NO._____

In The
Supreme Court of the United States

LEDGER LYNN HAMMONDS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

What is the proper test in determining whether or not a preliminary showing for a Franks hearing has been met when analyzing material omissions?

Assuming that the Fourth Circuit applied the proper test, did it err in its application of that test as applied to Petitioner?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ledger Hammonds, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished but available at 2022 WL 16835639 (4th Cir. Nov. 9, 2022). It also appears in Appendix A1 to the Petition. Circuit Judges Wilkinson and Diaz, as well as Senior Circuit Judge Motz, acted on the appeal.

The decision of the District Court for the Eastern District of North Carolina denying Petitioner's request for a *Franks* hearing appears in Appendix A7 to the Petition and is unpublished.

LIST OF PRIOR PROCEEDINGS

(1) *United States v. Ledger Lynn Hammonds, Jr.*, United States District Court, Eastern District of North Carolina, No. 7:18-cr-50-1FL (final judgment entered June 8, 2021).

(2) *United States v. Ledger Lynn Hammonds, Jr.*, United States Court of Appeals for the Fourth Circuit, No. 21-4316 (decision issued November 9, 2022).

JURISDICTION

The District Court for the Eastern District of North Carolina had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

The Fourth Circuit Court of Appeals had jurisdiction over the Defendant's appeal pursuant to 18 U.S.C. § 3731 and issued its opinion on November 9, 2022. No petition for rehearing was filed.

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

CONSTITUTIONAL PROVISION

The Fourth Amendment of the United States Constitution provides:

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

INTRODUCTION

This case allows the Court an opportunity to determine what the proper test should be when analyzing facts of a case to determine whether or not a hearing should be allowed pursuant to *Delaware v. Franks* when there are material omissions. While the Court has not specifically applied *Franks* to material omissions, the majority of circuits have either applied *Franks* to omissions or at least recognized the possibility. Of the circuits to apply *Franks,* there is a split on how to determine the "intentionality" or "recklessness" prong.

Some circuits, including the Fifth, Eighth, and Tenth recognize an approach that allows a "[r]ecklessness to be inferred from omission of facts which are 'clearly critical' to a finding of probable cause." *DeLoach v. Bevers*, 922 F2.d 618, 622 (10th Cir. 1990).

The Fourth Circuit has expressed doubt as to the appropriateness of the "clearly critical" approach. The Fourth Circuit acknowledges that "[w]hen relying on an omission, rather than on a false affirmative statement, [the] burden increases yet more." *United States v. Tate*, 524 F.3d 449, 454 (4th Cir. 2008).

Assuming that the Fourth Circuit's approach is correct, the approach was misapplied as to Petitioner.

STATEMENT OF THE CASE

On June 27, 2017, a search warrant was applied for by Eric Von Hackney, an Investigator for the Robeson County District Attorney's Office. Von Hackney was investigating deaths of multiple buffalo. In the affidavit for the search warrant, Von Hackney's main source of information was Ronald Hammonds; however, the affidavit omitted prior inconsistent statements from Ronald[1], evidence of Ronald's biases toward Petitioner, Ledger Hammonds, Jr., as well as other significant and critical omissions.

Included in the Affidavit

Von Hackney's affidavit alleges ongoing incidences of buffalo being shot over a period of approximately two years in or around Lumberton, NC. J.A.[2] 130-138.

The affidavit alleges that Ronald found two of his buffalo dead on July 6, 2015. J.A. 131. One of those buffalo was decapitated. J.A. 131. A third buffalo was reportedly found dead on July 8, 2015. J.A. 131.

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[1] Many of the individuals involved in the case are related and have the same last names. For that reason, Petitioner Ledger Hammonds, Jr. is referred to as "Ledger"), Ronald Hammonds is referred to as "Ronald," and Joshua Hammonds or Josh Hammonds is referred to as "Josh."

[2] J.A. refers to the Joint Appendix in the Fourth Circuit filings.

Von Hackney states that Ronald also claimed on September 19, 2015 that he heard a gunshot. J.A. 131. After hearing this, he "observed someone around one of the mobile homes nearby and that they had a flashlight." J.A. 132 The next morning another buffalo was found dead. J.A. 132.

