

23-6319

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
NOV 21 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Lacarl Dow, — PETITIONER
(Your Name)

vs.

T. Campbell, Warden. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals, For the Ninth Circuit.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lacarl Dow.

(Your Name)
Corcoran State Prison,
P.O. Box-3481,
Corcoran California 93212

(Address)

(City, State, Zip Code)

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(Phone Number)

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QUESTION(S) PRESENTED

- (1) Did the affiant officer intentionally or recklessly make false or misleading statements or omissions in support of the warrant?
- (2) Was the false or misleading statement or omission material necessary to finding probable cause?
- (3) Was Carson's four calls to Dow hours before the robberies, connect Dow to the robberies, where the four calls were among 69- other calls made by Carson prior to the robberies he was arrested for??
- (4) Did Lt. Maguire single Mr. Dow out and treat him as being guilty by association based on Mr. Dow's alleged association with Mr. Carson and Mr. Dow's owning a white sedan??
- (5) Was Dow's white, four-door, Chevy Impala, matching the description of the vehicle which dropped off the robbery suspect and left a couple of minutes after the robbery suspect fled by on foot- the only vehicle like that made by General Motors?
- (6) Did General Motors only make a white vehicle for Mr. Dow?
- (7) Does the Surveillance video show Dow as being the shadowy person entering the vehicle before it leaves?
- (8) Does the video show Dow as being the someone walking by the vehicle before it leaves?
- (9) Does the Surveillance videos show that it was not Dow walking by the vehicle before it leaves?
- (10) Does Evidence which merely creates a strong suspicion of the guilty of the accused shift the burden of proof in any form??
- (11) Does the denial of Dow's Motion to Quash and Traverse violate Dow's Federal Constitutional Rights because the warrants lacked Probable Cause and contained material misrepresentations and Omissions?
- (12) Does the Searches violate the Fourth Amendment because the warrants Lacked Probable Cause, and Evidence Obtained in Reliance on "Them" Must Be Suppressed?
- (13) Does the Failure to Hold a Franks Hearing Violate Dow's Fourth, Sixth, and Fourteenth Amendment Rights?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

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

Please see attached petition for arguments, points and authorities in support of petition.

RELATED CASES

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OTHER N/A

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is **Exhibit "A"**.

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is **Exhibit "A"**.

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the 9th Cir. Court of Appeals, _____ court appears at Appendix _____ to the petition and is **Exhibit "A"**.

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 9/15/2023.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A _____.

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED

The denial of Petitioner's motion to Quash and Traverse violated petitioner's Federal Constitutional Rights because the Warrants lacked probable cause and contained material misrepresentations and omissions.

A. The Searches Violated the Fourth Amendment Because The Warrants Lacked Probable Cause, and Evidence Obtained in Reliance on Them Must Be Suppressed.

1. General Applicable.
2. The first three warrant affidavits, which were materially identical, lacked probable cause.
3. The fourth warrant likewise lacked probable cause.
4. The evidence obtained pursuant to all Warrants was "fruit of the Poisonous tree."

B. The Failure to Hold a Franks Hearing Violated Petitioner's Fourth, Sixth, and Fourteenth Amendment Rights.

1. Introduction and general applicable law.
2. Petitioner made the substantial preliminary showing necessary for Franks Hearing.
 - a. Petitioner showed that Maguire Misrepresented and omitted facts either intentionally or with reckless disregard for the truth.
 - b. The misrepresentations and omissions were material.
3. The Good Faith Exception Does Not Apply.

STATEMENT OF THE CASE

In late fall of 2015, the San Francisco Police Department was struggling to solve what it believed to be a related series of convenience store robberies. Lieutenant Thomas Maguire had identified a suspect--Sekou Carson--but he was in custody when yet another convenience store robbery occurred on November 4, 2015. Stymied by this turn of events, Lt. Maguire swore out the first of what would be over fifteen affidavits hoping to crack the case. But the original warrant--on which the subsequent warrants relied--not only failed to establish probable cause on its face, it also omitted and mischaracterized material facts to create the misleading impression that Lt. Maguire's mere hunch was actually founded in evidence. Lt. Maguire failed to conduct the foundational police-work necessary to build a fact-based case for the issuance of a warrant as to a new suspect--Defendant-Appellant Lacarl Dow. But the Fourth Amendment guarantee against unreasonable searches and seizures requires more than an officer's suspicion and does not countenance shortcuts--it commands a fact-based showing of a fair probability or substantial chance that a suspect has committed a crime. No such showing was made here.

The challenged-warrants stated the following disparate facts in support of an application to attach a GPS tracker to Mr. Dow's car and to collect his subscriber records and historical cell site location information: (1) six unsolved robberies of various San Francisco convenience stores in fall of 2015; (2) Sekou Carson's admission to robbing two of the same convenience stores using the "same method" as the six unsolved robberies, i.e., approaching the register with an item to purchase and money in hand before pulling out a firearm and robbing the cashier; (3) phone records showing that "prior to" committing the first of his two robberies, Mr. Carson made four phone calls to a phone number associated with Mr. Dow; (4) the presence of a white, four-door sedan, described by Lt. Maguire as a "getaway car," captured by a private "surveillance video" around the time of one of the unsolved robberies, which occurred while Mr. Carson was in custody; and (5) Mr. Dow's prior arrest for "possession of stolen property" while driving a white, four-door

Chevy Impala. Despite the lack of any logical connection between these discrete facts and events, the district court found that they collectively demonstrated probable cause that Mr. Dow had committed a crime. The district court erred as a matter of law. Unrelated and disparate facts combined with an officer's assurance of expertise to not satisfy the probable cause requirement. As no exception to the warrant requirement justified the police's use of a GPS tracker and collection of Mr. Dow's subscriber records and historical cell site location information, the fruits of these unconstitutional searches must be suppressed.

In the alternative, this Court should reverse the district court's erroneous conclusion that Lt. Maguire's reckless or intentional omissions and misrepresentations were immaterial to the state magistrate's determination of probable cause. See Franks -v- Delaware, 438 U.S. 154, 155-56 (1978). The district court assumed without deciding that Lt. Maguire recklessly or intentionally made "at least one" misleading statement, but found it was immaterial to the probable cause determination. The district court erred in ignoring the cumulative effect of the additional, corrected facts on the probable cause determination. Once Lt. Maguire's misrepresentations and omissions are corrected, his affidavit demonstrates that there was nothing but a tenuous connection at best between Mr. Carson and the six unsolved robberies, no connection whatsoever between Mr. Dow and the unsolved November 4, 2015 robbery beyond the coincidence of driving a white sedan in a major metropolitan area, and that Mr. Carson called dozens of people on the same day he committed a robbery, including a number associated with Mr. Dow. This is insufficient to establish a fair probability that Mr. Dow was involved with the November 4, 2015 robbery.

Lt. Maguire recklessly or intentionally affirmatively misrepresented or omitted material information to mislead the state magistrate as to nearly every fact asserted in his affidavit:

Affirmative misrepresentation: The "same method" was used in the six unsolved robberies. This is false. One robbery involved two armed suspects taking hostages and robbing an office safe in an employees' only area. The others involved a single armed suspect

"robbing a cashier. Only one robbery purportedly involved a "getaway" vehicle--the November 4, 2015 robbery. As Lt. Maguire was investigating these robberies and this information was contained in the reports he cited in his affidavit, he knowingly or recklessly misled the state magistrate. Misleading omission: Mr. Carson made four calls to a number associated with Mr. Dow "prior to" committing the October 27, 2015 robbery. But Mr. Carson made seventy-four other calls to a dozen different contacts "prior to" committing the October 27, 2015 robbery and the last call to the number associated with Mr. Dow happened over three hours before Mr. Carson committed the robbery. Lt. Maguire knowingly and intentionally omitted this information as he averred that he "reviewed [Carson's] phone calls" in his affidavit.

