

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

**William Crittenden,
Petitioner,**

v.

**United States of America,
Respondent.**

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

Petition for Writ of Certiorari

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Question Presented

Whether the decisions of the courts below that a search warrant affidavit that was tainted by numerous lies, misleading half-truths, and multiple omissions still established probable cause once it was corrected deviated from the accepted and usual course of judicial proceedings such that this Court should grant review.

List of Parties

All parties are listed in the caption of this case.

TABLE OF CONTENTS

	<u>Page</u>
Question Presented.....	i
List of Parties.....	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved.....	1
Statement of the Case	1
Reasons for Granting the Petition	5
This Court should grant review because the decision of the Court of Appeals to deny the petitioner a <i>Franks</i> hearing departed from the accepted and usual course of judicial proceedings.....	5
Conclusion.....	9
 APPENDIX:	
A. Unpublished Opinion of the Fourth Circuit Court of Appeals, <i>United States v. William Crittenden</i> , No. 16-4480	A1
B. Motions Hearing Transcript from <i>United States v. William Crittenden</i> , Crim. No. CCB-14-412, U.S. District Court for the District of Maryland, Dated September 25, 2015.....	B1

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Francis v. Franklin</i> , 471 U.S. 307 (1985).....	9
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978).....	2, 5, 6
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	9
<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	5
<i>United States v. Lull</i> , 824 F.3d 109 (4 th Cir. 2016).....	7, 8

STATUTES

Fourth Amendment	1, 2
21 U.S.C. § 841.....	1
21 U.S.C. § 846.....	1
28 U.S.C. § 1254(1)	1

Petition for Writ of Certiorari

Petitioner William Crittenden respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The opinion of the United States Court of Appeals (Pet. App. A1-A14) is unpublished. The decision of the district court (Pet. App. B1-B8) is unpublished.

Jurisdiction

The United States Court of Appeals for the Fourth Circuit issued its opinion and judgment on December 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the United States Constitution states:

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

Statement of the Case

In September 2014, the government obtained an indictment charging the three owners of Healthy Life Medical Group, the petitioner Dr. William Crittenden, and another doctor with conspiracy to distribute and distribution of oxycodone and alprazolam (the generic name for Xanax), in violation of 21 U.S.C. §§ 841 and 846. (JA 24.) Dr. Crittenden filed numerous pre-trial motions, including a motion to

suppress on the grounds that the affidavit in support of the search warrant contained demonstrably false assertions and omitted material information that was critical to the finding of probable cause. He requested a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), in order to challenge the veracity of the search warrant affidavit and the validity of the search that had occurred pursuant to the otherwise facially valid warrant. The district court denied the motion.

Dr. Crittenden then proceeded to trial. The three owners, however, entered into cooperation agreements with the government, pled guilty, and testified against Dr. Crittenden. A jury convicted him of the conspiracy charge, acquitted him of fifteen substantive distribution charges, and convicted him of eight substantive distribution charges. He appealed his convictions arguing that the district court erroneously denied his *Franks* motion and motion to suppress and that the convictions rest on evidence obtained in violation of the Fourth Amendment.

In his motion to suppress and on appeal, Dr. Crittenden established, and the government conceded, that the affidavit in support of the search warrant included numerous statements that were blatantly incorrect. For example, the bulk of the affidavit detailed an undercover operation where law enforcement officers posed as patients of the clinic. The affidavit stated that all four undercover agents were provided with large quantities of narcotics without a medical need. (JA 140.) The affidavit also stated that Dr. Crittenden did not conduct a physical exam of the officers posing as patients, and that he coached them to increase their reported level of pain.

Audio and visual surveillance tapes of the undercover operation demonstrated the falsity of these allegations. In fact, one undercover agent received a prescription for ibuprofen only. Another left before he saw any doctor. A third provided an MRI that showed substantial damage to his spine. A fourth provided an MRI that showed so many injuries that Dr. Crittenden suggested that he might consider surgery to address his pain. The surveillance video also showed him performing physical exams. The footage demonstrates that he never coached the undercover officers on what they “should” say in order to get a prescription for narcotics.

In addition, Dr. Crittenden established that the government had omitted significant information from the affidavit. One of the undercover officers had tested positive for using oxycodone, even though the government claimed he had no medical need. Another confidential source was involved in the conspiracy by allegedly offering false readings of MRI’s, but that information was not disclosed to the magistrate. One confidential source was called both “CS 1” and CS 8”, making it seem like there were more sources than actually existed. Moreover, that confidential source had defrauded the government of potentially more than \$55 million regarding medical billing issues, although he eventually settled the fraud claim for \$3.57 million.

The affiant was aware of these details, as he was the individual who signed all the written debriefing reports and reviewed all the undercover officers’ reports. And the surveillance video demonstrated the falsity of many assertions in the affidavit.

The government attempted to excuse these numerous lapses by claiming that the affiant had acted negligently, not recklessly. The government, however, admitted that the affiant had never even watched the surveillance tapes.

The government also offered the affiants, who were the case agents in this investigation, as its main witnesses before the grand jury when it sought the indictments in this case. *See* JA 436-37. The affiants told the same false statements and misleading half-truths to the grand jury. Dr. Crittenden filed a motion to dismiss the indictment on the grounds that these lies, omissions, and half-truths misled the grand jury into thinking there was probable cause to issue an indictment when in fact none existed. (ECF Number 71.) Recognizing the impact these statements had on the grand jury's deliberations, instead of opposing the motion to dismiss on substantive grounds, the government put the affiants before the grand jury again to correct all the misinformation and obtain a superseding indictment. Nevertheless, the government attempted to justify the numerous false statements as immaterial to probable cause in its opposition to Dr. Crittenden's *Franks* motion.

