No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

CORLOYD ANDERSON

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

_____

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Nearly half a century ago, this Court held that the Fourth Amendment's Warrant Clause "surely takes the affiant's good faith as its premise…." *Franks v. Delaware*, 438 U.S. 154, 169 (1978). In this case, the law enforcement officer whose sworn affidavits resulted in the issuance of critical wiretap orders and search warrants was a drug trafficker and a thief. After Petitioners were indicted, tried, convicted, and sentenced, the Government disclosed that the affiant repeatedly and flagrantly concealed his prior criminal conduct from issuing judges. Yet the Fourth Circuit held that a new trial was not warranted because, regardless of the affiant's concealment of critical information about his background and qualifications, other information in the affidavits established probable cause.

I. Does the Warrant Clause require a new trial — and the right to seek suppression of evidence — when newly-discovered, undisputed evidence establishes that an affiant who applied to district and magistrate judges for wiretap orders and search warrants in bad faith concealed his prior felonious conduct, tainting the evidence obtained directly and derivatively from those orders and warrants?

The Due Process Clause provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law. In the sentencing context, this Court have consistently held that where a district court imposes a sentence outside of the Guidelines range, an appellate court must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall v. United States*, 552 U.S. 38, 47 (2007). A major variance should be supported by a more significant justification than a minor one. *Id.* at 50.

II. Does the Due Process Clause and 18 U.S.C. 3553(a) Require a District Court to Provide a Compelling Justification to Support a Nearly Two-Fold Upward Variance from the Sentencing Guidelines Contravening Binding Authority that Affects the Fundamental Rights of a Criminal Defendant and Is An Important And Recurring Issue.

LIST OF PARTIES

Petitioner is Corloyd Anderson is a natural person.

Respondent is the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Corloyd Anderson petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION AND ORDER BELOW

The decision under review, *United States v. Banks,* 104 F.4th 496 (4th Cir. 2024), is attached as Appendix A. The Fourth Circuit Order denying rehearing is attached as Appendix B. The district court's written opinion is attached as Appendix C.

JURISDICTION

This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1). The petition was filed within 90 days after the Fourth Circuit entered judgment on June 12, 2024.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation…." U.S. Const. amend. IV.

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V

Title 18 U.S.C. 3553(a) provides that "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider . . . the sentencing range . . . as set forth in the guidelines [and] the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. . . ."

STATEMENT

A. The Charges, Verdicts, and Sentences

The operative second superseding indictment, returned on June 1, 2017, charged Petitioner and others with racketeering conspiracy, committing violent crimes in aid of racketeering, conspiracy and substantive narcotics distribution offenses, and firearms offenses. After a 22-day trial, the jury convicted Petitioner of the racketeering conspiracy and of conspiracy to distribute and distribution of one kilogram or more of heroin, which gives rise to a mandatory minimum sentence of 10 years imprisonment. No drugs were ever recovered from Mr. Anderson. Nor was he ever observed selling drugs by law enforcement officers. The jury did *not* find him guilty of any of the other

racketeering activities charged, including any of the violent racketeering activity including murder, extortion, robbery, witness tampering and witness intimidation, as it did some of the other defendants who were tried with him. The district court sentenced Bailey to life imprisonment, Lockley to 360 months imprisonment, Davis to 300 months imprisonment, all of whom had been found guilty of one or more of the racketeering activities involving violence.

Nonetheless, the district court sentenced Anderson to 264 months imprisonment, a substantial upward variance from the guideline range established for his offense, which was 155 months to 188 months.[1] All defendants appealed; after their convictions were affirmed by the Fourth Circuit, they filed a separate petition for certiorari raising only the first issue raised by Mr. Anderson.[2]

B. The Newly-Discovered Evidence and New Trial Motion

In March 2020, shortly after Petitioner was sentenced and while

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[1] The total offense level for Mr. Anderson was 32 and his criminal history category was III. His prior convictions were relatively stale and involved street level distribution amounts.