Affirmative Misrepresentation: Surveillance video showed the November 4, 2015 robbery suspect use a white, four-door sedan as a "getaway" vehicle after committing the robbery. This is false. The surveillance video, taken from a private home two blocks away from the site of the robbery, did not show the suspect use any car as a "getaway" vehicle. To the contrary, the video shows the suspect run by and away from the white vehicle after the crime and a woman with a tote bag appears to get into the vehicle before it drives away. Lt. Maguire subsequently testified, contrary to his sworn written affidavit, that he personally reviewed the surveillance video and created the still images of the white vehicle prior to authoring the affidavit. The misrepresentation of this fact was thus knowingly and intentional.

Misleading omission: Mr. Dow was arrested for possession of stolen property while driving a white, four-door sedan. Mr. Dow's prior arrest for possession of stolen property occurred eight months prior to the November 4, 2015 robbery and involved checkbooks and credit cards, neither alleged to have been taken in the course of a convenience store robbery. Lt. Maguire knew this information and omitted it, as he stated in his affidavit that he had "noticed in Lt. Manning's police report that Dow was driving in a white, 4-door Chevy Impala...when he was arrested."

When considered in its totality and without misrepresentation,

Lt. Maguire's affidavit cannot support a finding of probable cause because it does not establish a fair probability that Mr. Dow was involved in the November 4, 2015 robbery. This Court should reverse.

JURISDICTION AND DETENTION STATUS

The United States Supreme Court have jurisdiction under the 8th, 13th, and 14th Amendments of the United States Constitution.

Mr. Dow files this Petition pursuant to a conditional guilty plea entered on February 16, 2022. He pled guilty to conspiracy to commit and interference with commerce by robbery in violation of 18 U.S.C. Section 1951(a) and being a felon in possession in violation of 18 U.S.C. Section 922(g)(1), while reserving his right to appeal the district court's order denying his motion to suppress.

The district court entered judgment on August 12, 2022. Mr. timely filed his notice of appeal on August 16, 2022.

Mr. Dow is presently serving a 15-year state term of imprisonment for related conduct at North Kern State Prison.

ISSUES PRESENTED

- (1) Did the affiant officer intentionally or recklessly make false or misleading statements or omissions in support of the warrant?
- (2) Was the false or misleading statement or omission material necessary to finding probable cause?
- (3) Was Carson's four calls to Dow hours before the robberies, connect Dow to the robberies, where the four calls were among 69-other calls made by Carson prior to the robberies he was arrested for??
- (4) Was Dow's white, four-door, Chevy Impala, matching the description of the vehicle which dropped off the robbery suspect and left a couple of minutes after the robbery suspect fled by on foot-- the only vehicle like that made by General Motors? Was that a special vehicle made only for Dow?
- (5) Does the Surveillance video show Dow as being the shadowy person entering the vehicle before it leaves?
- (6) Does the video show Dow as being the someone walking by the vehicle before it leaves?

(7) Does the Surveillance videos show that it was not Dow walking by the vehicle before it leaves?

(8) Does Evidence which merely creates a strong suspicion of the guilt of the accused shift the burden of proof in any form?

(9) Does the denial of Dow's Motion to Quash and Traverse violate Dow's Federal Constitutional Rights because the Warrants lacked Probable Cause and contained material misrepresentations and Omissions?

(10) Does the Searches violate the Fourth Amendment because The Warrants Lacked Probable Cause, and Evidence Obtained in Reliance on "Them" Must Be Suppressed?

(11) Does the Failure to Hold a Franks Hearing Violate Dow's Fourth, Sixth, and Fourteenth Amendment Rights?

STATEMENT OF THE CASE

In fall of 2015, the San Francisco Police Department (SFPD) was investigating several unsolved convenience store robberies. In particular, the police were investigating armed robberies that took place on May 23, 2015, July 14, 2015, July 18, 2015, September 25, 2015 October 8, 2015 and November 4, 2015. On October 29, 2015, the police arrested Mr. Sekou Carson who confessed to committing two different armed robberies in San Francisco at a Roxie Market and 76 Gas Station on October 27, 2015.

These two locations had previously been robbed on September 25, 2015 (Roxie Market) and October 8, 2015 (76 Gas Station) and were among the group of unsolved robberies being investigated by SFPD.

On November 12, 2015, then-Sergeant, now Lieutenant Thomas Maguire swore out the first of many search warrant applications related to the robbery investigation. This first warrant sought to place a

GPS tracker on Mr. Dow's car and to obtain Mr. Dow's subscriber records and historical cell-site location information.

The bulk of the factual allegations in the affidavit concern Mr. Carson. Lt. Maguire "believe[d] Carson may have been either the unknown suspect who committed the [other unsolved] robberies, or may have been involved with the suspects that committed the unsolved robberies at these locations." As set forth in his affidavit, Lt. Maguire's belief was based on two things: (1) Mr. Carson's confessed-to robberies "occurred at the same locations where two prior unsolved robberies occurred," and (2) Mr. Carson used the "same method" as the robbery suspects in the unsolved six robberies. With respect to the "method," Lt. Maguire averred that "Carson walked into the establishments, selected an item to purchase and approached the register with money in hand. Cars[on] then pulled out a firearm and robbed the cashier of U.S. Currency." Lt. Maguire then stated "[t]his is the same method that has been used in the other (6) unsolved robberies...." Though not referenced in the affidavit, at least the July 18, 2015 robbery involved a different method--the taking of hostages and the robbery of an office safe in an employees-only area.

Lt. Maguire described "review[ing]" Mr. Carson's phone calls on October 27, 2015, the day Mr. Carson committed two robberies. Lt. Maguire "noticed" that Mr. Carson had made (4) outgoing calls to a phone number" with the contact name "Blacc Jesus." Lt. Maguire explained that he recognized the name as a "moniker used by Lacarl Dow" and that the phone number corresponded to a number listed for Mr. Dow in a police report authored by Sgt. Manning that Lt. Maguire also "reviewed" prior to authoring the affidavit. The Manning police report concerned Mr. Dow's March 3, 2015 arrest for "possession of stolen property" while "driving in a white, 4-door Chevy Impala." Though Lt. Maguire did not provide these details, Mr. Dow was found to be in possession of stolen check books and credit cards, but no criminal charges were filed as a result of that arrest.

Lt. Maguire then averred that "Sgt. Mason advised me that a white 4-door sedan was used as the getaway vehicle in one of the robbery incidents he is investigating," and that "Sgt. Mason provided

me with still images of the video surveillance that captured the getaway vehicle used" in a November 4, 2015, robbery. Lt. Maguire subsequently testified that he created the still images after viewing the videos himself.

Lt. Maguire noted that "Carson was already in custody" during the November 4, 2015, robbery.

Lt. Maguire then stated that he "obtained images" of Mr. Dow's car from the Automated License Plate Reader Database and that based on a comparison of these images to the "image of the getaway vehicle," "they appear to be the same color, make and model."

