantial preliminary showing under *Franks*. *Id.* at 510.

Here, Judge Roberts noted that he was on the fence about whether Miller was entitled to a *Franks* hearing. Doc. No. 63 at 2. However, he stated he would make that decision after he had heard all of the evidence and noted that he would hear evidence with respect to all motions together. *Id.* After admitting the parties' exhibits, the hearing proceeded with testimony from Government witnesses. Miller was allowed to cross-examine all witnesses. Judge Roberts occasionally cited Bovy's testimony in analyzing whether Miller was entitled to a *Franks* hearing. *See* Doc. No. 57 at 17-27. He noted that Bovy acknowledged that Thomas was the officer who spoke with Borntreger and Cole rather than himself, *see id.* at 19, that Bovy sometimes has difficulty persuading witnesses to provide him information (particularly when firearms are involved), *id.* at 22 and that Bovy believed he was investigating an assault with a shotgun at the time he applied for a search warrant. *Id.* at 26.

Even if it was improper for Judge Roberts to hear evidence from the Government prior to determining if Miller met his initial evidentiary burden, I find that he did not rely on evidence from the Government used to "bolster" its affidavit in concluding that Miller did not make the required substantial preliminary showing and was not entitled to a *Franks* hearing. *See McMurtrey*, 704 F.3d at 513-14 (concluding it was "impossible to resolve the officers' factual contradictions as set forth in their conflicting warrant affidavits without improperly relying on the bolstering information" that the Government

presented during the pre-*Franks* hearing). To the extent any of the Government's evidence could be considered as "bolstering" the affidavit, such evidence consists of (1) Bovy's explanation that the "I" with regard to Borntreger's and Ms. Cole's statements is actually Thomas and Thomas was the one who wrote that statement and (2) that he did not believe the other individuals he spoke with (Latham's daughter, her aunt, Johnson) had relevant information. *See* Doc. No. 63 at 10, 13. As explained below, Judge Roberts did not rely on this evidence from the Government in determining that Miller failed to make the necessary substantial preliminary showing that Bovy (1) knowingly and intentionally included a false statement or made an omission or did so with reckless disregard for the truth or that (2) the allegedly false statement or omissions were necessary to the finding of probable cause. As such, any procedural error by Judge Roberts in hearing the Government's evidence before making the *Franks* determination is harmless. *See United States v. Arnold*, 725 F.3d 896, 900, n.3 (8th Cir. 2013) ("We can find no instance where the district court relied on any information other than the search warrant affidavit and [defendant's] own affidavit detailing the alleged misrepresentations and omissions."); *United States v. Graf*, 784 F.3d 1, 7 (1st Cir. 2015) (concluding that even if the magistrate judge erred in considering evidence from the Government, the district court did not err in denying a *Franks* hearing because defendant failed to make the initial substantial preliminary showing).

Judge Roberts noted that under *Franks*, a defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. He then considered the alleged false statements in Bovy's affidavit in support of the search warrant. Miller argued that the last two paragraphs of the affidavit, "when read together, are materially false or misleading." Doc. No. 57 at 18 (citing Doc. No. 11-2 at 3). The last two paragraphs provide:

> Officer Thomas with the Waterloo Police Department spoke with Takeela Latham who advised while at her home at 1005 W. Mulan, she walked out of her residence and noticed a suitcase on her deck. Latham 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. Latham advised her friend Jarrell Cole to take the suitcase and place it in Levi Miller's truck that was located in the parking area of the apartment. Latham then advised she heard someone coming down the stairs from the upstairs apartment. Latham advised she turned to see Defendant walking with a shotgun in his hands and cursing. Latham advised Defendant pointed the gun at her and Jarrell Cole. Latham described the gun as having a black barrel and wood along the stock. Latham advised herself and Jarrell Cole ran back into their apartment.
>
> I spoke with witnesses Kayla Borntreger and Chelsea Cole who were also on scene as the incident unfolded. Chelsea Cole and Kayla Borntreger advised the gun was black in color and had wood coloring around the stock. Kayla Borntreger and Chelsea Cole advised Defendant as wearing a red shirt and having dreads in his hair pulled back into a pony tail.

Id. (citing Gov. Ex. 1 at 4). Judge Roberts noted that the only false affirmative statement Miller could point to was Bovy's assertion that he, rather than Officer Thomas, spoke with Borntreger and Ms. Cole.[12] *Id.* Judge Roberts found that this false statement ("I spoke with witnesses Kayla Borntreger and Chelsea Cole . . . .") did not give rise to a *Franks* violation. *Id.* at 19.

Judge Roberts also found that any alleged omissions did not entitle Miller to a *Franks* hearing. Miller argued that Bovy recklessly omitted Borntreger's statement that contradicted Latham's claim that Miller pointed a gun at someone. *Id.* at 20 (citing Doc. No. 11-2 at 4). Judge Roberts reasoned the record did not show that Bovy entertained serious doubts as to the truthfulness of his statements or had any obvious reasons to doubt the accuracy of the information he wrote in the affidavit. *Id.* at 21. Finally, Judge Roberts found that Bovy did not act with reckless disregard for the truth when he failed

[12] At the hearing, Bovy explained that Thomas was the officer who spoke with Borntreger and Ms. Cole.

to note that Latham's account was inconsistent with the physical layout of the location. He noted that contrary to Miller's argument, Latham's account does not require a direct path between the stairs to Miller's apartment and the back of the residence. *Id.* at 23. He explained that even the mere possibility of a discrepancy would not have caused Bovy to entertain serious doubts about the truthfulness of the statements in the affidavit and there were no obvious reasons for him to doubt the accuracy of the information he put in the application. *Id.*

Judge Roberts explained that even if Bovy intended to mislead the judge or acted with reckless disregard for the truth, Miller was still not entitled to a *Franks* hearing because the false statement was not necessary to the issuing judge's finding of probable cause, nor was the omitted information clearly critical to a finding of probable cause. *Id.* at 24. With regard to the false statement "I spoke with witnesses Kayla Borntreger and Chelsea Cole," Judge Roberts found this was not necessary to the probable cause finding. If the affidavit had correctly stated "Officer Thomas spoke with witnesses Kayla Borntreger and Chelsea Cole," Judge Roberts reasoned the issuing judge's weighing of the facts would not have changed as the false part of the statement did not alter the content of the witnesses' statements and Miller did not offer any reason as to why the issuing judge may have found one officer credible over the other. *Id.* at 25. Moreover, both officers were involved in the investigation.

With regard to the omission of Borntreger's statement that Miller did not point the gun at any of the eyewitnesses and could not see the eyewitnesses, Judge Roberts found this omission was not clearly critical to the probable cause finding. Multiple witnesses observed Miller angry and cursing while carrying a shotgun. Even if Borntreger did not see Miller point the shotgun, the officer could reasonably conclude that Miller had been carrying the shotgun in a threatening manner. Moreover, all of the eyewitnesses except Borntreger saw Miller walk back toward his apartment with the shotgun. Finally, Latham stated that Miller had pointed the shotgun at her. Thus, even if Borntreger's statement that Miller had not seen them had been included, the eyewitness statements as a whole

still would have created a fair probability that evidence of a crime would be found in Miller's residence. *Id.* at 25-26.

With regard to the omitted statements from Latham's daughter, the aunt and Johnson, Judge Roberts found these were also not clearly critical to the probable cause finding. The daughter and aunt stated only that they did not hear any loud noises. Judge Roberts noted that loud noises are not a requirement for the crime Bovy was investigating (displaying a firearm in a threatening manner towards another person). *Id.* at 26. Similarly, Johnson's statement that he heard Miller and his wife arguing is not inconsistent with Latham's report of Miller pointing a shotgun at her. *Id.* at 27.

Finally, with regard to the alleged discrepancy between Latham's statements and the physical layout of the residence, Judge Roberts found this was not clearly critical to the probable cause finding. As noted above, Judge Roberts reasoned that this was not necessarily a discrepancy and even if it was, it would not have necessarily changed the issuing judge's finding of probable cause. *Id.* For these reasons, Judge Roberts concluded Miller was not entitled to a *Franks* hearing.