[2] *Shakeen Davis v. United States*, No. 24-5300. This petition is in large part identical to the *Davis* petition with respect to the first issue regarding the affiant's undisclosed criminality.

his appeal was pending, the Government filed a felony information against Ivo Louvado, a Baltimore City Police Department detective and federal task force officer. The information charged that Louvado, who in 2016 and 2017 swore out the affidavits in support of the most important wiretap and search warrant applications during the investigation that led to the charges against Petitioner and his codefendants, had participated in stealing and reselling seized narcotics in 2009 and lied when the Federal Bureau of Investigation interviewed him in 2018. Louvado's affidavits never disclosed his felonious misconduct to the judges who issued the wiretap orders and search warrants. In particular, Louvado swore out the affidavit for the search of Petitioner's home and business, which led to the discovery of a firearm in his home, but no drugs or implements of drug distribution. Incident to his arrest, Petitioner made a statement in which he admitted to possessing the firearm as well as to having distributed small quantities of heroin. Louvado pleaded guilty and was sentenced to a term of imprisonment.

In June 2020, Petitioners filed a motion for new trial pursuant to Fed. R. Crim. P. 33 so that they could seek to move to suppress the

evidence obtained, directly and derivatively, from the Louvado-tainted wiretaps and warrants, and/or seek a hearing regarding those affidavits pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The Fourth Circuit held Petitioners' appeals in abeyance pending resolution of that motion. The district court denied the motion in April 2022, and issued an Amended Memorandum explaining its decision on May 9, 2022. Petitioner filed a timely notice of appeal from that ruling.

The district court's memorandum opinion denying Petitioner's motion for new trial accurately recites the factual background relevant to the Louvado affidavits:

> Louvado was a corrupt Baltimore City police officer who, while executing a search in February 2009 with a squad including certain other corrupt BPD officers, stole and resold three kilograms of cocaine — a fact that did not surface with direct evidence until April 2019. In 2010, he was detailed to a task force with [ATF]. While on the ATF task force, he participated in an investigation of the defendants' criminal enterprise….
>
> **Investigation**
>
> *The MMP investigation: Homeland Security (2015) and ATF (2016–17)*
>
> In March 2016, the ATF became involved in an investigation of [MMP].
>
> * * *

Louvado's participation in the ATF investigation

Louvado was part of the MMP investigation after the ATF joined. There were two instances in the 18-month investigation where Louvado acted outside the presence of other officers in a moment or manner germane to the MMP case.[3]

* * *

The focus of the defendants' motions is Louvado's role in certain wiretaps and search warrants between June 2016 and March 2017:

- Louvado was the sole affiant for wiretaps of Dwight Jenkins (TT1) and Jacob Bowling (TT2), approved in June 2016. The probable cause was based on a series of four audio- and video-recorded controlled buys and text messages with informants in May and June 2016. Louvado wrote the report for one of the controlled buys but was accompanied at all times by other officers; he did not participate at all in the others.

- That same affidavit was incorporated by reference into an ATF lead investigator's July 2016 application for a wiretap of Lockley (TT3). The application discussed two calls from the TT1 wiretap, but the TT3 probable cause was mainly based on a March 2016 controlled buy that Louvado was not involved in. TT1 and TT2 information and the Louvado affidavit was similarly incorporated by reference into an ATF investigator's August 2016 application for a wiretap of Anderson (TT4).

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[3] In an instance where Louvado was accompanied by other officers, he participated in executing a search warrant at Bailey's residence on May 17, 2016 and allegedly discovered drugs. 4th Cir. Joint App'x 924-951, 6344-6346.

- Louvado applied in September 2016 for a warrant to search several residences and vehicles, including Lockley's home, Anderson's home and business, and Davis's home. The probable cause was based on wiretap calls, a recorded controlled buy (during which Louvado was accompanied at all times), and a confidential informant.