Von Hackney further swears that Ronald reported to the Robeson County Sheriff that another buffalo was dead on September 29, 2015. J.A. 132. Ronald said he witnessed "them" shoot the buffalo. J.A. 132. Ronald, in response to questions by the Robeson County Sheriff's Department, indicated "them" referred to Ledger. J.A. 132. Ronald reported that he heard a gunshot, got a pair of binoculars, went out onto his front porch, looked in the direction where he believed the shot originated, and observed Ledger. J.A. 132. He states that Ledger was standing in a lighted area and holding a flashlight. J.A. 132. Ronald stated that he observed Ledger shoot a pistol into the pasture. J.A. 132.

On August 3, 2016, Ronald reported another shooting in the area. J.A. 132. On May 23, 2017, Ronald reported another dead buffalo in his pasture. On June 5, 2017, Ronald reported that another buffalo had been shot. J.A. 133.

Ronald provided information that he had a rifle stolen about six to seven years earlier, which would have been approximately 2011. J.A. 137. He believes he saw Ledger with a rifle with an identical type of sling that was on his stolen rifle. J.A. 133.

Katherine Floyd, a Robeson County Animal Cruelty Investigator, indicated to the affiant that she had seen Ledger in the possession of a firearm on or about

May 24, 2017. J.A. 135. Floyd also indicated that she had seen Ledger in September of 2015 wearing a hip holster containing a firearm. J.A. 135.

Based primarily on the foregoing, a North Carolina Superior Court Judge authorized the search warrant. J.A. 137. Upon the execution of the search warrant, law enforcement recovered two firearms which the defendant was charged with possessing illegally. J.A. 16-17.

Omitted from the Affidavit

Nowhere in the search warrant does it mention a video-recorded statement of Ronald by Detective Mike Ellis of the Robeson County Sheriff's Department on October 8, 2015.[3] J.A. 141-190. The government acknowledged the accuracy of the transcript and did not challenge the fact that Von Hackney was aware of its existence. J.A. 21. The video contradicts the majority of the information attributed to Ronald in the application for the search warrant. J.A. 141-190. The omissions were significant and intentional or at the very least reckless, and were material.

A. Denials of Having Seen Ledger Shooting a Firearm

Despite language in the search warrant affidavit to the contrary, Ronald denied several times seeing Ledger shooting a firearm. The following are relevant excerpts from the interview:

DETECTIVE: "Did you see him holding anything else in his hand at the same time you saw him with the flashlight?"

[3] The video interview is available; however, for purposes of the motion in the lower courts the interview was transcribed.

RONALD: "Well, it could have been a rifle."

DETECTIVE: "But, that's what I'm saying, did you see him with a second object in his hand?"

RONALD: "Not—not that clear." J.A. 151.

DETECTIVE: "When you heard that shot, you won't physically looking at Ledger no more, 'cause he—in your view, he had been blocked by the dirt."

RONALD: "That's right" J.A. 158.

DETECTIVE: "Have you ever physically seen Ledger Hammonds, Jr. – have you ever physically seen him shoot a firearm down at the house?"

RONALD: "No." J.A. 171.

DETECTIVE: "Okay. But, now, you said he walked behind that dirt pile, so, you didn't actually physically see him shoot; correct?"

RONALD: "No, I did not." J.A. 171-172.

DETECTIVE: "But you, you have never physically seen either Josh nor Ledger out here shooting target – target shooting or anything."

RONALD: "No." J.A. 175

B. Incidents of Identity Confusion

During the interview Ronald confuses the names of those he was speaking about, even questioning himself at one point. The following are the incidents of Ronald's confusion:

RONALD: "And, I seen him; it was Josh. In my opinion, I swear to it, it was Josh with a flashlight. Went over to the buffalo, then, I heard the shot. It was a low caliber bullet." J.A. 150.

DETECTIVE: "And you seen Josh?"

RONALD: "Yep. 'Cause he's short." He's much shorter—shorter than—nope. I seen Papa, Ledger." J.A. 150-151.

RONALD: "Never have—he migrates on my property. He likes to hunt; he's a poacher."

DETECTIVE: "Who?"

RONALD: "Josh."

DETECTIVE: "Josh."

RONALD: "No, Papa—Papa Ledger- 'cause I see where he's been on my property, you know, tracks…" J.A. 170.

DETECTIVE: "Okay. Has Josh or Ledger, any one of 'em tempted to make any type of contact with you since all this occurred?"

RONALD: "Yes."

DETECTIVE: "Who?"

RONALD: "Josh--- Papa--- Ledger, Jr."

DETECTIVE: "Ledger, Jr."