Miller makes the same arguments in his objections to the R&R. He argues that the affidavit is false and misleading because Bovy admitted at the hearing that he had not spoken to Latham, Mr. Cole, Ms. Cole or Borntreger and did not have first-hand knowledge of what they said. Doc. No. 62-1 at 15. He also argues it was false and misleading not to include information that contradicted Latham's claim that Miller pointed a gun toward her. *Id.* He describes the various discrepancies between the statements and the affidavit and contends Bovy deliberately omitted such information, as well as information that he spoke with Latham's daughter, her aunt and Johnson. *Id.* at 16. He objects to the R&R finding that he did not offer evidence that Bovy omitted information to intentionally mislead the judge and did not do so with reckless disregard for the truth. *Id.* at 18. He contends Bovy admitted at the hearing that he deliberately omitted information from the application if it was inconsistent with the claim that Miller pointed

a shotgun at Latham and argues that the R&R fails to acknowledge this admission. *Id.*[13] He compares the situation to the one in *United States v. Jacobs*, 986 F.2d 1231, 1234-35 (8th Cir. 1993), in which the officer stated that a drug dog showed an "interest" in a package that was the subject of the warrant, but omitted information that the drug dog did not in fact "alert" to the package. *Id.* The court found that when including the information regarding the failed alert, the application lacked probable cause. *Jacobs*, 986 F.2d at 1235. Miller argues that the omitted facts here are similarly relevant and their omission was either deliberate or with reckless disregard for the truth.

Miller additionally objects to the R&R's discussion of why Bovy had good reason to believe Latham, despite "substantial evidence" that she was not credible. Doc. No. 62-1 at 19. He contends the issuing judge for the warrant should have been provided all relevant information to assess Latham's credibility. *Id.* at 19-20 (citing *United States v. Glover,* 755 F.3d 811, 814 (7th Cir. 2014)). Under *Glover*, Miller argues that affidavits for warrants based on informants are highly fact-specific and that information about the informant's credibility or potential bias is crucial. *Glover*, 755 F.3d at 816. Miller

[13] I have read the transcript from the hearing and do not find any such admission. Bovy stated Thomas did not tell him anything about the interviews with Ms. Cole or Borntreger that he thought was necessary to include or that he intentionally left out of the warrant. He also testified he did not intentionally leave anything out that he thought could result in the warrant going unsigned. *See* Doc. No. 63 at 12. When asked why he did not include the information about Latham's daughter, the aunt or Johnson, Bovy testified they had stated they were not a part of it and did not know what was going on. *Id.* at 15-16, 19. Bovy testified he also did not know that Borntreger had said Miller did not see Latham because Thomas drafted the part of the affidavit concerning Borntreger's and Ms. Cole's statements. *Id.* at 16. Bovy stated that in drafting the warrant he did not include every single fact they knew, but had to make a selection of the relevant facts that he thought were relevant to the case to put in the application and did not put in or leave out anything with the intent to deceive or mislead the judge. *Id.* at 19. In any event, such evidence was not submitted by Miller as part of his preliminary showing in support of a *Franks* hearing. The testimony from the hearing would be considered "bolstering" evidence by the Government. Because Miller did not rely on such evidence in making his preliminary showing, I find it is inappropriate to consider this evidence in determining whether Miller is entitled to a *Franks* hearing. The only evidence Miller provided was that Bovy did not talk to Ms. Cole and Borntreger. *See* Doc. No. 11-2 at 3-4. He failed to show that the word "I" in the affidavit was anything beyond negligence.

argues Bovy should have included information in the affidavit that Latham claimed she did not like Miller and had an ongoing dispute with him. He argues Bovy also failed to inform the judge about Latham's statements concerning where she was and statements from other witnesses that contradicted Latham's. *Id.* at 21.

Finally, Miller objects to the R&R's findings that Latham's claim (as set forth in the affidavit) would constitute an assault and give rise to the search of Miller's apartment for the firearm independent of her claim that Miller pointed the shotgun at her. *Id.* He also objects to the finding that even if the omitted information had been presented to the judge, the eyewitness statements still would have created a fair probability that Miller had committed an assault and that evidence of the crime would be found in his apartment. *Id.* at 22. Miller argues that because Bovy deliberately withheld information about where Latham was and what Miller did, both of Latham's claims (that Miller had a gun and was yelling and that Miller pointed the gun at her) should be excised from the affidavit.

He adds these claims should be stricken for the additional reason that Borntreger stated that Miller did not even see Latham, let alone point a gun at her. *Id.* Additionally, Bovy failed to advise the judge that Borntreger said they were all inside the apartment when Miller walked by with a gun. He contends this is consistent with Ms. Cole's statement that Latham was inside the apartment on the porch.[14] He also notes Bovy should have informed the judge that the stairs to Miller's apartment are in the front of the house, not the back of the house where Latham claimed to be, and thus, she would not have been able to see him coming down the stairs.[15] *Id.* at 23. Miller argues the last paragraph from the affidavit should also be stricken because it suggests that Borntreger

[14] Ms. Cole did not say Latham was inside, but that "they" were outside. Def. Ex. 2, video of Ms. Cole. She was asked who was with her and she named Latham, Mr. Cole and Borntreger, but did not clarify where they were in relation to her. She also stated "as they were coming back in the house" Miller went upstairs. *Id.*

[15] Government Exhibit 3 shows the stairs do not have risers or are slatted such that a person is able to see through them from the back of the house. *See* Doc. No. 50.

and Ms. Cole supported Latham's claim that Miller pointed the gun at Latham. Without this information and Latham's claims excised from the affidavit, Miller argues there is no probable cause. He adds the fact that Borntreger, Ms. Cole and Mr. Cole all saw Miller yelling with a gun is insufficient to believe that Miller committed a crime. *Id.* at 24 (citing Iowa Code § 708.1 providing that an assault occurs when a person "intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.").

I agree with Judge Roberts' *Franks* determination. The misstatement about who spoke with Borntreger and Ms. Cole is a minor discrepancy that does not warrant a *Franks* hearing. *See United States v. Coleman*, 349 F.3d 1077, 1084 (8th Cir. 2003) ("A 'minor discrepancy' in the wording of an officer's statement is not sufficient under *Franks* to establish that the officer acted deliberately or recklessly in making the statement."). Miller did not make a substantial preliminary showing that Bovy knowingly and intentionally included that statement or did so with reckless disregard for the truth. Even if Miller could make such a showing, the correction[16] of who spoke with the witnesses is not necessary to the probable cause finding as it does not change the content of the witnesses' statements, and, as Judge Roberts noted, there is no evidence that one officer could be considered more credible over the other.

With regard to the omissions concerning (1) inconsistencies between Borntreger's and Latham's statements, (2) Latham's account of the physical layout of the location and (3) the information from other residents of the apartment building, I do not find Miller has shown this information was intentionally omitted or omitted with reckless disregard for the truth or that it is material or critical to the probable cause determination. Miller's

[16] Miller is incorrect that the whole second paragraph should be stricken to analyze whether there is probable cause. Only the false information need to be excised or corrected – in this case the "I." *See United States v. Arnold*, 725 F.3d 896, 898 (8th Cir. 2013) (noting the second requirement of a *Franks* hearing is a showing that "if the false information is excised" the affidavit no longer establishes probable cause).

only evidence on this point prior to the hearing were the statements themselves. He did not produce any evidence that Bovy knew about the substance of the four witness statements, let alone any inconsistencies. To the extent the omissions could be deemed to have been made in reckless disregard for the truth, they do not meet the second step of being critical to the probable cause determination. None of the omissions have any bearing on the witnesses' consistent statements that Miller came to the back of the house in response to Latham and Cole moving the bag to his truck, holding a shotgun in a threatening manner and repeatedly saying "motherfuckers." Any discrepancies regarding where they made this observation and whether they aligned with the physical layout of the building are minor and extraneous.

All witnesses described being outside and, at some point, going inside Latham's apartment after Miller exited his apartment. The precise timing is not necessarily relevant except to the fact of whether Miller pointed the gun at Latham and allegedly committed an assault. Latham explained that when Miller "turned the corner" and came walking toward the truck, she saw him holding the shotgun saying "these motherfuckers" at which point she and Mr. Cole went into her apartment. She stated as he "came down" he had the gun pointed at them. Notably, she did not say down the stairs, and could be referring to Miller walking down the side of the house towards the truck. Mr. Cole's account of the incident largely corroborates Latham's in that he saw Miller with the shotgun saying "motherfuckers" at which point they went into Latham's apartment. Ms. Cole states that "they" were outside (presumably referring to Mr. Cole and Latham) and she was on her way out when she saw Miller standing there with a gun in his hands. She stated she could not tell where he came from because she was not outside then. She stated she could see everything through the glass door on the porch. It makes sense that Ms. Cole did not see Miller point the gun at anyone since Mr. Cole and Latham were coming back to the apartment by then. Ms. Cole also corroborates Latham's recollection that Borntreger was in the car. Borntreger's recollection of the events is slightly different. She stated that Mr. Cole and Latham put the bag in the truck and came back in the apartment when

they heard Miller coming down the stairs. She stated all of them stayed in "the front doors" so they could see. Then, "they came out" and that is when she and the others saw Miller with the gun walking to the back of the house. After a few minutes in the back, they saw him walk back around the house. Borntreger stated he did not see them and they were watching from the front porch window. Notably, all witnesses had similar descriptions of the gun, the people involved and the general chain of events.