Lt. Maguire then concluded that "[b]ased on the fact that Carson called Dow (4) times prior to the robberies he committed on 10/27/15, and the fact that the getaway vehicle used in a later robbery matches Dow vehicle, I believe that Dow is possibly associated with the larger robbery series that Sgt. Mason is investigating."

Following the state magistrate's issuance of this first warrant to place a GPS tracker on Mr. Dow's car and to collect Mr. Dow's subscriber and historical cell-site location information, Lt. Maguire swore out over a dozen additional warrants, each of which incorporated the same original facts sworn to in the November 12, 2015, warrant.

On November 19, 2015, Mr. Dow and his co-defendant, Mr. Namon Taylor, were arrested after Mr. Taylor robbed an East Bay gas station. Police found Mr. Dow sleeping in Mr. Taylor's car some distance away from the gas station. Although Mr. Dow was arrested, he was not held to answer for the November 19, 2015, robbery for lack of sufficient evidence. Relying on a November 19, 2015 warrant authored by Lt. Maguire--which depended on and incorporated the November 12, 2015 warrant challenged here--police conducted a search of the home in which Mr. Dow resided. Police found a gun and various articles of clothing that appear similar to clothing worn by suspect(s) in the unsolved robberies. Mr. Dow has been in continuous custody since his arrest.

II. PROCEDURAL BACKGROUND.

A. Federal Proceeding.

On March 21, 2019, Mr. Dow was charged by Indictment with con-

spiracy to interfere with commerce by robbery, 18 U.S.C. Section 1951(a); interference with commerce by robbery, 18 U.S.C. Section 1915(a); being a felon in possession of a firearm, 18 U.S.C. Section 922(g); and criminal forfeiture, 18 U.S.C. Sections 924(d) and 981(a). The evidence underlying each of these charges can be traced back to Lt. Maguire's first search warrant application submitted on November 12, 2015. Mr. Dow moved to suppress the fruits of this warrant and the district court entered an order denying Mr. Dow's suppression motion on June 1, 2021. The district court later amended its order denying Mr. Dow's suppression motion at the government's request. Mr. Dow subsequently reached a conditional plea agreement with the government, in which he pled guilty to all three counts alleged in the indictment while expressly reserving the right to appeal the district court's order denying his motion to suppress.

B. Related State-Court Proceedings.

In addition to the federal proceeding, Mr. Dow is also facing robbery charges in Alameda County. The evidence supporting those charges arises from the same search warrant at issue here and the warrant has already been the subject of multiple proceedings in that county. After successfully seeking a writ to overturn an Alameda County judge's initial denial of his suppression motion, Lt. Maguire testified at a Franks hearing on December 19, 2017. The focus of the hearing related to the extraction of information from Sekou Carson's phone and complications arising from the fact that Mr. Carson appeared to have two SIM cards. Only snippets of the video evidence from the November 4, 2015 robbery were played for the court at the suppression hearing. However, Lt. Maguire did testify contrary to his sworn statement in the search warrant affidavit that he had watched the video evidence and created the photo stills referenced in the search warrant affidavit himself as opposed to obtaining the stills from another officer. Lt. Maguire also acknowledged that the video revealed a "shadowy figure"--not the robbery suspect--moving in the vicinity of the white sedan right before it left the location. On December 19, 2017, an Alameda County judge denied the motion to suppress. The charges in Alameda County remain

pending.

Mr. Dow also stands convicted of robbery and wrongful possession of a firearm in San Mateo County Superior Court based on the same underlying warrants and evidence. On October 3, 2019, the San Mateo court considered and denied Mr. Dow's motion to traverse the same warrant at issue here without holding a Franks hearing. Mr. Dow's request to play the November 5, 2015 video evidence was also denied. Mr. Dow entered a conditional plea and appealed the trial court's denial of his motion to traverse. The California court of appeal affirmed the trial court's decision in an unpublished opinion on March 4, 2022. Mr. Dow is currently serving a 15-year sentence on the San Mateo case.

SUMMARY OF ARGUMENT

Probable cause requires more than mere suspicion, police intuition, or even a strong reason to suspect. Instead, it requires a fact-based showing of a "fair probability" that a suspect has committed a crime or evidence of a crime will be found in a particular location. There was no such showing here.

In the late fall of 2015, Lt. Thomas Maguire swore out over fifteen affidavits hoping to crack open a series of unsolved convenience store robberies that were vexing the San Francisco Police Department. Lt. Maguire's primary suspect, Mr. Sekou Carson, had confessed to robbing two of the same businesses and had used the same method as the six unsolved robberies. But Mr. Carson was in police custody at the time one of the unsolved robberies, forcing Lt. Maguire to find another suspect. Rather, than conduct the underlying investigatory work necessary to support a warrant application for Mr. Dow's subscriber records, historical cell-site location information, and to place a GPS tracker on Mr. Dow's car, Lt. Maguire swore out a series of affidavits based on nothing more than a listing of disconnected events strung together by equal combinations hunch and hyperbole. As neither was enough to meet the requisite probable cause standard, the seized items and observations made pursuant to the original warrant must be suppressed along with the fruits of those illegal seizures which were included in subsequent warrant affidavits. In the alternative, this Court reverse because the district

court incorrectly concluded that Lt. Maguire's intentional or reckless misrepresentations or omissions were immaterial to the magistrate's finding of probable cause. When considered in their totality, Lt. Maguire's intentional or reckless efforts to mislead the state magistrate were material to the magistrate's conclusion that there was some substantial linkage between Mr. Carson and the unsolved robberies, Mr. Dow and Mr. Carson, and Mr. Dow and the unsolved robberies.

The bare facts underlying the probable cause finding are as follows: On March 3, 2015, Mr. Dow was arrested in San Francisco for receiving stolen property. He was stopped while driving a white Chevy Impala that was registered to him. Almost eight months later, on October 27, 2015, Sekou Carson robbed a Roxie Market and a 76 Gas Station in San Francisco by selecting an item to purchase, approaching the register with case in hand, and then pulling out a firearm to rob the cashier. There were four outgoing calls from Mr. Carson's phone to a phone number associated with Mr. Dow that day, the last occurring approximately three hours before the robbery. Mr. Carson was subsequently arrested and confessed to committing the two robberies on October 27, 2015. Lt. Maguire was also investigating six other unsolved armed robberies involving the "same method" of an individual selecting an item to purchase and then pulling out a firearm to rob the cashier. On November 4, 2015, while Mr. Carson was still in custody, an unidentified man robbed a San Francisco Grocery Outlet by approaching the register with an item before pulling out a firearm to rob the cashier. Private surveillance videos from two blocks away from the Grocery Outlet showed a "getaway" vehicle--a white, four-door sedan--that appeared to be the "same color, make and model" as Mr. Dow's vehicle, i.e., a white Chevy Impala.

Based on these unrelated and discrete facts, a state court judge found probable cause to search Mr. Dow's subscriber records and historical cell site information and to place a GPS tracker on Mr. Dow's Impala. Notably absent is any factual or logical connection between (1) Mr. Carson's confessed-to robberies, (2) the four calls made to Mr. Dow's phone number on October 27, 2015, (3) the November 4, 2015 robbery at a completely different location that occurred

while Mr. Carson was already in custody, (4) a white sedan seen near the November 4, 2015 robbery, and (5) Mr. Dow's prior arrest eight months earlier while in his white car. Based purely on his hunch that Mr. Dow might offer some clue to solving a string of open convenience store robberies that were being investigated by SFPD, Lt. Maguire authored the affidavit in a manner that exaggerated the import of these unrelated events and selectively manipulated facts in an effort to elevate his mere intuition to something more concrete.