RONALD: "Excuse me. Somehow, I just keep connecting those two." J.A. 172.

RONALD: I never had no conversation with him. Papa's---Josh is the only one I've had a conversation with. It's always been cordial.

DETECTIVE: "Between you and Josh."

RONALD: "Yes."

DETECTIEVE: "Have you spoke to Josh since all this has occurred? Have y'all had—"

RONALD: "Josh spoke to me, and, then, he said, what's--- what's happening on the buffalo, Uncle Ronald? I said, you tell me, Josh. I keep thinking, am I using the right name or not." J.A. 174.

DETECTIVE: "Papa's children or Josh's children?"

RONALD: "Josh. Josh's children."

DETECTIVE: "And Peter Perry's children."

RONALD: "Yeah. I have a real problem with those two names." J.A. 181.

C. Criminal Charges Initiated by Ledger against Ronald

On October 6, 2015, Ledger filed charges against Ronald for assault by pointing a gun and communicating threats.[4] J.A. 191. In the October 8, 2015 video-taped interview, Ronald appears to discuss the incident with Detective Ellis:

DETECTIVE: "—or just talk to you from the road?"

RONALD: "No, he came on back a hundred yards back. I was at the barn."

DETECTIVE: "On your property?"

RONALD: "Yes."

DETECTIVE: "And what kind of conversation ensued between the two of y'all?"

RONALD: "There was no conversation. I immediately pulled my weapon out and told him to get—get off my property."

RONALD: "He said Uncle, I'm Papa. I'm not Josh. I told him, I know who you are. The best thing you can do is get off my property now, and he left. I fired one time over his head." J.A. 173-174.

D. Decapitation of Buffalo

A buffalo was found decapitated in the pasture. J.A. 145. In the interview Ronald explains that he spoke with a child of a neighbor who admitted to the decapitation.

[4] The case is Robeson County File No. 15CR56480. The offense date is October 6, 2015. The charges were ultimately dismissed.

RONALD: "I said, do you know anything about the head being cut off? And, the, the child admitted that he—"

DETECTIVE: "Peter Perry's son—"

RONALD: "Yes."

DETECTIVE: "—admitted. Okay." J.A. 145.

E. Statement of Katherine Floyd

Several individuals attested[5] to the fact that Ledger was out of the state on May 24, 2017. J.A. 193-195, and therefore, could not have been seen by Katherine Floyd on that day. While not omitted, the affidavits should help provide a basis for a *Franks* hearing.

Search warrant Issued

Without the benefit of the omitted information, a North Carolina Judge issued a search warrant. As a result of the search warrant, two firearms were found resulting in Petitioner being charged with a Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g).

Proceedings Below

Ledger filed a motion to suppress and motion for a hearing pursuant to *Delaware v. Franks*. The motion for the *Franks* hearing was based on the numerous and significant omissions of Ronald's ever-changing stories and his instances of misidentification. The motion for the hearing also cited the omission concerning the decapitation of the buffalo, as well as the omission of the fact that Ledger had

[5] It is not alleged that Von Hackney was aware of the individuals attesting to the fact that Ledger was out of the state.

criminal charges taken out against Ronald. The omitted incidents support why Ronald had a reason to be biased against Ledger.

The District Court held that Ledger had not shown that the alleged misrepresentations and omissions in the search warrant affidavit were intentional and denied the request for a *Franks* hearing. J.A. 61.

Thereafter, Ledger entered a plea to a criminal information, pursuant to a written agreement, preserving his right to challenge the denial of the *Franks* hearing on appeal. J.A. 82, 197. At sentencing, Ledger was sentenced under the Armed Career Criminal Act and sentenced to the mandatory minimum of 180 months. J.A. 95.

Ledger timely appealed to the Fourth Circuit. J.A. 108. The Fourth Circuit, in an unpublished opinion, held that Ledger "must show that the omissions were 'designed to mislead,'" or "made in reckless disregard of whether they would mislead," and that the omissions would defeat probable cause. *United States v. Hammonds*, No. 21-4316, 2022 WL 16835639, at *2 (4th Cir. Nov. 9, 2022). In making their ruling the Court noted that "burden increases" more for a showing that omissions are designed to mislead as opposed to included material misstatements under *Franks*. *Id.*

Using this standard, the Fourth Circuit opined that a mere assertion of omitted information lacks the requisite showing of intentionality or recklessness. *Id.* Absent evidence that the omitted information was designed to mislead, Ledger could not carry the burden to obtain a *Franks* hearing. *Id.*

Ledger timely filed this Petition asking this Court for review.