- Louvado applied in February 2017 for a warrant to search Frazier's cell phones; the probable cause was based on ballistic and DNA evidence from a homicide investigation Louvado was not part of and testimony about Frazier's arrest, given by someone other than Louvado. So, too, for a February 2017 warrant application to search Frazier's Instagram account, the probable cause for which was based on public Instagram posts, the aforementioned homicide investigation, and a recorded jail call.

- Louvado applied in March 2017 for a warrant to search Davis's cell phones; the probable cause was based on the circumstances of Davis's arrest, which Louvado was not involved in.

- Louvado applied in March 2017 for a warrant to search Davis's Instagram, based on Davis's arrest and public Instagram posts.

* * *

[Louvado] did not disclose his February 2009 drug thefts in these 2016 and 2017 affidavits and applications. For example, in affidavits supporting search warrant applications for Frazier's cell phones and Instagram account and Shakeen Davis's cell phones, Louvado declared that he had not "excluded any information known to [him] that would defeat a determination of probable cause."

* * *

The investigation of Louvado

Unbeknownst to the MMP defendants, at the same time as their case was progressing, the United States Attorney's Office was investigating corruption within BPD's Gun Trace Task Force, since then the subject of significant media coverage. Members of the GTTF were indicted for racketeering and racketeering conspiracy in February 2017, five months after the MMP indictment.

Louvado, however, was not a member of the GTTF, and his name had not come up in the GTTF investigation until July 2017, when a GTTF member admitted in a proffer that he and another officer had stolen money while executing a February 2009 search; he suspected that a third officer had also stolen that night. That GTTF member did not name Louvado in the same way as he named himself and two others as potential thieves; he noted only that shortly after that, Louvado had bought a boat. He did not offer direct evidence that Louvado had participated in the misconduct, but rather seemed to have inferred from Louvado's presence at the February 2009 search and from his purchase of a boat that Louvado had participated. In August 2017, USAO supervisors and GTTF prosecutors met with the MMP trial AUSAs to summarize the developments, and they explained that the GTTF officer had not seen Louvado steal money, had never talked to Louvado about it, and did not know whether Louvado had participated. Subpoenas of Louvado's financial records did not show large cash deposits shortly after the February 2009 search.

Months later, in March 2018, a former bail bondsman close to a GTTF officer told investigators that Louvado had "got proceeds" from the February 2009 search, but that bail bondsman was not present at the search, so his knowledge was second-hand. When GTTF investigators interviewed Louvado first in May 2018 and again in February 2019, he denied any knowledge of criminal activity.

> Federal GTTF investigators did not have direct evidence of Louvado's misconduct until a witness's April 2019 proffer (three weeks into the MMP trial), in which he recounted that he had seen Louvado steal the drugs in February 2009. The GTTF investigators notified USAO supervisors of the direct evidence of Louvado's misconduct, but the USAO's *Giglio* officers advised the MMP trial AUSAs that no *Giglio* obligation existed because (1) Louvado was not a trial witness; (2) the information in Louvado affidavits was independently verifiable; and (3) the GTTF investigation was still underway with potential covert steps to be taken.
>
> The April 2019 proffer's direct evidence led to further investigation and the January 2020 official opening of a confidential matter against Louvado as a criminal target. The government filed a March 2020 criminal information against Louvado for lying to investigators about the drug theft, and he pled guilty on November 6, 2020.

App. C at 2-8 (citations omitted).

Petitioners argued both that the Louvado evidence constituted newly discovered evidence that satisfied the requirements of Fed. R. Crim. P. 33(b) and that the Government had violated its obligations under the *Brady*/*Giglio* doctrine. The district court rejected both arguments and denied the motion. App. C.

C. The Fourth Circuit Affirmed Denial of Petitioners' New Trial Motion on the Grounds That Louvado's Criminal Misconduct, While Serious, Was Immaterial to the Evidence Establishing Probable Cause to Issue the Wiretap Orders and Search and Seizure Warrants

The Fourth Circuit affirmed the denial of the new trial motion.

