UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
v.	)	Crim. No. 2:24-CR-0090-LEW
XXXXX, Defendant	)	

XXXXX' MOTION TO SUPPRESS AND MOTION FOR *FRANKS* HEARING

NOW COMES XXXXX, by and through his attorney, David J. Bobrow, with this Motion to Suppress and for a *Franks* hearing particularly stated as follows:

BACKGROUND

This matter is currently before the Court on the Government's charges of Conspiracy to Distribute Cocaine and Cocaine Base in violation of 21:841(a)(1) and 841(b)(1)(C) and 21:846(1).

ISSUES PRESENTED:

1) Was there legal authority to conduct a search of the residence?
2) Was there a legal basis to seize the phones that are attributed to Mr. Neves?
3) Was the search warrant obtained that allowed for the extraction of the cellular

telephones in violation of *Delaware v. Franks*?

STATEMENT OF UNCONTESTED FACTS[1]

1) In February of 2024, a drive-by shooting occurred in Saco, Maine. https://wgme.com/news/local/court-documents-three-3-men-accused-saco-shooting-involved-drug-trafficking-ring-drive-by-crash-school-bus-shelter-in-place-new-bedford-massachusetts-maine
2) Immediately, after the shooting, probation contacted Mr. Neves and inquired about his involvement. As a result of their suspicions, probation requested that Mr. Neves be fitted with an electronic bracelet. See CMECF 2:19-cr-0133, ECF #56.
3) This was done despite the fact that Mr. Neves was quickly ruled out as a suspect in the Saco shooting matter. See Duquette Report, see also Duquette Search Warrant Application ¶9.
4) On March 28, 2024, Probation in the presence of numerous officers and agents conducted of a search of the residence of co-Defendant where XXXXX resided part time. Justin and Sheila share children together so it is not uncommon for him to spend time at that residence. In the Request for Search Warrant, Agent Duquette noted that the probation search was conducted "[b]ased on information from two different law enforcement agencies that Neves was in

[1] The facts provided are taken from discovery provided by the Government.

possession of a firearm, cash, and cocaine… ."[2] A search of the residence failed to produce any drugs. *Id.* $1560 cash was found and later returned as it was not determined to belong to Mr. Neves. Finally, a gun was located in a safe which belonged to Ms. T-Srey. *Id.* The gun was traced and determined to be owned by Ms. T-Srey. Id.

5) During an entire search of the residence, probation located three phones. One was on the floor in the living room, one was behind a child's bed, and one was in the kitchen cabinet. Id. The Search Warrant application makes no mention of the location the phones were found.[3]

6) ECF # 58 of United States v. Neves, Special Condition No. Three allows for a search of "anything the Defendant owns, uses, or possesses if the officer reasonably suspects that the defendant has violated a condition of release and reasonably suspects that evidence of the violation will be found in the area searched. Id.

7) On April 1, 2024, Agent Duquette filed a Search Warrant to allow for an extraction of the phones. Id.

ARGUMENT

I. THE PHONES WERE IMPROPERLY SEIZED BY THE GOVERNMENT

[2] The origination of this allegation is murky. It is unclear from discovery the basis for the belief that Neves was in possession of drugs, a firearm, and money on the date of the probation search.
[3] This is significant because two of the phones were not found on or near Mr. Neves.

A. The Warrantless Search in the Apartment that Led to the Phone Seizure Was Unreasonable

Warrantless searches inside a home are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). There are some general exceptions to the warrant requirement for home searches, for example exigency and emergency. *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005). The emergency exception applies to emergency situations that threaten life. *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009). The exigent exception applies when officers have probable cause to believe a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent the destruction of relevant evidence, escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. *Hopkins*, 573 F.3d at 763.

There is an exception to the warrant requirement in cases involving a probationer subject to a search condition which is that a warrantless search of a probationer's home does not violate the Fourth Amendment if, after evaluating the circumstances of the particular case, the Court determines the search was "reasonable." *United States v. Lara*, 815 F.3d 605, 610 (9th Cir. 2016). When doing so, the Court must balance, the degree to which the search intrudes upon an individual's privacy, and the need for the promotion of legitimate governmental interests. *United States v. King*, 736 F.3d 805, 808 (9th Cir. 2013) quoting *United States v. Knights*, 534 U.S. 112, 119, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)). Before an officer conducts a warrantless search of a probationer's home, the

officer must have probable cause to believe the probationer actually lives at the home searched. *United States v. Mayer*, 560 F.3d 948, 957 (9th Cir. 2009). Probation clearly stated that they believed Mr. Neves was spending time at the residence so they must concede standing.