In his initial affidavit, Lt. Maguire averred that the "method" used in Mr. Carson's two confessed robberies and the six unsolved robberies suggested a connection. He further posited that the fact that Mr. Carson's robberies occurred at the same locations as two of the unsolved robberies provided an additional linkage. But the "method" was neither the same across the six unsolved robberies, nor was it particularly distinctive. One of the unsolved robberies involved two armed suspects taking hostages and robbing the safe in a bank office. The other five robberies involved individual suspects robbing a cashier at the point of sale. According to Lt. Maguire, the "method" was an individual approaching the register with an item to purchase and money in hand before pulling out a firearm and robbing the cashier--hardly a signature modus operandi for committing armed robbery in a convenience store. There was no evidence that either Mr. Carson or the suspects in the unsolved robberies consistently worked in pairs or used getaway cars. Nonetheless, Lt. Maguire concluded that Mr. Carson was working in concert with others who were collectively responsible for the various armed robberies plaguing San Francisco.

Expanding on that dubious assumption, Lt. Maguire implicated Mr. Dow in this hypothetical conspiracy based on: (1) four outgoing calls to "blacc jesus"--an alias known by Lt. Maguire to be used by Mr. Dow--from Mr. Carson's phone on the day Mr. Carson committed two robberies, October 27, 2015; and (2) private surveillance footage from a residential street near the location of the November 4, 2015 Grocery Outlet robbery showing a "getaway" car that look similar in color and model to a car Mr. Dow was arrested in eight months earlier.

Even assuming that these factual recitations were accurate and

complete--which they were not--the district court erred in concluding that these facts demonstrate "objective links" sufficient to support a finding of probable cause to search Mr. Dow's phone: obtain phone records and historical cell site information from his provider; and to track Mr. Dow's car with GPS monitoring. Lt. Maguire's mere hunch that he might find evidence related to the robberies in Mr. Dow's cell phone records or by tracking his car--even if based on good faith and investigatory experience--is insufficient to demonstrate probable cause. As the original warrants fail to demonstrate probable cause on their face, they should be quashed and any evidence seized should be suppressed. As each subsequent search warrant relied on the same deficient statements from the first affidavit, and additional evidence obtained through the first invalid warrant, they too should be quashed and all seized evidence suppressed.

In the alternative, the search warrants should be quashed and their fruits suppressed under Franks because Lt. Maguire intentionally or recklessly made misrepresentations or omissions that materially affected the state magistrate's probable cause determination. The district court "assume[d]" without deciding that Lt. Maguire intentionally or recklessly misled the magistrate about: (1) Mr. Carson's outgoing phone calls on October 27, 2015, (2) that one of the unsolved robberies did not conform to the purportedly common "method of the others, and (3) that the car captured on home surveillance videos near the November 4, 2015 robbery location was a "getaway" car notwithstanding the video reflecting the suspect running by and away from the car after committing the crime. The district court then concluded that Lt. Maguire's statements and omissions were immaterial to the magistrate's finding of probable cause. The district court erred. When considered in their totality with accurate and supplemented factual information, Lt. Maguire's intentional or reckless misrepresentations and omissions negate any purported basis for probable cause.

ARGUMENT

I. The District Court Erred by Not Suppressing the Evidence from the Unlawful GPS Tracking of Mr. Dow's Car and Collection of His Subscriber Records and Historical Cell-Site Location Information.

A. Standard of Review

This Court reviews the district court's denial of a motion to suppress de novo and reviews the state magistrate's finding of probable cause to issue a search warrant for clear error. United States -v- Hill, 459 F.3d 966, 970 (9th Cir. 206).

B. The Four Corners of the November 12, 2015 Search Warrant Do Not Support a Finding of Probable Cause.

The first warrant, signed November 12, 2015, relied on a facially insufficient affidavit that cannot support a showing of probable cause. Lt. Maguire's affidavit is predicated on two unrelated events, neither of which convincingly implicate Mr. Dow. First, Se-kou Carson, who confessed to robberies that took place on October 27, 2015, made four phone calls to a number associated with Mr. Dow on October 27, 2015, "prior to" Mr. Carson robbing a Roxie Market in San Francisco. Second, Lt. Maguire stated that he had looked at "still images of the video surveillance" "provided to" him by Sgt. Mason related to the November 4, 2015 robbery of a Grocery Outlet that occurred while Mr. Carson was in custody. Lt. Maguire then averred that "Sgt. Mason advised me that a white 4-door sedan was used as the getaway vehicle." Lt. Maguire's affidavit offers the fact that Mr. Dow was driving a white, four door sedan--a Chevy Impala registered to Mr. Dow--when Mr. Dow was arrested for possession of stolen property in an unrelated incident on March 3, 2015 as a plausible bridge between the Roxie Market and Grocery Outlet robberies. Setting aside everything Lt. Maguire failed to mention in his affidavit regarding Mr. Carson's phone calls on October 27, 2015 and the purported "getaway" car, these facts alone cannot provide a "substantial basis for ... conclud[ing] that probable cause existed. United States -v- Underwood, 725 F.3d 1076, 1081 (9th Cir. 2013) (quoting Illinois -v- Gates, 462 U.S. 213, 238-39, (1983)). Similarly,

Lt. Maguire's professional hunch cannot make up for the absence of credible evidence to support a probable cause finding.

The fact of phone calls between from Mr. Carson's phone to a number associated with Mr. Dow on October 27, 2015 and a white sedan near a robbery scene on November 4, 2015, do not establish a "fair probability" that evidence of the unsolved robberies would be found in [Dow's] location data" simply because Mr. Dow owned a white Chevy Impala. United States -v- Elmore, 917 F.3d 1068, 1075 (9th Cir. 2019); see also United States -v- Grant, 682 F.3d 827, 832 (9th Cir. 2012) ("Probable cause for a search requires a fair probability that contraband or evidence of a crime will be found in a particular place, based on the totality of the circumstances.") (internal quotations omitted). The "Court's decision in Elmore is illustrative. In Elmore, a murder victim had been dating and pimping out a minor before he was shot and killed. The police sought a warrant for cell phone records and cell site location information for the defendant, a relative of the minor, on the theory that a member of the minor's family had likely murdered the victim for pimping out the minor. Elmore, 917 F.3d. at 1074. With respect to the defendant, the affidavit had only "scant and innocuous references" consisting of the fact that the defendant's phone number was stored in the minor's phone and that the defendant and minor were relatives who had lived together. No other facts connected the defendant to the victim. Based on that record, the Court held that the officer's hunch coupled with the "mere existence" of the familial connection and presence of the defendant's phone number in the minor's cell phone was "not sufficient to render it 'reasonable' to search for evidence of the crime in [defendant's] location data." Id. at 1075. There was no other evidence that the defendant was involved in the murder or even that he was in the same city as the victim on the night murder--only speculation by the affiant that he could have been and an officer's "hunch" that the defendant might be the perpetrator.