The Court applied its five-part test for evaluating new trial motions under Fed. R. Crim. P. 33(b) — which requires that (1) the evidence is newly discovered; (2) the defendant exercised due diligence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence would probably result in acquittal at a new trial, United States v. Robinson, 627 F.3d 941, 948 (4th Cir. 2010) (cleaned up) — and determined that Louvado's omissions were not material. The Court stated that Petitioners "argue that Louvado tainted the trial evidence because had he disclosed his own criminal conduct from 2009 in the affidavits and applications he signed, no judge would have approved those requests. That may well be true, but it does not satisfy the Defendants' burden of showing materiality." App. A at 14. Reviewing its own precedents and citing cases from other circuits, the panel held that "both this Court and our sister circuit courts have recognized under similar circumstances that the materiality requirement is not satisfied when a law enforcement officer's misconduct is tangential to the evidence establishing a defendant's own culpability." App. A. at 15-16. The Court concluded that

> each time Louvado played a role in obtaining a search warrant or wiretap authorization, the probable cause establishing the basis for those requests was based on third-hand evidence unrelated to Louvado personally. He may have signed the requests, but that personal attestation matters little to the underlying support for obtaining authorization to proceed.

App. A at 17.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Opinion Is Contrary to this Court's Holding That the Fourth Amendment's Warrant Clause Presumes and Requires That an Affiant Act in Good Faith, and Creates a Circuit Split Regarding the Severability of an Affiant's Qualifications from the Remainder of an Affidavit

A. The Warrant Clause Mandates That Affiants in *Ex Parte* Investigative Proceedings Act in Good Faith

Law enforcement agents swear out applications for wiretap orders under 18 U.S.C. § 2518 or search warrants under Fed. R. Crim. P. 41 in the part of the federal criminal process that "involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge." *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.,* 407 U.S. 297, 321 (1972). Affidavits are confidential and "necessarily *ex parte*, since the subject of the search [or wiretap] cannot be tipped off to the application for a warrant [or wiretap order] lest he

destroy or remove evidence." *Franks v. Delaware*, 438 U.S. at 169. Because *ex parte* proceedings are an exception to the principle that the "fundamental instrument for judicial judgment" is "an adversary proceeding in which both parties may participate," *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968), the affiant's good faith, honesty, and candor are an indispensable prerequisite to the issuance of *ex parte* orders and warrants.

Affidavits are subject to requirements imposed by statute, rule, and this Court's Fourth Amendment jurisprudence. Only an "investigative or law enforcement officer" can submit an affidavit in support of a wiretap application. 18 U.S.C. § 2510(7). Only a "federal law enforcement officer" can apply for a search or seizure warrant, Fed. R. Crim. P. 41(a)(2)(C). And when this Court decided *Franks v. Delaware* and established procedures for challenging a warrant's veracity under certain circumstances, it stated that "we derived our ground from language of the Warrant Clause itself, *which surely takes the affiant's good faith as its premise*: '[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation…." 438 U.S. at 154 (emphasis added). Courts rely on affiants to accurately narrate

matters observed first-hand and accurately summarize information provided by other agents, officers, and civilians. Like an affiant who swears to false facts to establish probable cause, an affiant who omits crucial facts about his background, experience, and qualifications "does not act truthfully. He therefore violates the Warrant Clause...." *Rainsberger v. Benner,* 913 F.3d 640, 652 (7th Cir. 2019) (Barrett, J.) (citing *Franks*).

In *Franks,* the Court repeatedly emphasized the significance of the affiant being completely candid with the judicial officers who issue warrants in *ex parte* proceedings: "Because it is the magistrate who must determine independently whether there is probable cause, … it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contact a deliberately or reckless false statement, were to stand beyond impeachment." *Id.* at 165. For this reason, the good-faith exception to the exclusionary rule does not apply "when the affidavit or testimony supporting the warrant contained a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge...." *United States v. Leon,* 468 U.S. 897, 923 (1984).