Even if I found the discrepancies in the witness statements were intentionally omitted or omitted with reckless disregard for the truth, this would not require excising Latham's claims to determine whether the omissions impacted the probable cause analysis as Miller argues. Rather, I must consider whether the affidavit was supported by probable cause if the omitted information *had been included*. *See United States v. Williams*, 477 F.3d 554, 557 (8th Cir. 2007) (noting that where a probable cause determination was premised on an affidavit containing false or omitted statements, the resulting search warrant may be invalid if the defendant can prove by a preponderance of the evidence "(1) that the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading . . . and (2) that the affidavit, if supplemented by the omitted information would not have been sufficient to support a finding of probable cause."); *Hunter v. Namanny*, 219 F.3d 825, 830 (8th Cir. 2000) ("a reconstructed affidavit must also include material allegedly omitted with reckless disregard for the truth."). If the information concerning the full extent of statements from Latham, Borntreger, Ms. Cole and Mr. Cole had been included in the affidavit, as well as information concerning the layout of the apartment and the location of Miller's stairs, I do not find that such information would render the affidavit unsupported by probable cause.

"The determination of whether or not probable cause exists to issue a search warrant is to be based upon a common-sense reading of the entire affidavit." *United States v. Notman*, 831 F.3d 1084, 1088 (8th Cir. 2016) (quoting *United States v. Sumpter*, 669 F.2d 1215, 1218 (8th Cir. 1982)). Latham was the alleged victim in the case, not a

mere informant. *See United States v. Wallace*, 550 F.3d 729, 734 (8th Cir. 2008) ("Not only is more weight given to information where officers meet face-to-face with the informant and judge her to be credible, but law enforcement officers are entitled to rely on information supplied by the victim of a crime, absent some indication the information is not reasonably trustworthy or reliable."). It would have been reasonable for the issuing judge to believe her statement over Borntreger's or that evidence of a possible crime would be found in Miller's apartment even if the events (as recalled by one witness) did not precisely match up with the particular crime the officers believed they were investigating. Probable cause requires only a showing of facts "sufficient to create a fair probability that evidence of a crime will be found in the place to be searched." *United States v. Wells*, 223 F.3d 835, 838 (8th Cir. 2000). *See also United States v. Multschelknaus*, 592 F.3d 826, 828 (8th Cir. 2010) ("An affidavit establishes probable cause for a warrant if it sets forth sufficient facts to establish that there is a fair probability that contraband or evidence of criminal activity will be found in the particular place to be searched.") (cleaned up). Probable cause "does not require evidence sufficient to support a conviction, nor even evidence demonstrating that it is more likely than not that the suspect committed a crime." *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007) (citation omitted). For these reasons, Miller's objections as to the *Franks* hearing are overruled.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LEVI FARREN MILLER, Defendant.	No. 19-cr-2031-LTS **REPORT AND RECOMMENDATION ON DEFENDANT'S REQUEST FOR A *FRANKS* HEARING, MOTION TO SUPPRESS, MOTION TO DISMISS, AND SECOND MOTION TO DISMISS**

TABLE OF CONTENTS

Page

I. INTRODUCTION

The matters now before me are Defendant's Motion to Suppress and Request for *Franks* Hearing, Motion to Suppress, Motion to Dismiss, and Second Motion to Dismiss. (Docs. 11, 12, 14, and 17). The Government timely filed its responses. (Docs. 30, 32, 33, and 34.) On May 8, 2019, the Grand Jury charged Defendant with Possession of a Firearm by a Felon in violation of 18 U.S.C. Sections 922(g)(1) and 924(a)(2) and Possession of a National Firearms Act Short-Barreled Shotgun Not Registered to Possessor in violation of 26 U.S.C. Sections 5841, 5861(d) and 5871. (Doc. 2.) The charges arose from a search of his residence pursuant to a warrant issued by the Honorable Joel Dalrymple, District Court Judge of the Iowa District Court.

The Honorable Charles J. Williams, United States District Court Judge, referred these motions to me for a Report and Recommendation. On October 7, 2019, I held an evidentiary hearing on Defendant's motions. The Government called Waterloo Police Officer Jeremy Berryman ("Officer Berryman"); Waterloo Police Officer Alexander Bovy ("Officer Bovy"); Waterloo Police Officer Steven Thomas ("Officer Thomas"); and Waterloo Police Officer Joseph Saunders ("Officer Saunders"). Defendant called no witnesses, and instead offered videos and documents. Following the hearing, each party timely submitted a supplemental brief. (Docs. 55 and 56.)

For the following reasons, I respectfully recommend that the Court deny all Defendant's motions.

II. FINDINGS OF FACT

This case involves Defendant's alleged possession of a short-barreled shotgun. Defendant's neighbor, Takeela Latham, called law enforcement to report Defendant possessing a shotgun and yelling at Ms. Latham for removing items from her porch and placing them in Defendant's truck. (Gov. Ex. 1 at 4.) Ms. Latham claimed Defendant pointed the shotgun at her and Jarrell Cole, after which she and Mr. Cole ran back into

Ms. Latham's apartment. (*Id.*) Officer Alexander Bovy, a police officer with the Waterloo Police Department, was the first to respond to the call regarding the alleged confrontation between Ms. Latham and Defendant. Defendant resided in the upstairs apartment of 1005 West Mullan Avenue in Waterloo, Iowa. (Bovy Oct. 7, 2019 Hr'g Test.) Ms. Latham and her daughter resided on the ground floor of the same residence. (Gov. Ex. 1 at 4.)

A. Officers Bovy and Payne's Initial Contact with Ms. Latham's Daughter and the Daughter's Aunt at 1005 West Mullan Avenue

Officer Bovy arrived at 1005 West Mullan Avenue at approximately 6:20 p.m. on February 3, 2019. (*Id.*) When Officer Bovy first arrived at the residence, he walked to the back of the residence but did not see anyone. (Doc. 24 at 1.) Officer Payne arrived at the residence shortly after Officer Bovy. (*Id.*; Berryman Hr'g Test.) Officers Bovy and Payne then knocked on the back door of 1005 West Mullan Avenue to contact residents. (Doc. 24 at 1; Def. Ex. 2 at 5:45.)

After knocking on the back door, Officers Payne and Bovy first made contact with a girl who identified herself as a ten-year-old resident who lives at 1005 West Mullan Avenue with her "auntie" ("the aunt"). (Def. Ex. 2 at 5:50.) The girl later identified herself as Ms. Lathan's daughter, and stated that Ms. Latham left with her friends to get some food. (*Id.* at 7:45-8:00.) The aunt consented to Officers Bovy and Payne entering the apartment. (*Id.* at 6:18.) Officer Bovy asked if the aunt heard people yelling, but she denied having heard anything. (*Id.* at 6:30-6:46.)

B. Officers Bovy and Payne's Contact with Ms. Latham and Defendant's Neighbor, Emmitt Johnson

Officers Bovy and Payne next contacted Ms. Latham and Defendant's neighbor, Emmitt Johnson. The officers knocked on Mr. Johnson's door to initiate contact. (*Id.* at 10:22.) Mr. Johnson initially denied knowledge of an altercation, stating he had only recently arrived at his residence. (*Id.* at 10:40.) Mr. Johnson eventually acknowledged

he heard Defendant and Defendant's wife Sarabeth Miller arguing but stated no one else was outside and there was no physical altercation. (*Id.* at 10:40-11:35.)