REASONS FOR GRANTING THE WRIT

It is necessary that the lower courts are uniformly giving the proper test and instructions on how to apply *Franks* when analyzing material omissions. This case gives the Court a vehicle to provide guidance to all lower courts who are faced with omissions from warrant, assuring that similarly situated persons are treated equally.

Further, even if the Fourth Circuit applied the correct test, its application of that test was incorrect as applied to Petitioner, and granting the Writ would right the wrong and allow a *Franks* hearing.

The Fourth Amendment to the United States Constitution protects the rights of individuals "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *Franks v. Delaware*, 438 U.S. 154 (1978), this Court said that "[n]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .." and held "challenge[s] to a warrant's veracity must be permitted." *Id.* at 164.

The rule of *Franks* was espoused by the Court saying:

> [W]here 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 if 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.

Franks v. Delaware, 438 U.S. at 155–56.

The Court announced a two-prong rule to decide if a warrant would be invalidated. An "intentionality prong" where "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Id.* at 155-156. Secondly, a "materiality prong" where the "affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." *Id*. at 156.

If both the falsity and materiality showings are made, then the defendant has made the requisite "substantial preliminary showing" needed to mandate an evidentiary hearing for the court to inquire into the veracity of the affidavit at issue. *Id.*

A. *Franks* as applied to omissions – Circuit Split

Though this Court has never explicitly mentioned *Franks* issues applying to an affiant's material omissions, the rule has evolved through lower courts, and now most apply or at least recognize the "*Franks*" test to material omissions.[6] Despite the majority of circuits applying the *Franks* test to omissions, circuit courts have not applied a uniform test to determine whether or not an omission is intentional and/or reckless. Some of the tests require more showing of an intent or design to mislead, while others infer the intent to mislead based on the significance of the fact

[6] See *United States v. Castillo*, 287 F.3d 21 (1st Cir. 2002), *United States v. Rajaratnam*, 719 F.3d 139 (2nd Cir. 2013), *United States v. Yusuf*, 461 F.3d 374 (3rd Cir. 2006), *United States v. Colkley*, 889 F.2d 297 (4th Cir. 1990), *United States v. Martin* 615 F.2d 318 (5th Cir. 1980), *Mays v. City of Dayton*, 134 F.3d 809 (6th Cir. 1998), *United States. v. Glover*, 755 F.3d 811 (7th Cir. 2014), *United States v. Reivich*, 793 F.2d 957 (8th Cir. 1986), *United States. v. Stanert,* 752 F.2d 775 (9th Cir. 1985), *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990), *Madiwale v. Savaiko*, 117 F.3d 1321 (11th Cir.1997), *United States v. Spencer*, 530 F.3d 1003 (D.C. Cir. 2008).

that is omitted. [7] The latter is more prudent. If facts are "clearly critical" to a finding of probable cause and omitted from an affidavit, the intent to mislead should be inferred. This Court should grant the writ to provide guidance to the lower courts as to how the *Franks* test should apply to material omissions. Without such guidance, as evidenced by the circuit split, similarly situated individuals cannot achieve equality in the application of the law.

1. Fourth Circuit Approach

The Fourth Circuit has noted that the showing required for a *Franks* hearing, when addressing omissions, is a higher burden as compared to a material inclusion stating, "[w]hen relying on an omission, rather than on a false affirmative statement, [the] burden increases yet more." *United States v. Tate*, 524 F.3d 449, 454 (4th Cir. 2008)(emphasis added). See also *United States v. Lull*, 824 F3.d 109, 115 ("the defendant's burden in showing intent is greater in the case of an omission").

The Fourth Circuit has expressed doubts in the approaches of other circuits, namely the Fifth's approach to "clearly critical" omitted facts stating, "We have doubts about the validity of inferring bad motive under *Franks* from the fact of omission alone, for such an inference collapses into a single inquiry the two elements—'intentionality' and 'materiality.'" *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990).

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[7] See *United States v. Tate*, 524 F.3d 449 (4th Cir. 2008) "When relying on an omission, rather than on a false affirmative statement, [the] burden increases yet more. Id. at 454 *Cf. Martin* at 329, "when the omitted facts from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself."

The Fourth's reasoning presupposes that the analysis of omissions is to be treated the same as material misstatements when there has not been a test for omissions announced by this Court.