As such, evidence seized pursuant to a warrant issued because an affiant provided materially false and misleading information is subject to the exclusionary rule and must be suppressed. *Franks,* 438 U.S. at 155-56. Every circuit has extended *Franks* to include challenges to material omissions in the warrant affidavit.[4] In matters involving omissions and willful concealment, "it is necessary to evaluate the hypothetical effect of knowledge of [a fact] on the original district court's determination that a wiretap" should be authorized. *United States v. Ippolito*, 774 F.2d 1482, 1485-86 (9th Cir. 1985). If the court finds that the corrected affidavit would not support a finding of probable cause, it should suppress the wiretap or warrant. *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d Cir. 2013). *See also Betker v. Gomez,* 692 F.3d 854, 862 (7th Cir. 2012) ("We eliminate the alleged false statements, incorporate any allegedly omitted facts, and then evaluate whether the

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[4] *See, e.g., United States v. Owens*, 917 F.3d 26, 38 (1st Cir. 2019); *United States v. Rajaratnam,* 719 F.3d 139, 146 (2d Cir. 2013); *United States v. Pavulak*, 700 F.3d 651, 663 (3d Cir. 2012); *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990); *United States v. Tomblin,* 46 F.3d 1369, 1376-77 (5th Cir. 1995); *United States v. Rose*, 714 F.3d 362, 370 (6th Cir. 2013); *United States v. Hansmeier*, 867 F.3d 807, 813 (7th Cir. 2017); *United States v. Reed*, 921 F.3d 751, 756 (8th Cir. 2019); *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017); *United States v. Ruiz*, 664 F.3d 833, 838 (10th Cir. 2012); *United States v. Whyte*, 928 F.3d 1317, 1333-34 (11th Cir. 2019); *United States v. Spencer*, 530 F.3d 1003, 1007 (D.C. Cir. 2008).

resulting 'hypothetical' affidavit would establish probable cause."); *United States v. Tate*, 524 F.3d 449, 451-57 (4th Cir. 2008). But the Government cannot undo an affiant's lies or omissions by retroactively swapping in a different, baggage-free affiant. As then-Judge Barrett stated: "A hypothetical affidavit is not designed to determine whether an officer *could* have satisfied the Warrant Clause; it is to determine whether he *actually* satisfied it." *Rainsberger v. Benner,* 913 F.3d at 652 (emphasis in original).

A. The Court of Appeals Impermissibly Separates the Affiant's Qualifications and Good Faith from the Remainder of the Affidavit

Louvado was the sole affiant on five affidavits for two wiretaps and 20 search and seizure warrants. In each instance, he offered himself as a credible, experienced narcotics investigator while concealing from the issuing district judge and magistrate judges the fact that he himself trafficked in narcotics and pocketed proceeds from their sale. An affiant's qualifications are an essential part of a judicial determination that an affidavit does or does not establish probable cause. An affiant's repeated, flagrant, and inexcusable lack of good faith in describing those critical qualifications cannot be swept away

and negates the validity of the resulting warrant.

The Fourth Circuit acknowledged Louvado's serious prior criminal conduct but separated his concealment of that conduct in the qualifications portion of his affidavits from the "third-hand evidence unrelated to Louvado personally" that he summarized in subsequent sections. This bifurcation of the affidavit impermissibly flies in the face of this Court's holding in *Franks* that the Warrant Clause "takes the affiant's good faith as its premise…" 438 U.S. at 164.