C. Law Enforcement Contact with Defendant, Ms. Miller, and Ms. Randall

In addition to Defendant, Ms. Miller and Michele Randall also reside at 1005 1/2 West Mullan Avenue. (Gov. Ex. 1 at 4.) Officer Bovy knocked on Defendant's apartment door, and Defendant answered. (Bovy Hr'g Test.) Defendant spoke with the officers about a number of issues, including a prior incident involving the discovery of a pipe bomb at a different residence of Defendant and an altercation where Defendant asserted he had been beaten by the police. (*Id.)* Defendant, Ms. Miller, and Ms. Randall stated they all went to the back of the residence after hearing a loud noise because they were concerned someone was damaging their truck in the back parking lot. (Gov. Ex. 1 at 4.) Ms. Miller told Officer Bovy she was carrying a broken pool stick and Defendant was carrying a large knife when they checked the truck. (*Id.*) Defendant also stated he was carrying a large fixed blade knife when he checked the truck with Ms. Miller. (Doc. 23-2 at 1.) Ms. Miller claimed they walked past Ms. Latham behind the residence, where Ms. Latham was in an argument with an unidentified male. (Gov. Ex. 1 at 4.)

Officer Bovy requested Defendant consent to a search of the residence, but Defendant declined. (Bovy Hr'g Test.) Officer Bovy then spoke with Officer Thomas, who had been dispatched to 123 Elmwood Street, where Ms. Latham was located, at approximately 6:45 p.m. (Thomas Oct. 7, 2019 Hr'g Test.) While at 123 Elmwood Street, Officer Thomas spoke with Ms. Latham, Mr. Cole, Chelsea Cole, and Kayla Borntreger, who all reported seeing Defendant with a gun. (Gov. Ex. 1 at 4; Bovy Hr'g Test.) Ms. Borntreger and Ms. Cole stated Defendant was wearing a red shirt and had dreadlocks pulled into a ponytail. (Gov. Ex. 1 at 4.) Officers Thomas and Bovy called their sergeant supervisor, who advised them to obtain a search warrant. (Thomas Hr'g Test.)

After deciding to obtain a search warrant, law enforcement secured the residence to make sure no one was present other than those with whom law enforcement already made contact, Ms. Miller, Ms. Randall, and Defendant. (*Id.*) The officers decided that securing the residence required them to enter and conduct a protective sweep of the residence, only looking in areas large enough for people to hide. (Bovy Hr'g Test.)

Officers Berryman and Bovy testified they believed Defendant, Ms. Miller, and Ms. Randall could have left the residence if they desired but did not explicitly tell Defendant and the other residents they were free to leave. (*Id.*; Berryman Hr'g Test.) Officer Berryman testified he was not told Defendant and the residents were required to stay. (Berryman Hr'g Test.) Special Agent Saunders, who was not present when law enforcement secured the residence, reviewed video of officers securing the residence and could not recall officers instructing the residents that they were free to leave if they wanted. (Saunders, Oct. 7, 2019 Hr'g Test.) Defendant briefly left the residence to look at his truck. Officer Berryman accompanied him as a precautionary measure for officer safety. (Berryman Hr'g Test.) If Defendant, Ms. Miller, or Ms. Randall left the residence, law enforcement would not have allowed them back in. (Bovy Hr'g Test.) However, law enforcement did not tell Defendant, Ms. Miller, or Ms. Randall they were free to leave with the condition that they could not reenter the residence until a search was completed.

After informing Defendant, Ms. Miller, and Ms. Randall that law enforcement intended to obtain a search warrant for the residence, Ms. Miller told Officer Bovy she was willing to go to the police department and provide a statement.[1] (Bovy Hr'g Test.) Defendant and Ms. Randall were unwilling to provide statements. (*Id.*) Officer Bovy took Ms. Miller to the Waterloo Police Department so she could make a statement. (*Id.*) Officer Thomas returned to 123 Elmwood Street to bring Ms. Latham, Mr. Cole, Ms.

[1] Ms. Miller's statement was not offered into evidence.

Borntreger, and Ms. Cole to the Waterloo Police Department for interviews. (Doc. 23-1 at 1.) Each witness except Ms. Miller stated Defendant was holding a shotgun when he exited his residence. The witnesses provided somewhat differing accounts of whether Defendant pointed the shotgun at the witnesses, whether Defendant could see the witnesses, and where the witnesses were located when Defendant exited his apartment while holding the shotgun.

D. Police Interview with Ms. Latham

Officer Thomas interviewed Ms. Latham at the Waterloo Police Department on February 3, 2019. (Doc. 23-1 at 1; Def. Ex. 2, video of Ms. Latham.) During this interview, Ms. Latham described plans for Ms. Borntreger to give her a ride to the grocery store prior to the alleged incident. (Def. Ex. 2, video of Ms. Latham, at 1:05.) Ms. Latham stated that as she was leaving her apartment to get into Ms. Borntreger's car, Ms. Latham noticed a suitcase sitting on her porch, directly outside the back door that leads into her kitchen. (*Id.* at 1:18.) Ms. Latham believed this suitcase belonged to her upstairs neighbors, including Defendant. (*Id.*at 1:45.) Ms. Latham asked Mr. Cole to place the suitcase in Defendant's truck located behind the apartment building. (*Id.*) She then stated that Defendant exited his apartment while Ms. Borntreger was still sitting in her car and Mr. Cole and Ms. Latham had not yet reached Ms. Borntreger's car. (*Id.* at 2:30-2:53.) Ms. Latham claimed to have witnessed Defendant and an unidentified woman walking towards the pickup truck. (*Id.* at 3:10.) Ms. Latham stated that Defendant, carrying a shotgun, pointed it directly at her and Mr. Cole. (*Id.* at 3:45.) She stated she could hear Defendant say, "These motherfuckers," as he walked toward the pickup truck. (*Id.* at 3:10.) She stated this scared her, so she and Mr. Cole started to quickly walk back to her apartment. (*Id.* at 3:28.) Ms. Cole followed closely behind them from the direction of Ms. Borntreger's car, although the interview does not provide a clear picture of whether Ms. Cole was sitting inside Ms. Borntreger's car prior to

walking towards Ms. Latham's apartment or had walked with Mr. Cole and Ms. Latham from Ms. Latham's apartment towards Ms. Borntreger's car. (*Id.*) Ms. Latham stated that Defendant relaxed his shotgun's position, allowing the barrel to angle down towards the ground as she and Mr. Cole hurriedly walked back to her apartment. (*Id.* at 3:40.)

Ms. Latham described Defendant's shotgun as "brown" but stated Ms. Borntreger had a better angle to see the gun because she remained outside while the others hurried towards Ms. Latham's apartment. (*Id.* at 7:00-7:10.) Ms. Latham reiterated that Ms. Borntreger was in the car during the alleged incident, noting she could have driven away if Defendant started shooting. (*Id.* at 7:20.)

Ms. Latham later stated she had the door to Ms. Borntreger's car partially open when she heard Defendant come down the stairs from his apartment. (*Id.* at 7:38.) This differed from her prior statement that she was not by the vehicle when Defendant started to come down. (*Id.* at 3:20.)

Ms. Latham acknowledged she has a poor relationship with Defendant and dislikes him. (*Id.* 8:55.) She noted this was not her first encounter with Defendant, and she had previously called the police about her neighbors. (*Id.* at 8:15.) She had previously called the police to complain that Defendant purposefully moved the bathtub in his apartment and continuously ran the water, causing her daughter's bedroom ceiling to collapse. (*Id.* at 8:28.) She had also called the police to complain that Defendant yelled racial slurs at her children. (*Id.* at 8:44.)

E. Police Interview with Mr. Cole

Officer Thomas interviewed Mr. Cole at the Waterloo Police Department on February 3, 2019. (Doc. 23-1 at 1; Def. Ex. 2, video of Mr. Cole.) During this interview, Mr. Cole described Defendant descending the stairs from his apartment with a shotgun in hand. However, he did not clearly describe how Defendant held the shotgun or who was present with him during the alleged incident.

Mr. Cole stated he and Ms. Latham were leaving her apartment building when she noticed a bag that did not belong to her on her porch. (Def. Ex. 2, video of Mr. Cole, at 1:05.) Ms. Latham asked Mr. Cole to move the bag to her neighbor's pickup truck. (*Id.* at 1:35.) Mr. Cole did not state whether he actually placed the suitcase in the pickup truck. (*Id.*) He stated Defendant's apartment windows were open, which allowed Defendant to hear him talking with Ms. Latham. (*Id.* at 1:45.)