The test by the Fourth Circuit admittedly imposes a "greater" burden as opposed to some other circuits. *United States v. Lull*, 824 F.3d 109, 115 (4th Cir. 2016).

2. Fifth Circuit Approach

The Fifth Circuit approach looks at the facts that are omitted and "when the facts omitted from an affidavit are *clearly critical* to a finding of probable cause, then recklessness may be inferred from the proof of the omission itself." *United States v. Martin,* 615 F.2d 318, 329 (5th Cir.1980)(emphasis added). Several other circuits apply this test to omissions either directly or in part. See *United States v. Reivich*, 793 F.2d 957 (8th Cir. 1986), *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir.1990).

In *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990), the Fifth Circuit used the reasoning from *Martin* in finding omissions clearly critical to a finding of probable cause. *Id*. at 400. The case stemmed from an arrest warrant; however, the Court found that the victim eye witness had "ample motive to lie." *Id*. at 399. The Court observed that several witnesses contradicted the allegations contained in the warrant. *Id*. at 400. The Court found a "number of facts omitted fell into the 'clearly critical'" category and in doing so that probable cause was lacking. *Id.* at 400.

In *Reivich*, the Eighth Circuit, in reviewing *Martin,* noted that "recklessness may be inferred from the fact of omission of information from an affidavit." *Reivich* at 961. The Eighth Circuit expounded and said, "[s]uch an inference, however, is warranted only when the material omitted would have been "clearly critical" to the finding of probable cause" but noted that some other circuits have "relied also on additional circumstances in support of their findings of recklessness." *Id.* at 961. In *Reivich* the court looked at promises and inducements made by police to informants that were omitted from the affidavit. *Id*. The Court acknowledged that even the District of Columbia Circuit had suggested that recklessness should be inferred from the omission of information when there are flagrant police actions such as taking statements out of context. *Id*. However, the Court ultimately found that those promises weren't material because there still would have been a finding of probable cause. *Id*. at 962.

Additionally, the Tenth Circuit echoed *Hale* and *Reivich* saying "recklessness may be inferred from omission of facts which are 'clearly critical' to a find of probable cause." *DeLoach v. Bevers*, 922 F.2d 618 at 622 (10th Cir. 1990). In *DeLoach,* the agent included portions of an autopsy report and accurately included that the death was ruled a homicide. *Id.* at 621-22. However, the agent failed to include information about when the death blow could have occurred, and failed to included other information that tended to show the time of death which could have excluded the person for whom the warrant was sought. *Id*. 621-624. That Court found the omissions clearly critical. *Id*. at 622-23. The Court looked at the fact that

the doctor was used frequently as an expert by the prosecution and that the prosecution dropped the charges, when they learned the doctor's views, was "strong evidence that probable cause would have been vitiated … [had the omissions] been incorporated in the affidavit of probable cause." *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990).

B. Fifth Circuit Analysis as applied to Ledger

Petitioner submits that under the Fifth Circuit's "clearly critical" approach to omissions, without doubt he would have been eligible for a hearing pursuant to *Franks*.

Ronald's numerous inconsistencies that were omitted are akin to the number of eye witnesses that gave contradictory statements in *Hale* where the Court found those omissions "clearly critical" to a finding of probable cause. Additionally, Ronald's incidents of confusion when trying to relay information are "clearly critical."

The bias that Ronald may have held against Ledger for instituting the criminal charges against him was omitted, and just as in *Reivich* the Court looked at inducements when determining that the omissions were critical. Additionally, the criminal charges provided a "motive to lie" as in *Hale*.

Further, as in *DeLoach* the inclusion of certain facts, but not all, such as the medical examiner's opinion, was found to be "clearly critical." Just as the inclusion of the amputated buffalo head in Von Hackney's affidavit, but he omitted the fact that someone else had claimed responsibility for the act. The "clearly critical"

omissions from Von Hackney's affidavit would certainly satisfy the *Franks* test as employed by the Fifth Circuit.