Rather, the Warrant Clause mandates that proving Louvado's qualifications as a candid, legitimate law enforcement officer acting in good faith was the first of several sequential barriers that stood between the Government's application and issuance of the requested wiretap orders and search warrants. A reviewing court "puts itself in the shoes of the warrant's issuing jurist," *United States v. Moses,* 965 F.3d 1106, 1112 (10th Cir. 2020), and, as noted above, evaluates the hypothetical effect of knowledge of an omitted fact on the issuing court's determination that a wiretap or warrant should be authorized. Had Louvado disclosed his criminality in the qualifications section, no reviewing judicial officer would have permitted the application to

proceed to the next stage of the probable cause process. No court would have treated Louvado's dishonesty as tangential to probable cause or balanced Louvado's dishonesty against other information in the subsequent sections of the affidavit. No court would have authorized a drug trafficker to use judicial process to investigate other alleged drug traffickers. The Fourth Circuit's conclusion that Louvado's "personal attestation matters little to the underlying support for obtaining authorization to proceed," App. A at 17, is contrary to both the lived experience of judicial officers who review affidavits on a daily basis and to the principles established in this Court's Warrant Clause cases.

Indeed, under the Fourth Circuit's analysis, the government would never face any consequences for using a sworn declaration by a deceitful affiant, as long as it could retroactively verify the information in the affidavit. As Justice Sotomayor observed while serving as a district judge, Fourth Amendment protections would be "reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *United States v. Castellanos*, 820 F. Supp. 80, 84 (S.D.N.Y. 1993) (Sotomayor,

J.) (quoting *Franks*, 438 U.S. at 168). The Fourth Circuit's holding that sufficient evidence in the body of the affidavit can overcome even the most flagrant misrepresentations and omissions about the affiant's qualifications misapplied *Franks* and improperly sidestepped the central issue of whether any fully informed judge would have allowed Louvado into chambers or even considered the remainder of the affidavit. Just as courts give substantial weight to the fact that "a police officer views the facts through the lens of his police experience and expertise," so that "the background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference," *Ornelas v. United States*, 517 U.S. 690, 699 (1996), misrepresentations about that experience and expertise should be treated as highly material. Just as courts trust law enforcement agents to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person,'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002), law enforcement must bear the consequences when the unlawful episodes of that experience are omitted. And just as "courts should not invalidate the warrant by

interpreting the affidavit in a hypertechnical, rather than a commonsense, manner," *United States v. Ventresca,* 380 U.S. 102, 109 (1965), they should not shield defective warrants from suppression by hypertechnical separation of the affidavit's integrated components. "After all, in the law, what's sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 272 (2016). The Court should grant review to reiterate that regardless of whether material false statements or omissions occur at trial or at the *ex parte* wiretap and warrant stage, "[t]he government of [a] strong and free nation does not need convictions based upon such [perjurious] testimony. It cannot afford to abide with them." *Mesarosh v. United States*, 352 U.S. 1, 14 (1956).

B. The Fourth Circuit's Decision Creates a Circuit Split

The Fourth Circuit's holding that the affiant who applies for a wiretap order or search and seizure warrant is a mere scrivener whose statements about his background and qualifications "matter little" compared to the probable cause set forth elsewhere in the affidavit is contrary to the position adopted by other Circuits.

First, the Fifth, Sixth, Eighth, and Ninth Circuit have made clear

that an affiant's credentials and qualifications are an indispensable, non-severable part of an affidavit. In *United States v. Allison,* 953 F.2d 870 (5th Cir. 1993), the Fifth Circuit held that an affidavit set forth adequate probable cause when it included "agent/affiant's extensive qualifications as a narcotics investigator" as well as contact with the defendant, personal observations, and information supplied by other agents and an informant. *Id.* at 874. In *United States v. Brooks,* 594 F.3d 488 (6th Cir. 2010), the Sixth Circuit affirmed denial of a motion to suppress because "the affidavit sets up the affiant's qualifications in paragraph 1" and then provided sufficient facts to establish probable cause. *Id.* at 491. In *United States v. Kelly*, 954 F.3d 1060 (8th Cir. 2020), the Eighth Circuit affirmed denial of a motion to suppress a computer search where the affidavit spelled out the affiant's qualifications, professional background, and training *and* the qualifications of another investigator with expertise in peer-to-peer and file sharing networks, then summarized facts from the investigation. *Id.* at 1064. Conversely, in *United States v. DeLeon,* 979 F.2d 761 (9th Cir.1992), the Ninth Circuit held that a corrected search warrant application failed to support probable cause where affiant