Here too, the "scant and innocuous" references to Mr. Dow fail to establish a "fair probability" that Mr. Dow was involved in the October 27, 2015 and November 4, 2015 robberies, much less the other unsolved robberies. The bulk of Lt. Maguire's affidavit focused on

evidence related to Mr. Carson who Lt. Maguire knew was not the perpetrator of the November 4, 2015 Grocery Outlet robbery as he was in custody at the time. Despite this glaring fact, Lt. Maguire asserted a link between Mr. Carson and the six unsolved armed robberies based on the "method" of robbery, and the locations of the two robberies Mr. Carson admitted committing. Regarding, "method," Lt. Maguire noted that the six unsolved armed robberies and Mr. Carson's two robberies all involved pretending to purchase an item with cash before pulling out a firearm and robbing the cashier. But nothing about this "method" is particularly distinguishing and Lt. Maguire offered no explanation as to why he considered it unique. Lt. Maguire also included the fact that the robber(s) in each of the six unsolved robberies wore white or green gloves, but then was silent as to whether Mr. Carson wore the signature gloves during his robberies. Lt. Maguire further observed that the two stores Mr. Carson robbed had also been robbed about a month prior as part of what he labeled a "series" of unsolved armed robberies. Again, Lt. Maguire offered no support for his conclusion that he "believe[d] Mr. Carson may have been either the unknown suspect who committed the robberies, or may have been involved with the suspects" apart from the overlapping locations on two occasions.

As Mr. Carson could not have committed the November 4, 2015 robbery-- removing the prime suspect from consideration--Lt. Maguire then theorized a connection between Mr. Carson and Mr. Dow based on little more than a hunch: four calls from Mr. Carson's phone to Mr. Dow's phone on October 27, 2015. Even assuming there was a tenuous connection between Mr. Carson and Mr. Dow, this Court has rejected similar "guilt by association" claims. See, e.g., United States -v- Garcia, 151 F.3d 1243, 1246-47 (9th Cir. 1998)(rejecting a theory of "guilt by association" based on gang membership alone). By Lt. Maguire's reasoning, there would be probable cause to obtain cell phone records and cell-site location information for anyone Mr. Carson called on October 27, 2015 who also owned a white sedan. On October 27th alone Mr. Carson made over seventy phone calls to over a dozen different contacts "prior to" committing the Roxie Market robbery. Even if one could reasonably suspect that Mr. Carson might be involved with the

other unsolved armed robberies, without Mr. Carson, there was nothing directly linking Mr. Dow to any of the robberies. There was no reasonable basis to believe that evidence regarding the November 4, 2015 robbery would be found in Mr. Dow's cellphone records and cell-site location information based on four calls initiated by Mr. Carson hours before the Roxie Market robbery on October 27, 2015. Lt. Maguire did not aver that he was aware of the contents of these conversations or whether Mr. Dow actually answered and spoke to Mr. Carson, much less that these conversations were about the October 27th robbery. As in Elmore, Lt. Maguire had "no reason to believe that" Mr. Dow was even in San Francisco on November 4, 2015, apart from rank speculation.

Nor does the second, unrelated fact that Mr. Dow owns a white Chevy Impala somehow render it reasonable to conclude that the white sedan spotted approximately two blocks from the Grocery Outlet robbery was his car, let alone that Mr. Dow was the driver of that car on November 4, 2015. Even assuming that the "getaway" label was accurate--which it is not--the only link between that car and Mr. Dow is Lt. Maguire's conclusory statement that the surveillance video vehicle and Mr. Dow's vehicle "appear to be the same color, make and model." That must be true of thousands of white sedans registered in San Francisco. Lt. Maguire did not aver that a partial license plate was visible or that any other distinguishing characteristics of the "getaway" car resembled those of Mr. Dow's car, nor did he suggest that it was possible to establish the gender, race, height, or weight of the sedan's driver. At best, this establishes a mere possibility that Mr. Dow's car like any other white, four door sedan could have been near the robbery scene that night and extension, that Mr. Dow could have been the driver of that car.

Notably, even viewed in their most favorable light, these random, unrelated facts do not bolster the evidence of probable cause. The calls from Mr. Carson's phone to Mr. Dow's on October 27, 2015 do not make it any more likely that Mr. Dow's car was involved in a robbery eight days later, at an entirely different location, on a day when Mr. Carson was in police custody. Nor can Lt. Maguire's professional hunch substitute for reliable evidence. See, e.g., McKenzie -v- Lamb,

738 F.2d 1005, 1008 (9th Cir. 1984) ("Mere suspicion, common rumor, or even strong reason to suspect are not enough" to establish probable cause."). The affidavit improperly bootstrapped these facts with other speculation about Mr. Carson's involvement in the remaining unsolved robberies and Lt. Maguire's gut instinct about Mr. Dow.

Notwithstanding these deficiencies, the district court found that there were two "link[s]" between Mr. Dow and the November 4, 2015 robbery: "a vehicle matching Dow's played a role in the robbery," and "just eight days earlier, Carson spoke to Dow on the phone and committed two robberies using the same method that was used in the November 4, 2015 robbery." But Mr. Carson was in custody on November 4, 2015 and the government has never claimed that Mr. Dow was the November 4, 2015 robbery suspect caught on camera. Whatever thin thread connected Mr. Carson and Mr. Dow based on Mr. Carson's outgoing phone calls eight days earlier therefore had no factual or logical connection to the November 4, 2015 robbery when an unknown third person committed and armed robbery by walking up to a cashier with an item in hand before pulling out a firearm and demanding the cash in the register.

The district court's conclusion that there was nonetheless some connection between Mr. Dow and the unidentified November 4, 2015 robbery suspect relied on unfounded speculation that was entirely absent from the warrant application. The district court indicated that "the magistrate could have reasonably inferred that more than one person was involved in some or all of the robberies" based on common knowledge that people who rob grocery stores and gas stations often act with accomplices." But there is no basis for the magistrate to have made such an inference and the district court's post hoc speculation lacks any substantial basis. Nothing in Lt. Maguire's affidavit could support such an inference; Lt. Maguire's affidavit made no mention of looking or accomplices and his descriptions of the unsolved robberies and common "method" all detailed a single suspect approaching the register and committing armed robbery. The district court's conclusion that any "objective link" tied

Mr. Dow to the unknown November 4, 2015 robbery suspect based on Mr. Carson's phone calls to a number associated with Mr. Dow prior to Mr. Carson committing a robbery lacks any logical or factual basis. It cannot be the case that simply receiving phone calls from an individual who commits a crime creates a fair probability that evidence of a subsequent crime by an unknown third party will be found in the location data of the person who was called by the confessed robber.

That there was a purported "getaway" car in connection with the November 4, 2015 robbery that "matche[d]" Mr. Dow's white Chevy Impala does not alter this analysis. If anything, it only highlights the significant and precarious leaps of logic necessary to conclude that there was a fair probability that Mr. Dow was involved with the November 4, 2015 robbery. In order to deduce that Mr. Dow owning and driving (eight months earlier) a white Chevy Impala could support a finding of probable cause, the district court relied on the fact of Mr. Carson's confessed to robberies and his phone calls to a number associated with Mr. Dow on the same day. Even assuming that receiving phone calls from a confessed robber on the day he commits a crime could support more than mere suspicion of Mr. Dow's involvement, that tenuous inference cannot bear the weight of the next required leap: that Mr. Dow was involved in a conspiracy of robbers, one of whom (not Mr. Carson or Mr. Dow), committed a robbery on November 4, 2015, because there was a white "geraway" car that "matched" the look of Mr. Dow's Chevy Impala. Lt. Maguire made no reference to use of a getaway car in any of the other unsolved robberies, much less the October 27, 2015 robbery that Mr. Carson committed. Nor did (or could) Lt. Maguire allege any other facts purportedly tying Mr. Dow to Mr. Carson's criminal conduct, much less to a subsequent robbery committed by an unknown third party on November 4, 2015. The tenuous chain of inferences required by Lt. Maguire's Affidavit cannot support a finding of probable cause. See United States -v- Weber, 923 F.2d 1338, 1345 (9th Cir. 1990) ("Each of these inferences standing alone may be reasonable. But with each succeeding inference, the last reached is less and less likely to be true. Virtual certainty becomes probability, which merges into possibility, which fades into chance. The fourth amendment requires a fair probability' that the items searched for will be found.")