Mr. Cole stated "they" came downstairs, referring to Defendant and at least one other person, but he did not identify who accompanied Defendant. (*Id.* at 1:45.) Defendant was allegedly carrying a shotgun as he walked down the stairs from his residence, saying, "Motherfuckers, motherfuckers, motherfuckers." (*Id.*; *Id.* at 2:30, 3:00.) Mr. Cole described how Defendant held the shotgun, stating Defendant "had [the shotgun] like this," as he mimicked how Defendant held the shotgun. (*Id.* at 1:50.) Mr. Cole positioned his hands to demonstrate holding the shotgun in both hands across his body. The butt of the weapon is not raised to his shoulder. Mr. Cole demonstrated holding a shotgun in a position of readiness to fire, not as one might carry a shotgun to merely transport it or to avoid a discharge. (*Id.*) Mr. Cole stated Defendant "pointed" the shotgun but did not state whether Defendant pointed the shotgun at any individual. (*Id.* at 2:30.) Mr. Cole described the shotgun as having a black barrel and brown, "wood-like" stock. (*Id.* at 2:00-2:06.) He described Defendant as wearing a red shirt and having dreadlocks pulled back into a ponytail. (*Id.* at 2:10.)

Mr. Cole stated that after seeing Defendant descend the stairs with the shotgun, "we all hurried back in the house." (*Id.* at 2:45.) He did not state who is included in the term "we." (*Id.*) Mr. Cole stated he could hear Defendant walk back up to his apartment after Mr. Cole returned to Ms. Latham's apartment. (*Id.* at 3:55.)

Mr. Cole acknowledged an existing animosity between Ms. Latham and her friends and Defendant. (*Id.* at 3:20.) He stated that Defendant has called Ms. Latham

and her friends racial slurs in the past but stated this was the first time he saw Defendant carrying a gun. (*Id.*)

F. Police Interview with Ms. Cole

Officer Thomas interviewed Ms. Cole at the Waterloo Police Department on February 3, 2019. (Doc. 23-1 at 1; Def. Ex. 2, video of Ms. Cole.) Ms. Cole described how she witnessed the alleged incident from inside Ms. Latham's porch.

Ms. Cole stated she and Ms. Latham were on Ms. Latham's porch, Ms. Borntreger was in her car, and Ms. Cole was walking from inside Ms. Latham's apartment towards the porch immediately before the alleged incident. (Def. Ex. 2, video of Ms. Cole, at 1:05; 2:20.) Ms. Cole stated Defendant held a gun as he stood outside with two women, repeatedly saying, "Motherfuckers." (*Id.* at 1:15; 2:10.) Ms. Cole did not elaborate on the term "outside," so it is unclear whether this means outside on the porch, outside by the pickup truck, or in another location outside of the apartment building. She observed Defendant and the two women from Ms. Latham's porch, as she could look through the porch's glass door. (*Id.* at 2:00.)

Ms. Cole described the gun Defendant held as a brown shotgun. (*Id.* at 1:35; 3:15.) She stated she was unsure whether Defendant pointed the gun at anyone. (*Id.* at 2:25.) After seeing Defendant outside with a gun, Ms. Cole stated that she and Ms. Latham returned to Ms. Latham's apartment, and Defendant walked up the stairs back to his apartment. (*Id.* at 2:40.)

Ms. Cole described Defendant as wearing a red shirt and black or blue sweatpants. (*Id.* at 1:40.) She further described Defendant as having his hair pulled back in a ponytail. (*Id.*)

Officer Bovy's affidavit in support of the search warrant incorrectly states, "I spoke with" Ms. Cole. (Gov. Ex. 1 at 4.) Officer Thomas actually spoke with her. (*Id.*; Bovy Hr'g Test.) The officers' testimony was contradictory regarding how this

misstatement occurred. Officer Bovy stated that he and Officer Thomas each typed a portion of the document. Officer Bovy stated that Officer Thomas typed "I spoke with" Ms. Cole, but Officer Bovy signed the document so it should have stated, "Officer Thomas spoke with" Ms. Cole. (Bovy Hr'g Test.) Officer Thomas stated Officer Bovy typed while he dictated. (Thomas Hr'g Test.)

G. Police Interview with Ms. Borntreger

Officer Thomas interviewed Ms. Borntreger at the Waterloo Police Department on February 3, 2019 (Doc. 23-1 at 1; Def. Ex. 2, video of Ms. Borntreger.) Ms. Borntreger's statements did not align with aspects of the other witnesses' statements, especially regarding where witnesses were located during the incident.

Ms. Borntreger stated Ms. Latham called her for a ride to the grocery store. (Def. Ex. 2, video of Ms. Borntreger, at 1:05.) She then drove to Ms. Latham's apartment and parked behind the apartment. (*Id.* at 1:15.) She entered Ms. Latham's apartment and waited for Ms. Latham to finish getting ready. (*Id.* at 1:20.) Ms. Borntreger stated Ms. Latham saw Defendant's suitcase on the porch as she, Ms. Latham, Mr. Cole, and Ms. Cole walked out of Ms. Latham's apartment.[2] (*Id.* at 1:20; 4:45.) Ms. Latham and Mr. Cole then put the suitcase into the truck parked behind the apartment. (*Id.* at 1:35.) Ms. Latham and Mr. Cole then returned to Ms. Latham's apartment. (*Id.*)

Shortly after Ms. Latham and Mr. Cole returned to the house, Ms. Borntreger heard Defendant and two women come down the stairs outside of the apartment. (*Id.* at 1:42.) Ms. Borntreger stated that she, Ms. Latham, Mr. Cole, and Ms. Cole stayed in the front porch to watch Defendant and the two women. (*Id.* at 1:55.) She said that Defendant was carrying a gun while mumbling, "Fuck motherfuckers," and walking

[2]Ms. Borntreger first stated Ms. Latham saw the suitcase as "we" left Ms. Latham's apartment, making it difficult to determine who "we" referred to in this context. Later, at 4:45 in the video, Ms. Borntreger clarified that "we" meant her, Ms. Latham, Mr. Cole, and Ms. Cole.

behind the apartment building. (*Id.* at 2:05; 3:00.) Ms. Borntreger told Officer Thomas that as Defendant walked around the apartment building, she, Ms. Latham, Mr. Cole, and Ms. Cole decided to exit the apartment building through Ms. Latham's back door and go to Ms. Borntreger's residence to call the police. (*Id.* at 2:15.)

Ms. Borntreger described the gun Defendant was holding as "a regular shotgun" with a wood-grain grip and stock and a black barrel. (*Id.* at 2:35-2:50.) She stated Defendant did not point the shotgun at anyone because Defendant could not see her or the other witnesses, as they all watched Defendant from inside Ms. Latham's porch. (*Id.* at 4:27-5:00.) Ms. Borntreger instead described Defendant as carrying the shotgun in a manner that would allow him to shoot quickly if necessary. (*Id.*)

Ms. Borntreger described one of the women with Defendant as approximately the same age as Defendant, with dark hair, while the other woman appeared to be several years older than Defendant. (*Id.* at 3:15.) The woman who was approximately the same age as Defendant wore a gray and white striped coat, while the older woman wore a gray or black T-shirt and jeans. (*Id.* at 3:40.)

Ms. Borntreger described Defendant as wearing a red T-shirt with the sleeves cut off and pants that were either camouflage or had another pattern. (*Id.* at 3:50.) She stated Defendant had dark hair in dreadlocks pulled into a ponytail. (*Id.* at 4:00.)

Officer Bovy's affidavit in support of the search warrant contains the same misstatement regarding Ms. Borntreger's interview as the misstatement regarding Ms. Cole's interview. Officer Bovy wrote "I spoke with" Ms. Borntreger, but Officer Thomas actually spoke with her. (Gov. Ex. 1 at 4; Bovy Hr'g Test.) The explanations for the discrepancy are the same as above. (Bovy Hr'g Test.; Thomas Hr'g Test.)

H. Search of 1005 1/2 West Mullan Avenue and Subsequent Arrest of Defendant

After Ms. Miller provided a statement at the Waterloo Police Department, Officer Bovy drove her back to the residence. (Bovy Hr'g Test.; Gov. Ex. 1 at 1.) Officer Bovy

then finalized the affidavit and presented it to a judge who issued a search warrant for 1005 1/2 W. Mullan Avenue at approximately 9:36 p.m. (*Id.*) At the time Officer Bovy applied for the search warrant, he believed law enforcement was investigating a possible assault involving a shotgun.[3] (Bovy Hr'g Test.) Officer Bovy thus sought the search warrant to find the firearm allegedly used in the assault. (*Id.*) Officer Bovy returned to the Waterloo Police Department to make a copy of the signed warrant, and then returned to the residence to execute the warrant. *(Id.)* The application describes Defendant "walking with a shotgun in his hands and cursing," as well as having "pointed the gun" at two people. (Gov. Ex. 1 at 4.)