stated that he smelled marijuana but the affidavit failed to set forth the officer's qualifications to recognize the odor. *Id.* at 764–65. *Cf. Johnson v. United States,* 333 U.S. 10, 13 (1948) (search warrant justified where affiant is qualified to know the odor to identify a forbidden substance). The Fourth Circuit, by severing Louvado's "personal attestation" from the "underlying support for obtaining authorization to proceed," App. A at 17, created a circuit split on an issue critical to the review of wiretap and search warrant affidavits that district courts perform on a daily basis.[5]

Additionally, the Seventh and Ninth Circuits have made clear that granting a new trial motion is appropriate solely because evidence undermines the credibility of a witness who is indispensable to the prosecution of a case. Writing for the Seventh Circuit in *United States v. Taglia,* 922 F.2d 413 (7th Cir.1991), Judge Posner stated: "If the government's case rested entirely on the uncorroborated testimony of a

[5] Indeed, the Fourth Circuit's assertion that Louvado's "personal attestation matters little" is inconsistent with its previous statements in the context of a probable cause arrest that a defendant's "insistence that [an officer]'s training and experience count for little runs headlong into the teachings of the Supreme Court." *United States v. Johnson,* 599 F.3d 339, 343 (4th Cir. 2010) (citing *Ornelas v. United States,* 517 U.S. at 699).

single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial...." *Id.* at 415. The Ninth Circuit stated that "[i]f newly-discovered evidence establishes that a defendant in a narcotics case has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, the 'interest of justice' would support a new trial under Rule 33." *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992). *See also United States v. Quiles*, 618 F.3d 383 (3d Cir. 2010) (new trial appropriate "in situations in which the evidence is more than merely impeaching or in which it severely undermines the credibility of a crucial government witness whose testimony was essential to the government's case."); *United States v. Phillips*, 177 F. App'x 942, 960 (11th Cir. 2006) (newly discovered impeachment evidence showing key witness recanted his testimony would be a "unique situation" warranting evidentiary hearing).

Those cases properly focus on the credibility of a key witness — or in this case, the most important affiant in the *ex parte* proceedings that led to the acquisition of much of the government's evidence — in

evaluating motions for new trial. To the contrary, the Fourth Circuit's approach impermissibly separates the affiant from the facts the affiant presents. That approach is precisely the kind of imposition on the authority of the magistrate that this Court rejected in *Franks*. This Court should grant review to resolve the circuit split and reassert the magistrate's right to truthful evidence presented by a truthful narrator.

II. The Fourth Circuit's Opinion Affirming The Substantial Upward Variance Without Requiring the District Court to Provide a Compelling Justification to Support the Degree of the Variance Contravenes Binding Authority and Is An Important And Recurring Issue That Affects Fundamental Rights of Criminal Defendants

Petitioner's upwardly variant sentence of 264 months, from a guidelines range of 151 to 188 months was procedurally and substantively unreasonable because the district court did not adequately explain such a steep increase in the sentence. While the district court referenced Mr. Anderson's criminal history and the offense of conviction when it imposed such a substantial upward variance, it provided no explanation why the Guidelines range which specifically takes into account -- criminal history and offense conduct -- failed properly to reflect § 3553(a) considerations. And, while the district court considered the sentences imposed on the codefendants, it

noted that the others were more culpable but nonetheless varied upwardly whereas it imposed a guideline sentence for the more culpable defendants. The district court therefore not only rejected the Sentencing Commission's considered judgment as to the appropriate sentence for the crimes committed but it also rejected one of the foundational principles of due process and the Sentencing Guidelines that require that punishment should match culpability. 18 U.S.C. 3553(a)

This Court has consistently held that where a district court imposes a sentence outside of the Guidelines range, an appellate court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall v. United States*, 552 U.S. 38, 47 (2007). A major variance should be supported by a more significant justification than a minor one. *Id.* at 50. Here, the Fourth Circuit's holding that the district court's explanation was sufficient conflicts with *Gall* and its own decisions which require a compelling justification where a substantial variance is imposed.