The district court found, and the Court of Appeals agreed, that the affidavit included "troubling misstatements" and statements that were "wrong." (Pet. App. A6; Pet. App. B5.) With respect to the omissions, the district court found that the information "ideally" should have been provided to the magistrate judge. (Pet. App. B6.) Both the district court and the Court of Appeals, however, decided that other information in the affidavit established probable cause. (Pet. App. A11.) The remainder of the affidavit, the courts below held, provided a sufficient basis for a

finding of probable cause. (Pet. App. A14.)

Reasons for Granting the Petition

This Court should grant review because the decision of the Court of Appeals to deny the petitioner a *Franks* hearing departed from the accepted and usual course of judicial proceedings

Before the government may obtain a search warrant, law enforcement officers must present a magistrate with sworn facts that establish probable cause. Recognizing that “it would be an unthinkable imposition upon [a magistrate’s] authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment,” this Court has developed a procedure through which the veracity of a search warrant affidavit may be challenged. *Franks v. Delaware*, 438 U.S. 154, 165 (1978). If the district court finds that (1) a police officer made a false statement in a search warrant affidavit that was knowing and intentional, or in reckless disregard for the truth, and (2) the false statement was necessary to the finding of probable cause, the district court must then excise the materially false information and evaluate whether probable cause remained. *Id.* at 155-56.

A search pursuant to a warrant that violates *Franks* cannot be saved by the good-faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984). “Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known to be false except for his reckless disregard of the truth.” *Leon*, 468 U.S. at 923.

Dr. Crittenden more than satisfied this standard. The affidavit includes numerous patently false statements, unambiguously contradicted by the government's own video surveillance and investigatory reports. In addition, each aspect of the investigation described in the affidavit omits critical information that a magistrate would have needed to make an independent assessment of probable cause. The many false statements and repeated omissions were material.

These false statements and omissions misled the magistrate judge who signed the warrant. These statements had a direct bearing on the determination of probable cause.

Undercover operations have immeasurably substantial weight to a magistrate judge reviewing an application for a search warrant. When an affidavit described four different undercover law enforcement officers all directly witnessing the same suspicious conduct at a specific place, that information alone would certainly provide ample probable cause to search. A magistrate need consider no more. The credibility of this information should be unimpeachable.

But when the affidavit provides demonstrably false information—information so false that in fact the agents had not experienced suspicious activity at all—the magistrate cannot have assessed probable cause with any accuracy. Asking a magistrate to judge probable cause on false representations of an undercover agent's observations “would be an unthinkable imposition up on [a magistrate's] authority.” *Franks*, 438 U.S. at 165.

Not only would the magistrate treat descriptions of an undercover agent's direct experiences as the strongest possible source of reasonable suspicion, a magistrate would most likely credit those agents above other potential sources. But when the affidavit fails to mention that the main undercover agent had illegally, without a prescription, used the same controlled substance that was government was investigating, the magistrate certainly was deceived. (JA 200.) This information regarding credibility is a critical factor in assessing probable cause. When a source in the affidavit engages in criminal activity that occurs at the same time as the allegations that the source provides, the information is necessary to a magistrate deciding whether probable cause exists. *United States v. Lull*, 824 F.3d 109, 117 (4th Cir. 2016).

The omissions regarding the reliability of confidential source 8 (and 1) are likewise just the sort of information that a magistrate needs to know. A magistrate would certainly want to know if a source relied upon so heavily has a background of fraud and making false claims against the United States. This is the stuff of potent cross examination during trial. Even if the government believed that this person had left those practices in the past, the magistrate is the one who must assess this source's credibility.

Compounding the significance of the omission regarding confidential source 8's past is the fact that the government separated into two reported sources the same individual. This gave the appearance of corroboration when in fact the source was the same. Moreover, it appears to insulate one source from the credibility problems of the

other. If the defense had not uncovered this untruth, it would appear that there was an unimpeachable source of information detailing all the practices of the clinic.

Moreover, concealing confidential source 1/8's potential criminal liability in the instant case prevented the magistrate from assessing credibility. A source's personal involvement in the crime under investigation has an undeniable impact on whether and to what extent that individual should be believed.

"Reliability is 'key' to a magistrate's probable cause analysis when the search warrant application contains information provided by an informant." *Lull*, 824 F.3d at 116. And determining whether an informant is reliable, including whether portions of the information is reliable and other parts are not, "is an assessment that is for the magistrate, not [the] [i]nvestigator." *Id.*

The materiality of these false statements and omissions is evidenced by the government's own conduct. When the prosecutors became aware that Dr. Crittenden was exposing these falsities and misleading half-truths to the courts, they recognized the impact that information would have had on probable cause. Their response was to correct all the information before the grand jury that had considered the same false information that they had asked the magistrate judge to consider. They knew that the grand jury's finding of probable cause—applying the same standard that applies to probable cause to issue a search warrant—was tainted by the case agents'/affiants' lies. They knew that proceeding on the tainted indictment was legally unsound. And they were right.

After removing the false information from the affidavit and all references to the undercover operation, rife with incorrect information as it was, and after correcting the misleading omissions and half-truths, the affidavit failed to establish probable cause. The Fourth Circuit's decision to the contrary contravenes decisions from this Court, which require a probable cause determination to be based on facts, not simply assumptions. *See Francis v. Franklin*, 471 U.S. 307, 315 (1985). The known facts and circumstances would not have led a person of reasonable prudence to believe that evidence of a crime would be found at the clinic. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996).

Conclusion

This case presents an important question where the decision of the court of appeals departed from the usual and accepted course of judicial proceedings. As the case involves a court's acceptance of untruthful information from police officers in support of search warrants, it presents an issue of significant national importance. Review is therefore necessary.

Respectfully submitted,

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