Officer Bovy read the warrant to Defendant, Ms. Miller, and Ms. Randall when he returned to the residence, and the officers began the search. (*Id.*) Officer Thomas found a pump action shotgun with a black barrel and brown wood stock and foregrip propped against the door frame inside the kitchen. (Doc. 23-1 at 1; Gov. Ex. 3 at 12.) A T-shirt was covering part of the barrel, and the butt of the gun was in a pan filled with cat food. (Doc. 23-1 at 1; Gov. Ex. 3 at 12.)

Following the search, Defendant was placed under arrest. (Bovy Hr'g Test.; Doc. 24 at 2.) Upon arrest, Officer Bovy searched Defendant and found a red plastic straw with white powder residue and two plastic bags containing suspected methamphetamine. (Doc. 21-1 at 1; Doc. 24 at 2.) Defendant was indicted with two federal criminal counts, Possession of a Firearm by a Felon and Possession of a National Firearms Act Short-Barreled Shotgun Not Registered to Possessor. (Doc. 2 at 1.)

[3]IOWA CODE § 708.1(2)(C) 2019 (defining "intentionally point[ing] any firearm toward another, or display[ing] in a threatening manner any dangerous weapon toward another" as assault).

I. Conclusions from the Bureau of Alcohol, Tobacco, Firearms and Explosives Regarding the Shotgun Seized at 1005 1/2 West Mullan Avenue

The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") concluded the shotgun found in Defendant's residence is properly classified as a short-barreled shotgun as defined in 18 U.S.C. Section 921(a)(6). (Gov. Ex. 9 at 3.) Cody J. Toy, a Firearms Enforcement Officer with ATF, examined and tested the shotgun before sending a report to Special Agent Joseph Saunders classifying the firearm as a short-barreled shotgun. (Gov. Ex. 9.) Officer Toy measured the barrel length by placing the shotgun on a flat surface, closing the bolt, and inserting a cylindrical scale into the barrel's muzzle until the scale touched the bolt face. (*Id.* at 2.) Officer Toy measured the barrel and found it to be 17-7/8 inches long. (*Id.* at 2-3.) Photos show the barrel is not of uniform length, and it appears to be cut. (*Id.* at 12-14.) Although not uniform in length, the entire barrel also appears to be less than eighteen inches long. (*Id.* at 14.)

Special Agent Joseph Saunders is a police officer with the Waterloo Police Department and a task force officer with ATF. (Saunders Oct. 7, 2019 Hr'g Test.) He was not directly involved in the search of Defendant's residence, but was the recipient of ATF's report on the seized shotgun. (Gov. Ex. 9 at 1.)

III. ANALYSIS

A. Defendant was not entitled to a **Franks** *hearing.*

At the October hearing, I stated that I had doubts whether Defendant had demonstrated a sufficient showing that he was entitled to a hearing pursuant to *Franks v. Delaware*. Over the Government's objection, I decided that, in the interest of judicial economy, I would take up all the evidence at the October hearing, hold a *Franks* hearing, and then determine whether Defendant was entitled to the *Franks* hearing. Defendant incorrectly interpreted this to mean the Court found Defendant satisfied the burden to show he was entitled to a *Franks* hearing. (Doc. 55 at 8.)

Defendant offers three arguments in support of his request for a *Franks* hearing. First, Defendant argues that two paragraphs of the addendum to Officer Bovy's application for a search warrant are materially false or misleading when read together. (Doc. 11-2 at 3-5.) Second, Defendant argues he is entitled to a *Franks* hearing because Officer Bovy's application for a search warrant did not describe Officer Bovy's interactions with Defendant's neighbors prior to Officer Bovy's contact with Defendant. (*Id.* at 8.) Third, Defendant argues "officers failed to note in the application . . . that [Ms.] Latham's account was inconsistent with the physical layout of" 1005 West Mullan Avenue. (Doc. 55 at 13.) These arguments do not provide a substantial preliminary showing that Officer Bovy intended to mislead the issuing judge or acted with reckless disregard to whether the application would mislead the issuing judge.

The Government argues that Officer Bovy's application in support of the search warrant did not contain a materially misleading statement or omission. (Doc. 32-1 at 4.) The Government relies on *United States v. Neal* in arguing that false information and omissions in an affidavit do not necessarily mean the affiant included or omitted the information intentionally, deliberately, or with reckless disregard for the truth. *United States v. Neal*, 528 F.3d 1069, 1073 (8th Cir. 2008); (Doc. 32-1 at 5.) In *Neal*, the affiant included false information in an affidavit that stated law enforcement had an arrest warrant for the defendant. *Neal*, 528 F.3d at 1073 (8th Cir. 2008). The affiant, however, was unaware that law enforcement did not have an arrest warrant for the defendant. *Id.* The Eighth Circuit upheld the affidavit because "there [was] no evidence that the officers involved . . . acted intentionally, deliberately, or with reckless disregard for the truth when they caused the false statement to be included in the affidavit."

The Government further argues that Defendant cannot meet his burden to show that probable cause would not have existed if the omitted information was included in the affidavit. (Doc. 32-1 at 6.) The Government cites *Illinois v. Gates* that held whether

probable cause exists is based on "the totality of the circumstances" and exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. 213, 238 (1983); (Doc. 32-1 at 6-7) (citation omitted). The Government argues that even if the omitted information had been included in the affidavit, it would still have been possible for the issuing judge to find probable cause to search Defendant's residence.

1. Standard of Review for Determining Whether Defendant is Entitled to a Franks *Hearing*

Franks held that a defendant is entitled to a hearing when he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. The Eighth Circuit has extended *Franks* to allow defendants to challenge affidavits by asserting the affiant deliberately or recklessly omitted information. *United States v. Reivich*, 793 F.2d 957, 960-61 (8th Cir. 1986). "[T]he failure to include the information and a reckless disregard for its consequences may be inferred from the fact that the information was omitted. . . . [F]or this inference to be valid, the defendant must show the omitted material would be '"clearly critical" to the finding of probable cause.'" *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993) (quoting *Reivich*, 793 F.2d at 961). Given that law enforcement sought a warrant because of a suspected assault using a shotgun (Bovy Hr'g Test.), the questions before the Court are whether Defendant made a substantial preliminary showing that the false information Officer Bovy included in the warrant application was necessary and whether omissions from the warrant application were clearly critical to the issuing judge's finding probable cause. *See Franks*, 438 U.S. at 155-56; *Jacobs*, 986 F.2d at 1235; *Reivich* 793 F.2d at 960-61.

2. Officer Bovy did not intend to mislead the issuing judge or act with reckless disregard for the truth when he mistakenly stated in the application that he spoke with Ms. Borntreger and Ms. Cole.

Defendant's only allegation of false or misleading information in the application concerns two paragraphs that Defendant alleges, "when read together, are materially false or misleading." (Doc. 11-2 at 3.) The two paragraphs at issue are paragraphs six and seven on page four of Government Exhibit 1:

> Officer Thomas with the Waterloo Police Department spoke with Takeela Latham who advised while at her home at 1005 W. Mulan, she walked out of her residence and noticed a suitcase on her deck. Latham 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. Latham advised her friend Jarrell Cole to take the suitcase and place it in Levi Miller's truck that was located in the parking area of the apartment. Latham then advised she heard someone coming down the stairs from the upstairs apartment. Latham advised she turned to see Defendant walking with a shotgun in his hands and cursing. Latham advised Defendant pointed the gun at her and Jarrell Cole. Latham described the gun as having a black barrel and wood along the stock. Latham advised herself and Jarrell Cole ran back into their apartment.
>
> I spoke with witnesses Kayla Borntreger and Chelsea Cole who were also on scene as the incident unfolded. Chelsea Cole and Kayla Borntreger advised the gun was black in color and had wood coloring around the stock. Kayla Borntreger and Chelsea Cole advised Defendant as wearing a red shirt and having dreads in his hair pulled back into a pony tail.

(Gov. Ex. 1 at 4.)