The affidavit failed to demonstrate probable cause on its face and the evidence obtained pursuant to the warrant must therefore be suppressed.

II. The District Court Erred in Finding that Lt. Maguire's Misrepresentations or Omissions Were Immaterial to the PROBABLE CAUSE DETERMINATION

A. Standard of Review,

This Court should review for clear error a district court's finding that an affidavit did not contain purposeful or reckless omissions or misstatements and should review *de novo* its determination that the misleading omissions or misstatements were immaterial to the finding of probable cause. United States -v- Martinez-Garcia, 397 F.3d 1205, 1215 n.5 (9th Cir. 2005)(citing United States -v- Elliott, 322 F.3d 710, 714 (9th Cir. 2003)). The ultimate question, whether misstatements or omissions are material to a finding of probable cause is a mixed question of law and fact subject to *de novo* review. United States -v- McQuisten, 795 F.2d 858, 863 (9th Cir. 1986).

B. The Record Establishes that Lt. Maguire Recklessly or Intentionally Omitted or Misrepresented Information Material to the Probable Cause Determination.

Mr. Dow has the right to challenge the veracity of statements made in support of an application for a search warrant. Franks, 438 U.S. at 155-56. This is especially true where the record demonstrates that Lt. Maguire knowingly chose to selectively include and exclude information to bolster his affidavit and mislead the magistrate making the probable cause determination. Rather, then make findings about Lt. Maguire's reckless or intentional misrepresentations and omissions, the district court "assume[d]" without deciding that Lt. Maguire made "at least one" recklessly or intentionally misleading statement. Despite so assuming, the district court declined to hold a Franks hearing because it concluded Lt. Maguire's misrepresentations and omissions were immaterial to the magistrate's finding of probable cause. The district court erred on both counts.

To prevail on a Franks challenge, the defendant must establish two things by a preponderance of the evidence: first, that "the affiant officer intentionally or recklessly made false or misleading state-

ments or omissions in support of the warrant[,] and second, that the false or misleading statement or omission was material, i.e., "necessary to the finding of probable cause." United States -v- Martinez-Garcia, 397 F.3d 1205, 1214-15 (9th Cir. 2005) If both requirements are met, "the search warrant must be voided and the fruits of the search excluded...."Franks, 438 U.S. at 156. Both elements are met here.

I. Lt. Maguire Knowingly Omitted Material Information About Mr. Carson's Outgoing Phone Calls on October 27, 2015 in Order to Mislead the State Judge.

Lt. Maguire intentionally and recklessly omitted essential context regarding the four phone calls Mr. Carson made to a phone number associated with Mr. Dow on October 27, 2015. There can be no mistaking the importance that Lt. Maguire attached to these outgoing calls or the inferences and conclusions he expected the magistrate would draw from their inclusion in the affidavit. In his sworn affidavit, Lt. Maguire stated that he "reviewed [Mr. Carson's] phone calls for the day he committed the two robberies" and "noticed (4) outgoing calls" to a number associated with Mr. Dow. He then averred that "the fact that Carson called Dow (4) times prior to the robberies he committed on 10/27/15"--in addition to the white "getaway" vehicle used in the November 4, 2015 robbery--undergirded his "belie[f] that Dow is possibly associated with the larger robbery series that Sgt. Mason is investing."

Despite representing to the state magistrate that the fact of the phone calls from Mr. Carson to Mr. Dow supported an inference that Mr. Dow was "possibly associated" with Mr. Carson's October 27, 2015 robberies, Lt. Maguire intentionally omitted material information that would tend to undercut such an inference. Lt. Maguire did not disclose the time and duration of these calls, nor did he disclose that these four phone calls represented four of seventy-three phone calls Mr. Carson made to over a dozen different contacts "prior to" committing the October 27, 2015 robberies. Omitting this information gave the misleading impression that the four phone calls to Mr. Dow related to the robbery that Mr. Carson committed and that Mr. Dow was somehow involved with the robbery.

The excerpted table shows that the calls from Mr. Carson's phone to Mr. Dow's phone on October 27th were relatively short and all occurred between 1:54 p.m. and 3:05 p.m.--at least three hours before the Roxie Market robbery that took place at 6:35 p.m. There are no calls from Mr. Carson's phone to Mr. Dow's immediately after the robbery on October 27, 2015, nor are there calls from Mr. Dow's phone to Mr. Carson's phone immediately before or after the robbery. An officer presenting a search warrant application has a duty to provide, in good faith, all relevant information to the magistrate. United States -v- Hill, 459 F.3d 966, 971 n.6 (9th Cir. 2006). As Lt. Maguire sought to establish a factual basis for some association between Mr. Carson's commission of a robbery and Mr. Dow based on four phone calls, that duty required Lt. Maguire to disclose to the judge that the four brief phone calls occurred within approximately an hour of one another with the last eight second call happening three hours before the Roxie Market robbery, and that Mr. Carson had made over seventy calls to over a dozen different numbers "prior to" committing the first of two robberies on October 27, 2015.

All of this information is material to the probable cause analysis, as it tends to disprove Lt. Maguire's supposition that the calls to Mr. Dow were related to the Roxie Market robbery, and by extension that Mr. Dow was involved with some larger conspiracy of robbers. The timing, durations and number of other calls are all variables that would have materially affected the magistrate's probable cause analysis. This is especially so where, as here, Lt. Maguire's intentional effort to tie Mr. Dow to Mr. Carson, and by extension to the October 27, 2015 Roxie Market robbery, was crucial to his insistence that the sighting of a car bearing a resemblance to Mr. Dow's near a robbery committed on November 4, 2015 was another linkage. In short, Lt. Maguire "selectively included information bolstering probable cause, while omitting information that did not." United States -v- Perkins, 850 F.3d 1109, 1117 (9th Cir. 2017). Yet, in truth the SFPD had not established any meaningful connections among the unsolved robberies but rather were at an investigative dead end.

2. Lt. Maguire Knowingly Omitted and ~~Misrepresented Material~~ Information About the November 4, 2015 Robbery "Getaway" Vehicle.

Lt. Maguire Knowingly omitted and misrepresented material infor-

mation regarding the purported "getaway" car that would also have negated the state magistrate's probable cause finding. In his affidavit, Lt. Maguire states that Sgt. Mason "advised" him that "a white 4-door sedan was used as the getaway vehicle in one of the robbery incidents." Lt. Maguire then averred that "Sgt. Mason provided me with still images of the video surveillance that captured the getaway vehicle used in this robbery." As noted supra, the use of the term "getaway" vehicle is problematic and misleading as it is belied by the facts known to Lt. Maguire but not disclosed in the affidavit: (1) the private video surveillance footage of the white sedan which Lt. Maguire characterized as the getaway car was taken on 28th Avenue approximately two blocks from the location of the robbery of a Grocery Outlet; (2) in the video, the presumed robbery suspect runs by and away from the getaway car which is stopped on the opposite side of the street from the fleeing suspect; (3) the alleged getaway car remains in its original position for another two minutes after the robbery suspect can be observed running past it; (4) the fleeing suspect never reappears in any surveillance footage after running by the white sedan; and (5) other surveillance footage, including footage captured by a Grocery Outlet exterior camera, shows what appears to be a woman, not the robbery suspect, walking southbound from Geary Blvd. On 28th Avenue and appearing to get in the getaway car immediately before it leaves the area. These omissions gave the misleading impression that surveillance video showed the suspect get into the vehicle and flee in the car after the robbery and make Lt. Maguire's blanket assertion that the "still images" in fact "captured the getaway vehicle used in this robbery" all the more disingenuous.