C. Fourth Circuit Analysis as to Omissions as applied to Ledger

The Fourth Circuit's approach when determining Ledger's case did not focus on nor even mention the relevance of the omitted facts when determining whether or not the omitted information was a false statement or misleading. Several other circumstances[8] that could shed light on the intent were also advanced but those were overlooked by the Fourth Circuit. After a brief review of the omissions the Fourth Circuit concluded that absent evidence that the omitted information was designed to mislead, Ledger could not carry the burden needed to obtain a *Franks* hearing. *Hammonds* at 2. Noting, that the "burden increases yet more" for showing the omissions were designed to mislead. *Id.*

While the Fourth Circuit didn't provide in depth analysis in Ledger's opinion, it stated that to grant a *Franks* hearing requires a showing that the omissions were '*designed to mislead*' or "made in *reckless disregard of whether they would mislead*," and that the omissions "would defeat probable cause." *Id.* (quoiting *United States v. Clenney*, 631 F.3d 658, 664 (4th Cir. 2011). The Fourth has acknowledged that the

[8] (1) former Investigator Von Hackney was terminated by the Robeson County District Attorney's Office for misconduct. J.A. 20. (2) the lead case agent, Mike Chavis, has been terminated for misconduct. J.A. 18. (3) a telephone which Defendant believes may have contained favorable evidence was gathered at the scene by Von Hackney, and is now lost. J.A. 48. and, (4) a search warrant was sought after Ronald gave the omitted interview, and detectives were told that there wasn't enough probable cause. J.A. 54.

"*Franks* threshold is even higher for defendants making claims of omissions rather that affirmative false statements." *Clenney* at 664.

However, in the Fourth's unpublished opinion, it did not address previous cases which discussed determining recklessness. In *Lull*, the Fourth noted, "[o]ne way of establishing reckless disregard is by proffering "evidence that a police officer 'failed to inform the judicial officer of facts [he] knew would negate probable cause" and reckless disregard could be shown from an omission because it was something that "[a]ny reasonable person would have known that this was the kind of thing the judge would wish to know." *Lull* at 117 (citations omitted). "The relevance of the omission thus comes into play: the significance—or insignificance—of a particular omission to the determination of probable cause may inform our conclusion regarding the agent's intent." *Id. at* 117.

The materiality prong regarding omitted material is met when, "the facts omitted, if included, would defeat probable cause." *Tate* at 457. The materiality part of the test can "turn on overlapping facts" *Lull* at 115. Omitted information can certainly "casts doubts on the inherent validity [] of [] information in the original affidavit." *United States v. Wharton*, 840 F.3d 163, 170 (4th Cir. 2016). If the omitted information is material, then when included the information "undermine[s] the foundational core of the affidavit." *Id.* at 169.

In *Lull*, the agent used a confidential informant to make a controlled purchase of narcotics. *Id.* at 112. The informant stole money from the transaction. *Id.* The agent then used the informant's information from the controlled purchase

as the basis for the search warrant and omitted the fact that the informant had committed theft. *Id* at 113. The court, in finding a *Franks* violation, that the agent had at the least acted recklessly, looked at the omission itself and the relevance of the omission as to "trustworthiness" and analyzed the situation under the framework of "any reasonable person would have known that this was the kind of thing the judge would wish to know." *Id.* At 117.

It is not up to the investigator to pick and choose when it comes to the reliability of the informant but is "an assessment for the magistrate." *Id.* at 116. (Citing *Franks*).

In Petitioner's case, the numerous inconsistencies, the confusion and misidentifications, the failure to include the criminal charges filed by Ledger against Ronald, and the omitted admission of culpability of others, are something that a judge would want to know. The omitted statements are material, as they undermine the "foundational core of the affidavit," *Wharton* at 169. The omission was done recklessly because Ronald's numerous inconsistencies are things "any reasonable person would have known that this was the kind of thing the judge would wish to know." *Lull* at 117.

The numerous inconsistencies in Ronald's statements go to his "trustworthiness," the misidentification and confusion in Ronald's statements go to his "credibility," the reason for bias against Petitioner, and the omission of someone else claiming responsibility for the decapitation are things that "any reasonable person would have known a judge would like to know." *Lull* at 117. Looking at the

facts and the circumstances under the Fourth Circuit's framework, it is clear there was "design to mislead." Otherwise, why include the decapitation but not include the misstatements, the bias, and that someone took responsibility for the decapitation? The reckless prong and materiality prong can turn on "overlapping facts," and the facts here show a "design to mislead" even under the Fourth Circuit's higher burden.

Even assuming that the proper test is the "increased burden" of the Fourth Circuit, and not the "clearly critical" approach of the Fifth Circuit, the Fourth Circuit misapplied its test based on the facts and this Court should allow the writ, vacate the conviction, and remand for a *Franks* hearing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this the 23rd day of January, 2023.

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