Defendant's assertion that the affidavit in support of the search warrant contains the above two paragraphs that "when read together, are materially false or misleading" (Doc. 11-2 at 3) does not state a colorable claim of a violation of Defendant's rights under *Franks v. Delaware*. Officer Bovy's assertion in the affidavit that he, rather than Officer Thomas, spoke with Ms. Borntreger and Ms. Cole is the only false affirmative statement Defendant argues constitutes a *Franks* violation. (*Id.* at 3-4.) In *Franks*, the United

States Supreme Court held that, under certain circumstances, a defendant is entitled to a hearing to "challenge the veracity of a sworn statement" police used to obtain a search warrant:

> In the present case the Supreme Court of Delaware held, as a matter of first impression for it, that a defendant under no circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

438 U.S. 154, 155-56 (1978). Showing a false statement in an affidavit was inserted deliberately or with reckless disregard for the truth "is 'not met lightly.'" *United States v. Lucca*, 377 F.3d 927, 931 (8th Cir. 2004) (quoting *United States v. Wajda*, 810 F.2d 754, 769 (8th Cir. 1987)). A defendant must "point out specifically the portion of the warrant affidavit that is claimed to be false; and [the allegations] should be accompanied by a statement of supporting reasons." *Id.* (quoting *Franks*, 438 U.S. at 171) (alterations in original).

Defendant's claim of a *Franks* violation based on affirmative false statements rests on the argument that Officer Bovy signed the addendum to the application, but Officer Thomas is the officer who spoke with Ms. Borntreger and Ms. Cole. (Doc. 11-2 at 3-4.) Officer Bovy acknowledged this during the October 7 hearing. (Bovy Hr'g Test.) While Officer Bovy's signed statement that "I spoke with witness Kayla Borntreger and Chelsea Cole" (Gov. Ex. 1 at 4) is false, Defendant acknowledges this falsehood "probably would not have made much difference to the judge to know that it was Officer Thomas who spoke with" Ms. Borntreger and Ms. Cole. (Doc. 11-2 at 4.) Defendant thus acknowledges the false statement does not satisfy the second requirement for a *Franks* violation, that the "false statement [be] necessary to the finding of probable

cause." *Franks*, 438 U.S. at 155-56. As such, the false statement in the application does not give rise to a *Franks* violation.

3. Officer Bovy's omissions do not constitute a substantial preliminary showing that Officer Bovy intended to mislead the issuing judge or acted with reckless disregard as to whether the application would mislead the issuing judge.

Defendant also argues certain omissions entitle him to a *Franks* hearing. (Doc. 11-2 at 4-8; Doc. 55 at 10-14.) Although Officer Bovy omitted information from the application, Defendant does not offer evidence that Officer Bovy omitted information to intentionally mislead the issuing judge, therefore, the question before the Court is whether Officer Bovy's omissions constitute a reckless disregard for the truth. "[F]or omissions of fact, [Defendant] must show: '(1) that facts were omitted . . . in reckless disregard of whether they make[] the affidavit misleading; and (2) that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.'" *United States v. Reed*, 921 F.3d 751, 756 (8th Cir. 2019) (quoting *United States v. Conant*, 799 F.3d 1195, 1200 (8th Cir. 2015)). An affiant has omitted a fact with reckless disregard if "the officer 'must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information.'" *Id.* For the reasons discussed below, I find Officer Bovy did not omit information with reckless disregard for the truth.

Defendant first argues that Officer Bovy recklessly omitted Ms. Borntreger's statement that contradicted Ms. Latham's claim that Defendant pointed a gun at someone. (Doc. 11-2 at 4.) The record does not show Officer Bovy must have entertained serious doubts as to the truthfulness of the affidavit or had obvious reasons to doubt the accuracy of the information he reported. *See Reed*, 921 F.3d at 756. Officer Bovy was presented with statements from multiple witnesses stating Defendant was angry and cursing while carrying a shotgun. Ms. Latham stated Defendant pointed the shotgun at her. (Def. Ex.

2, video of Ms. Latham, at 3:45.) Mr. Cole stated Defendant "pointed" the shotgun but did not state whether the shotgun was pointed at any individual. (Def. Ex. 2, video of Mr. Cole, at 2:34.) Ms. Cole stated Defendant had a gun, but she was unsure whether Defendant pointed the gun at anyone. (Def. Ex. 2, video of Ms. Cole, at 2:27.) Ms. Borntreger was the only eyewitness to directly state Defendant did not point the gun at anyone. (Def. Ex. 2, video of Ms. Borntreger, at 5:10.)

These eyewitness statements did not provide Officer Bovy with obvious reasons to doubt the accuracy of Ms. Latham's statement that Defendant pointed a gun at her and Mr. Cole, nor did the statements give Officer Bovy serious doubts as to the validity of Ms. Latham's statement. Moreover, I do not conclude that Officer Bovy acted with reckless disregard for the truth when he omitted Ms. Borntreger's statement that contradicted Ms. Latham's claim that Defendant pointed a shotgun at Ms. Latham and Mr. Cole. As stated above, Iowa Code Section 708.1(2)(c) criminalizes not only pointing a firearm toward another person, but also displaying it in a threatening manner. Ms. Borntreger may not have seen Defendant "point" the shotgun, but what she saw was at least consistent with displaying a firearm in a threatening manner.

Defendant next argues that Officer Bovy acted with reckless disregard for the truth when he omitted Officer Bovy's encounters with the girl, the aunt, and Mr. Johnson. (Doc. 11-2 at 8.) However, nothing in the record indicates Officer Bovy must have entertained serious doubts about the truthfulness of his statements or had any obvious reasons to doubt the accuracy of the information he wrote in the affidavit. *See Reed*, 921 F.3d at 756. As described above, Officer Bovy's first interaction after he arrived at 1005 West Mullan Avenue was with a young girl and the aunt, after which Officer Bovy spoke with Mr. Johnson. Officer Bovy asked the aunt if she heard people yelling, but she denied having heard anything. (Def. Ex. 2, video of Officer Bovy, at 6:30-6:46.) Mr. Johnson initially denied knowledge of an altercation, but eventually stated he heard

Defendant and Ms. Miller arguing. (*Id.* at 10:22-11:35.) Mr. Johnson stated he neither saw a physical altercation nor saw anyone other than Defendant and Ms. Miller outside. (*Id.*)

Although the aunt denied having heard people yelling and Mr. Johnson was hesitant to acknowledge he was aware of a verbal altercation near his residence, these events were not obvious reasons for Officer Bovy to doubt the accuracy of the information he put in his application. Officer Bovy testified that, in his experience, he sometimes has difficulty persuading witnesses to provide him information. (Bovy Hr'g Test.) He further testified it is more difficult to talk to people when firearms are involved in the alleged incident. (*Id.*) In this situation, with Defendant's alleged pointing or displaying of a shotgun, neighbors' hesitance to provide Officer Bovy with information was not an obvious reason for Officer Bovy to doubt the accuracy of the information he put in his application. Furthermore, it does not follow from the aunt's and Mr. Johnson's denials that Officer Bovy must have entertained serious doubts about the truthfulness of the statements he put into the application. Rather than create serious doubts about the truthfulness of Officer Bovy's application, Mr. Johnson's and the aunt's hesitancy may have been due to their desire to avoid any confrontation with Defendant or law enforcement. As such, I find Officer Bovy did not act with reckless disregard for the truth when he omitted from the application his encounters with a young girl, the aunt, and Mr. Johnson.

Defendant lastly argues that Officer Bovy acted with reckless disregard for the truth when he "failed to note in the application . . . that [Ms. Latham's] account was inconsistent with the physical layout of the location." (Doc. 55 at 13.) Defendant argues 1005 West Mullan's physical layout refutes Ms. Latham's account that Defendant pointed a shotgun at Mr. Cole and her because "the evidence at the suppression hearing establishes that there is no direct path from the stairs to [Defendant's] apartment to the

back of the residence." (*Id.* at 14.) However, Ms. Latham's account of the incident does not require that a direct path exist between the stairs to Defendant's apartment and the back of the residence. As such, Officer Bovy would not have necessarily entertained serious doubts about the truthfulness of his statements nor would he have any obvious reason to doubt the accuracy of the information he wrote in the affidavit. *See Reed*, 921 F.3d at 756.

During her meeting with Officer Thomas, Ms. Latham stated she was with Mr. Cole near the pickup truck behind the residence. She said Mr. Cole was placing a suitcase in the pickup truck. She stated she saw Defendant holding a shotgun as Defendant, Ms. Miller, and Ms. Randall walked toward the truck. (Def. Ex. 2, video of Ms. Latham, at 3:02.) Ms. Latham also stated Defendant pointed the shotgun at Mr. Cole and her "when he came down." (*Id.* at 3:45.) The phrase "when he came down" does not necessarily mean Defendant pointed the gun at Ms. Latham and Mr. Cole while Defendant was walking down the stairs. Instead, Officer Thomas could reasonably have interpreted this statement to mean Ms. Latham was claiming Defendant pointed the shotgun at Mr. Cole and her after Defendant had descended the stairs.