As illustrated below, the white sedan was parked on the west side of 28th Ave., around the corner from the Grocery Outlet at the intersection of 28th Ave. and Geary Blvd. The Grocery Outlet surveillance camera captured the suspect fleeing the store following the robbery at 8:14:09 p.m. At 8:15:21 p.m., the home surveillance video shows the suspect run by the camera, heading south on the east side

of 28th Ave., i.e., on the opposite side of the street from the white vehicle. The suspect runs by and away from the white car towards Anza Street, which runs parallel to Geary Blvd. on block south. Approximately two minutes later, at 8:16:50 p.m. a figure can be seen slowly walking south from Geary Blvd. towards Anza Street and the white car. At 8:17:18 p.m. the white car drives away. For the suspect to return to the vehicle as shown in the videos, he would have had to run around the entire block. A tool on Google Maps demonstrates that this would be approximately 1850 feet, or 0.35 miles, whether the suspect ran east or west to circumnavigate the block. The blue arrows indicate the direction in which the suspect ran and the "shadowy" figure walked.

To cover 0.35 miles in the two-minute gap between the suspect running past the white car and the white car leaving the scene, the suspect would have had to run at a pace of less than six minutes per mile. As discussed below, this does not accord with the actual video surveillance showing a figure walking quite slowly down 28th Ave., carrying what looks like a bag and then appearing to get into the white vehicle before it drives away. Contrary to the conclusory assertion made by Lt. Maguire in his affidavit that the white car "was used as the getaway vehicle," if anything, the evidence tends to demonstrate the suspect did not enter the car after the robbery. Certainly, if an individual unrelated to the robbery got into the car in an unhurried manner immediately before it left the scene that would seriously undermine the conclusion Lt. Maguire was urging upon the state judge: that the driver of the white sedan was in league with the robbery suspect, or that the white sedan was in any way related to the Grocery Outlet robbery. As the remote possibility that the white sedan was Mr. Dow's is the only piece of evidence connecting him to the November 4, 2015 robbery, absent that linkage there is no probable cause to support the search warrant. The omission of these contextual facts was material.

The time, distance, and locations of individuals and the white vehicle are critical to understanding the sequence of events, yet none of that information was provided in Lt. Maguire's affidavit. At 8:14:24 p.m., the suspect can be seen running west on Geary Blvd.

towards 28th Ave. This accords with the home surveillance video showing the suspect run by on 28th Ave. at 8:15:21 p.m. The suspect does not run by the Grocery Outlet camera again. Instead, at 8:15:04 p.m. two individuals separately walk past the camera in front of the Grocery Outlet, the latter appears to be a woman holding a tote bag.

Indicating that if the suspect did, in fact, run around the block to get back to Geary Blvd., he must have done so by running west towards 29th Ave. At 8:14:58 p.m. the first person below crosses 28th Ave. at the intersection of Geary Blvd., and 28th. The second individual, the woman with the tote bag, crosses 28th Ave. and then turns south onto west sidewalk of 28th Ave. at 8:16:12 and walks toward the white car.

Although it is admittedly difficult to make out, from another home surveillance camera angle, the woman appears to get into the white car before it pulls away at 8:17:18 p.m. What is not difficult to interpret and what was known to Lt. Maguire when he wrote the affidavit is that there is no video image of the fleeing robbery suspect anywhere near the white car at this time. The schematic below illustrates the same thing without photo stills. Lt. Maguire's definitive and unqualified statements mischaracterize the video evidence that he later admitted reviewing before authoring the affidavit. Lt. Maguire failed to relay any facts about when and where the suspect could be seen, or the direction in which the suspect appeared to run. In doing so, Lt. Maguire elided critical information that directly contradicted his assertion that the white vehicle in the surveillance videos "was used as the getaway vehicle" by the robbery suspect. See United States -v- Stanert, 762 F.2d 775, 781 (9th Cir. 1985), amended, 769 F.2d 1410 (9th Cir. 1985) (B"By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw."). Had Lt. Maguire mentioned that the surveillance cameras were located around the corner from the Grocery Outlet and would require someone to walk more than 300 feet to get from the entrance of the store to the front of the home, it would have raised questions about the relationship between the fleeing suspect and the alleged getaway car. As a result, the judge was

mised about material evidence supporting the probable cause finding.

It can be fairly inferred that Lt. Maguire's omissions were at a minimum reckless, and arguably knowing and intentional. With respect to the cell phone records, Lt. Maguire testified that he "reviewed" and "rel[ied]" on the data extracted from Mr. Carson's cell phone. These records, excerpted *supra*, clearly show the time, recipient, and number of calls Mr. Carson made on October 27, 2015. Lt. Maguire disregarded the other approximately 70 calls made to over a dozen different contacts that day and instead cited only the four calls from Mr. Carson's phone to Mr. Dow's number without placing them in time relative to the Roxie Market robbery.

Similarly, Lt. Maguire testified that he had personally "watched the video surveillance from this residence ... prior to authoring the affidavit," and that he had personally "pulled the still [images]" that he refers to in his affidavit. Lt. Maguire also testified to viewing the Grocery Outlet surveillance videos before preparing his affidavit, including the video depicting the two individuals walking west on Geary Blvd., of whom later appears to enter the white car. To have reviewed all of the surveillance videos and still aver in an unqualified and definitive manner that the white car "was used as the getaway vehicle" demonstrates more than an inadvertent mistake. This is especially so when Lt. Maguire claimed in his affidavit to be relying on another officer's recounting of events, but then later testified that he personally reviewed the videos and selectively curated the description for the state magistrate. To satisfy the first step of the Franks analysis "all that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." Stanert, 762 F.2d at 781. Mr. Dow has made a substantial showing here.

3. The District Court Incorrectly Concluded that Lt. Maguire's Intentional or Reckless Omissions and Misrepresentations Did Not Negate the State Magistrate's Finding of Probable Cause.

The district court erred in discounting the materiality of Lt. Maguire's reckless or intentional omissions regarding Mr. Carson's

phone calls and the supposed getaway vehicle. First, the district court omitted from its "hypothetical warrant" material information about the November 4, 2015 surveillance videos that would have tended to negate any inference that there was a getaway vehicle. Second, the district court's method of analysis was flawed. Despite concluding that the "facts" of Mr. Carson's calls and the getaway vehicle constituted the two "objective links" between Mr. Dow and the November 4, 2015 robbery sufficient to support a finding of probable cause, the district court declined to consider the cumulative effect of Lt. Maguire's omissions and misrepresentations on the state magistrate's probable cause analysis.

The district court found that a "hypothetical warrant" should have included several additional and corrected pieces of information about the supposedly common method of armed robbery, Mr. Carson's other phone calls on October 27, 2015, Mr. Carson's phone calls to Mr. Dow (timing and duration), and the getaway vehicle.