The district court imposed a sentence that was nearly double

the low end of the guideline range. Indeed, the severity of the upward variance is highlighted when the 264 months imprisonment is compared with statistics published by the Sentencing Commission. The Judiciary Sentencing Information (JSIN) which sets out the national average and median length of imprisonment for the past five years shows that for defendants with records similar to Petitioner's (Criminal History III), who have been found guilty of similar conduct (Total Offense Level 32) involving heroin "the average length of imprisonment imposed was 148 month(s) and the median length of imprisonment imposed was 133 month(s)."

The only reasons the district court gave for this substantial increase were factors taken into account in the guidelines calculations – criminal history, nature of the offense, and possession of a firearm. Notably, the firearm was recovered at Petitioner's home, where no evidence of drug activity was found or alleged and its presence was taken into account in by an upward adjustment in the offense level calculation. Moreover, the priors were not remarkable in any aggravating manner as the sentences imposed involved mostly time-served sentences for street level sales and involved relatively stale

convictions dating back more than a decade. Yet, the district court did not explain why it rejected the considered judgment of the Sentencing Commission, which established the sentencing ranges which take those factors into account. Significantly, the district court did not vary upwardly for *any* other defendant who were charged in the case even at it recognized that Petitioner was substantially less culpable than the other defendants.[6]

While Petitioner was found guilty of the RICO conspiracy, the only racketeering acts for which the jury found him liable were the heroin conspiracy and heroin distribution. The jury did not find Petitioner guilty of any other racketeering acts, including the racketeering acts involving murder, witness intimidation, robbery or extortion. Thus, the district court did not impose an upward variance on any of the three codefendants, whom the court compared even though it found that Petitioner was much less culpable than the others. Thus, for those more

[6] Davis, one of the codefendants was held responsible for a murder and had a conviction for use of a firearm in connection with a crime of violence. Lockley, another codefendant the district court compared was responsible for witness intimidation and had a worse criminal history. Banks, received a sentence of 20-years, which was within the guideline range as calculated by the district court.

culpable defendants, the district court accepted the guidelines calculation as an appropriate sentencing range.

In a case where a district court imposes such a substantial upward variance, this Court has required a more compelling explanation. *Gall v. United States*, 552 U.S. at 51 ("[W]hen the variance is a substantial one ... *we must more carefully scrutinize the reasoning offered by the district court in support of the sentence.*)". *See also Pepper,* 562 U.S. 476, 541-42 (2011) ("[T]he law permits the court to disregard the Guidelines only where it is 'reasonable' for a court to do so").

Here, the district court's substantial upward variance contravenes the parsimony principle reflected in § 3553(a), which requires a district court to impose a sentence "sufficient, but not greater than necessary." It did so without providing any explanation, other than citing the petitioner's criminal history and drug quantity, both factors which are taken into consideration in establishing the guidelines. Neither factor was remarkable in this case, if anything both factors were run of the mill or mitigating.[7]

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[7] Petitioner's criminal history was nearly a decade old and involved street level sales. The drug quantity was based on the jury verdict for the mandatory

It is true that district courts exercise substantial discretion in . . . imposing sentences in general. But they do not do so by mere instinct. Courts are instead guided by statutory standards: . . . in sentencing more generally, the detailed factors in section 3553(a). A contrary approach—one that asks district judges to impose restitution or other criminal punishment guided solely by their own intuitions regarding comparative fault — would undermine the requirement that every criminal defendant receive due process of law. *Paroline v. United States*, 572 U.S. 434, 471 (2014) (Roberts, CJ, dissenting)

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted:

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minimum. However, the district court made no findings regarding drug quantities beyond relying on the jury verdict.