Photos of 1005 West Mullan Avenue show that a direct path between the stairs leading to Defendant's apartment and the back of the residence is not necessary for Ms. Latham to have seen him holding a shotgun while he, Ms. Randall, and Ms. Miller walked toward Ms. Latham and Mr. Cole. (Gov. Ex. 3 at 1-4.) The alleged discrepancy between Ms. Latham's statements and the physical layout of 1005 West Mullan may not exist. The mere possibility of a discrepancy, without more, would not have caused Officer Bovy to entertain serious doubts about the truthfulness of the statements in the application. This also was not an obvious reason for Officer Bovy to doubt the accuracy of the information he put in his application. As such, I find Officer Bovy did not act with reckless disregard for the truth when he omitted from his application the alleged

discrepancy between Ms. Latham's statements and 1005 West Mullan's layout. *See Reed*, 921 F.3d at 756.

4. The alleged false statement was not necessary to the issuing judge's finding of probable cause, and the omitted information was not clearly critical to the issuing judge's finding of probable cause.

Even if the District Court rejects my recommendation and finds that Officer Bovy intended to mislead the issuing judge or acted with reckless disregard for the truth, Defendant was not entitled to a *Franks* hearing. The false information was not necessary to the issuing judge's finding of probable cause, nor was the omitted information clearly critical to the issuing judge's finding of probable cause. As described above, even if the Court infers Officer Bovy acted with reckless disregard for the truth because he omitted information, this inference is valid only if the omitted material was "'clearly critical' to the finding of probable cause." *United States v. Jacobs*, 986 F.2d 1231, 1234-35 (8th Cir. 1993) (quoting *Reivich*, 793 F.2d at 961.) Information or an omission is clearly critical to the finding of probable cause if, absent such information or omission, there would not be a fair probability that contraband or evidence of a crime would be found in the place to be searched. *United States v. Smith*, 581 F.3d 692, 695 (8th Cir. 2009) (finding that "omission of the fact that [the defendant's] trash included mail addressed to other persons at 4401 5th Avenue South, and that trash from two garbage cans might have been pulled, raising the possibility that the drug residue and paraphernalia came from the other unit's trash, did not eliminate the affidavit's showing of a fair probability that evidence of narcotics trafficking could be found in [the defendant's home]"); *See also Gates*, 462 U.S. at 238 (holding that probable cause exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place").

Thus, the first question before the Court is whether Officer Bovy's false statement that "I spoke with witnesses Kayla Borntreger and Chelsea Cole" was necessary for the issuing judge to find probable cause. *See Franks*, 438 U.S. at 155-56 (requiring the false

statement in an affidavit be "necessary to the finding of probable cause" for a defendant to be entitled to a *Franks* hearing). The second question before the Court is whether the omissions discussed above were "clearly critical" for the issuing judge to find probable cause. *See Jacobs*, 986 F.2d at 1234-35 (requiring an omission in an affidavit be "clearly critical" to the issuing judge's finding of probable cause for a defendant to be entitled to a *Franks* hearing).

I find Officer Bovy's false statement in the application claiming he spoke with Ms. Borntreger and Ms. Cole was not necessary for the issuing judge to find probable cause for a search warrant. If Officer Bovy had instead stated, "Officer Thomas spoke with witnesses Kayla Borntreger and Chelsea Cole," the issuing judge's weighing of the facts would not have changed. This false statement did not alter the content of Ms. Borntreger or Ms. Cole's statements. Defendant offered no reason to believe one officer was more credible than the other or that the issuing judge would have knowledge of any difference in their relative credibility. Furthermore, both Officers Thomas and Bovy were involved in responding to and investigating the reported incident, so changing "I" to "Officer Thomas" would most likely not have altered the judge's conclusion. Defendant appears to concede that it "probably would not have made much difference to the judge to know that it was Officer Thomas who spoke with them." (Doc. 11-2 at 4.)

I also find Officer Bovy's omission of Ms. Borntreger's statement that Defendant did not point the gun at the eyewitnesses and could not see the eyewitnesses was not clearly critical to the issuing judge's finding of probable cause. Even if Officer Bovy had included her statement, the issuing judge would still have had testimony from multiple eyewitnesses that Defendant was angry and cursing while carrying a shotgun. (Def. Ex. 2, video of Ms. Borntreger, at 2:05; 3:00; Def. Ex. 2, video of Ms. Cole, at 1:15; 2:10; Def. Ex. 2, video of Mr. Cole, at 1:45; 2:30; 3:00; Def. Ex. 2, video of Ms. Latham, at 3:10; 3:45.) Even if Ms. Borntreger did not see Defendant point the shotgun, Officer

Thomas could reasonably conclude her statement supported the assertion that Defendant carried the shotgun in a threatening manner. All of the eyewitnesses except Ms. Borntreger stated they saw Defendant walk back toward his apartment with the shotgun. (Def. Ex. 2, video of Ms. Cole, at 2:40; Def. Ex. 2, video of Mr. Cole, at 3:55; Def. Ex. 2, video of Ms. Latham, at 3:40.) Additionally, the issuing judge would have had Ms. Latham's statement that defendant pointed the shotgun at her. (Def. Ex. 2, video of Ms. Latham, at 3:45.) Thus, had Officer Bovy included Ms. Borntreger's statement that Defendant did not see the eyewitnesses and did not point the shotgun at them, the eyewitness statements would still have created a fair probability that evidence of a crime (i.e., a shotgun as evidence of an assault) would be found in Defendant's residence. *See Gates*, 462 U.S. at 238.

I also find Officer Bovy's omissions of his contact with the girl, the aunt, and Mr. Johnson were not clearly critical to the issuing judge's finding of probable cause. Even if Officer Bovy had included the aunt's statement that she did not hear anything (Def. Ex. 2, video of Officer Bovy, at 6:30-6:46), the alleged incident did not require any loud noises. When Officer Bovy decided to apply for the search warrant, he believed he was investigating an assault with a shotgun. (Bovy Hr'g Test.) As described above, "display[ing] in a threatening manner any dangerous weapon toward another" constitutes an assault under Iowa law. *See* Iowa Code § 708.1(2)(c) (2019). Displaying a firearm in a threatening manner towards another person does not require any sound at all. Thus, the aunt's statement that she did not hear anything, if included, would likely not have changed the issuing judge's finding of probable cause and was thus not clearly critical to the issuing judge's finding of probable cause.

I also find Officer Bovy's omission of his contact with Mr. Johnson was not clearly critical to the issuing judge's finding of probable cause because assault can be a silent crime. As described above, Mr. Johnson initially denied knowledge of an altercation.

He eventually stated he heard Defendant and Ms. Miller arguing, but he neither saw a physical altercation nor saw anyone other than Ms. Miller and Defendant outside. (Def. Ex. 2, video of Officer Bovy, at 10:22-11:35.) Mr. Johnson's statements are not inconsistent with Ms. Latham's report of Defendant committing an alleged assault. Therefore, Mr. Johnson's statement that he only heard a verbal altercation between Defendant and Ms. Miller, if included, would likely not have changed the issuing judge's finding of probable cause and was thus not clearly critical to the issuing judge's finding of probable cause.

Lastly, I also do not find Officer Bovy's omission of the alleged discrepancy between Ms. Latham's statements and the physical layout of the residence was clearly critical to the issuing judge's finding of probable cause. As described above, the discrepancy Defendant alleges may not be a discrepancy at all and is not supported by evidence in the record. Thus, if Officer Bovy had included the discrepancy between Ms. Latham's statements and the physical description of the residence as Defendant alleges, this information would not have necessarily changed the issuing judge's finding of probable cause.

5. Conclusion

For all of the above reasons, I find that Defendant failed to satisfy his burden to show he was entitled to a *Franks* hearing.

***

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2857

United States of America

Appellee

v.

Levi Farren Miller

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:19-cr-02031-LTS-1)

ORDER

The petitions for rehearing by the panel are denied.

January 27, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

WJ19-009186

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 about1817 hours, your Affiant was dispatched to 1005 West Mullan Avenue for a report of a male named Levi came out of his appartment 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 appartment 1005 1/2. Miller is a white male with dreads and he was wearing a red shirt. The appartment was also occupied by Sarabeth Miller (02/05/1993) and Michele Randall (02/27/66).

Your Affiant spoke with the three individuals in the appartment 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 ther 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 larg 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 appartment.

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

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

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

SUBSCRIBED AND SWORN TO BEFORE ME BY:

Alex Bovy
Applicant

Applicant / Signature

This 3rd Day of February , 2019

Magistrate / Judge