With respect to the getaway vehicle, the district court postulated that the hypothetical warrant should have specified that "the robber arrived two blocks from the Grocery store in a car that appeared to match Dow's vehicle's color, make, and model (i.e., a car that appeared to be a white Chevrolet Impala)" and that "[a]fter committing that robbery, the robber ran past the vehicle appearing to match Dow's on the other side of the street" and "drove off without the robbery suspect. It is not known whether the suspect later rendezvoused with the vehicle."

The district court failed to include the fact that the surveillance videos appear to show a woman--with no apparent connection to the robbery--approach and possibly enter the vehicle just before it drove away. Even if it was not entirely clear from the videos that the woman entered the vehicle before it drove off, a candid description of the surveillance videos should have included for the state magistrate's consideration the strong possibility that a woman, with no apparent connection to the robbery, got into the vehicle before it drove away. That additional fact raises serious questions as to whether the driver of the white car--despite having apparently dropped off the suspect--had any relationship to the suspect or any

knowledge of the suspect's plans--or merely dropped off a stranger, like hundreds of side-share drivers do every day in the city of San Francisco, and then picked up another rider departing the area. The district court's materiality analysis was also flawed because it failed to properly consider the cumulative effect of Lt. Maguire's misrepresentations and omissions. Instead, the district court dismissed each omission or misrepresentation in piecemeal fashion and concluded that Lt. Maguire's misleading omissions and misrepresentations were immaterial because probable cause "does not require certainty." While that is true, probable cause certainly requires more than the bootstrapped chain of inferences that would have remained here had Lt. Maguire provided the state magistrate the full and candid facts relevant to making a probable cause determination. See Weber, 923 F.2d at 1345.

C. The Good Faith Exception to the Exclusionary Rule Cannot Save This Warrant.

For the reasons discussed *supra*, the government has no basis on which to claim that Lt. Maguire believed he had a good faith belief that there was probable cause to search Mr. Dow's cell phone records and GPS location; having mislead the Court in the first instance, he cannot now rely on the Court's probable cause finding to justify the search. Even if the affiant could claim good faith here, the exception to the exclusionary rule does not apply. There are "four exceptions to the exception where suppression 'remains an appropriate remedy.'" Elmore, 917 F.3d F.3d at 1077 (quoting United States -v- Leon, 468 U.S. 897, 923 (1984)). "The four situations are: (1) where the affiant recklessly or knowingly placed false information in the affidavit that misled the issuing judge; (2) where the judge 'wholly abandon[s] his [or her] judicial role'; (3) where the affidavit is 'so lacking in indicia of probable cause as to render official relief in its existence entirely unreasonable'; and (4) where the warrant is 'so facially deficient--i.e., in failing to particularize the place to be searched or things to be seized--that the executing officers cannot reasonably presume it to be valid.'" Underwood, 725 F.3d at 1085 (quoting Leon, 468 U.S. at 922-23). The first three situations are relevant here.

First, Lt. Maguire recklessly and knowingly omitted material inf-

ormation that misled the state court judge. As discussed above, Lt. maguire omitted material information regarding the calls from Mr. Carson's phone to Mr. Dow's number that would have precluded a finding of probable cause. He also recklessly mischaracterized the white sedan as a getaway car to give undeserved weight to the thin link between Mr. Dow and the November 4, 2015 robbery. Based on Lt. Maguire's sworn testimony regarding his personal familiarity with the video evidence prior to submitting his affidavit in support of the first warrant, he knew or should have known that his descriptions of the phone calls and the "getaway" car would mislead the judge.

Second, the state magistrate "wholly abandon[ed]" its judicial role by "rubber-stamp[ing] the conclusions of law enforcement." Underwood, 725 F.3d at 1083-84. The magistrate did not question the conclusory statements made by Lt. Maguire nor did the magistrate review the limited evidence underlying Lt. Maguire's claims, i.e., the call records, surveillance videos, or still images. Instead, the magistrate accepted Lt. Maguire's unqualified and unsupported speculation that evidence relating to the November 4, 2015 robbery might be found in Mr. Dow's cell phone records and GPS location based on Mr. Dow's alleged association with Mr. Carson and Mr. Dow's owning a white sedan.

Third, it was objectively unreasonable for the state magistrate to rely on an affidavit that lacked any "indicia of probable cause." Underwood, 725 F.3d at 1085-86. There was no evidence or fact tying Mr. Dow directly to the unsolved November 4, 2015 robbery. Instead, there was a tenuous and strained connection between Mr. Carson and the November 4, 2015 robbery that occurred while Mr. Carson was in custody, four phone calls from Mr. Carson's phone to Mr. Dow's on the date of a different robbery, a white car in the vicinity of the November 4, 2015 Robbery, and Mr. Dow's driving of a white car eight months prior. At best this supports the innocent conclusion that Mr. Carson called Mr. Dow on October 27, 2015 and that Mr. Dow's sedan, like thousands of other white cars, could have been the getaway vehicle on November 4, 2015. But

REASONS FOR GRANTING THE PETITION

1. The District Court Erred by Not Suppressing the Evidence Resulting from the Unlawful GPS Tracking of Mr. Dow's Car and Collection of His Subscriber Records and Historical Cell-Site Location Information.
2. The Four Corners of the November 12, 2015 Search Warrant Do Not Support a Finding of Probable Cause.
3. The District Court Erred in Finding that Lt. Maguire's Misrepresentations or Omissions Were Immaterial to the Probable Cause Determination.
4. The Record Establishes that Lt. Maguire Recklessly or Intentionally Omitted or Misrepresented Material to the Probable Cause Determination.
5. Lt. Maguire Knowingly Omitted Material Information About Mr. Carson's Outgoing Phone Calls on October 27, 2015 in Order to Mislead the State Judge.
6. Lt. Maguire Knowingly Omitted and Misrepresented Material Information About the November 4, 2015 Robbery "Getaway" Vehicle.
7. The District Court Incorrectly Concluded that Lt. Maguire's Intentional or Reckless Omissions and Misrepresentations Did Not Negate the State Magistrate's Finding of Probable Cause.
8. The Good Faith Exception to the Exclusionary Rule Cannot Save This Warrant.

there is no support for the conclusion that Mr. Dow was actually involved with either the October 27th or November 4th robberies.

The facts in the affidavit are several steps removed from facts sufficient to demonstrate a fair probability that evidence of a crime would be found in Mr. Dow's cell phone records and GPS location data.

There are no facts about the substance of any communications between Mr. Carson and Mr. Dow, whether Mr. Carson's two robberies or the other unsolved robberies--including the Grocery Outlet robbery--involved pairs working together, whether any getaway vehicle were ever used in the other robberies, or whether there were any distinguishing characteristics of the getaway vehicle(s) that matched Mr. Dow's vehicle.

Some of this information could and should have been readily available to Lt. Maguire, had he chosen to investigate before seeking a warrant to search Mr. Dow's cell phone records and GPS location. Where, as here, an affidavit "fails to provide a colorable argument for probable cause," the good faith exception to the exclusionary rule does not apply.

CONCLUSION

For the above reasons, petitioner, Mr. Dow, respectfully request this court to declare that the search warrants, and each of them, was and are, illegal and unconstitutional and must be eliminated without delay. He also ask the court to declare that he should have had a Franks Hearing. However, he request that the court grant him such further relief as is appropriate in the interests of justice.

Dated: 11/21 (2023)

Respectfully submitted,
/S/ La Carl Dow
La Carl Dow,

Petitioner.