In United States v. Knights, 534 U.S. 112, 121-22, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), the Supreme Court held that a warrantless search of a probationer's apartment, supported by reasonable suspicion and authorized by a probation condition, was reasonable within the meaning of the Fourth Amendment. In reaching this decision, the Supreme Court explained:

> Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, [*306] or plea of guilty. Probation is one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens. United States v. Oliveras
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> The Supreme Court, however, explicitly left open the question of "whether the probation condition so diminished, or completely eliminated, [the probationer's] reasonable expectation of privacy (or constituted consent) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." Id. at 120 n.6 (emphasis added) (citation omitted). United States v. Oliveras

B. The Government Has Failed to Produce Evidence Justifying the Basis to Seize the Phones.

Despite the existence of cruiser cameras, the Government cannot produce one video, audio, or written evidence that there was a vehicle infraction.[4] All such evidence has been requested and is solely within the control of the Government. The missing evidence rule provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of America (UAW) v. NLRB ("Int'l Union")*, 459 F.2d 1329, 1336 (D.C.Cir.1972). The idea is that "all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case." *Id.* at 1338. Thus, "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character." *Interstate Circuit v. United States,* 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939)(internal citations omitted).

C. Probation was Improperly Acting

When probation conducted the supervised release search on March 28, 2024, it is clear that they fully expected to find drugs, money, and guns that could be directly attributable to Mr. Neves. Why else would they conduct a search with probation, numerous FBI persons, as well as officers from the Old Orchard Beach Police

[4] The Officer alleges that the driver was not wearing a seatbelt however never states this during his initial stop, only in the report drafted subsequent to the stop.

Department. Yet, nothing attributable to Mr. Neves was found.[5] As such, probation then used the supervised release conditions as a 'stalking horse' to seize the phones absent a warrant.

In United States v. Griffin, CITE the Supreme Court upheld a probation search, concluding that the supervision of probationers constituted a "special need" that justified a comparatively greater intrusion on individual privacy. *Id.* at 875. After *Griffin*, some courts concluded that this "special needs" exception did not permit a probation officer to act as a 'stalking horse' to help the police evade the Fourth Amendment's warrant requirement. See *e.g.*, *United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994). They concluded that probation officers could cooperate with police to achieve joint objectives, but probation officers could not use their authority to eliminate the warrant requirement for police investigations. *See, e.g.*, *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991), *overruled by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (per curiam)(on grounds of to the extent the case holds there is no difference between probation and parole for purposes of the 4th Amendment).

In United States v. Watts, the Ninth Circuit endorsed the stalking horse theory: "A probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers. . . . The appropriate inquiry is whether the probation officer used

[5] The money located was returned. The gun was found in a safe with no evidence that Mr. Neves ever possessed or nor had access to it. No drugs were found.

the probation search to help police evade the Fourth Amendment's usual warrant and probable cause requirements or whether the probation officer enlisted the police to assist his own legitimate objectives." 67 F.3d 790, 794 (9th Cir. 1995), rev'd on other grounds, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997).

II. SEIZURE WAS IMPERMISSIBLE

Another exception permits law enforcement to seize property in a probationer's home so long as the officer has reasonable suspicion that the property is evidence of a crime. See [*622] United States v. Knights, 534 U.S. 112, 120, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). United States v. McGill

Of course, reasonable suspicion must be"supported byarticulable facts that criminal activity may be afoot," and itcannot be based on "inchoate suspicion or [a] mere hunch."United States v. Freeman, 735 F.3d 92, 96 (2d Cir. 2013)(quotingUnited States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct.1581, 104 L.Ed.2d 1 (1989)andUnited States v. Bayless,201 F.3d 116, 132-33 (2d Cir. 2000)). While a court shouldevaluate the "totality of the circumstances 'through the eyes ofa reasonable and cautious police officer on the scene, guidedby his experience and training' " a court should not "merelydefer to the police officer's judgment."Id.(quotingBayless,201 F.3d at 133).

Although the district court determined "that the unmonitored cell phone was not in and of itself a violation of McGill's conditions of supervised release," it found that the incriminating nature of the phone was immediately apparent to Officer Williams under the circumstances. We agree.

The circumstances of the seizure were as follows: McGill's supervised-release conditions prohibited him from having contact with minors or possessing any sexually stimulating

materials, including on a cell phone. At the time of the home visit, Officer Williams knew that McGill had previously violated the terms of his release by viewing child pornography on a cell phone and that he had failed two polygraph tests regarding his compliance with his supervised-release conditions. Officer Williams testified that he observed a cell phone that he believed was capable of connecting to the internet and that might relate to the failed polygraphs. He further testified that McGill attempted to hide the phone from his view and changed his demeanor when asked about the phone. McGill's odd explanation for having the phone—to charge an extra battery—further increased Officer Williams's suspicion, particularly because [*623] it didn't make sense to keep the phone in a case if its only purpose was charging a battery. Finally, Officer Williams was able to power on the phone, contrary to McGill's story, and observed a photo of a young boy on the phone's wallpaper United States v. McGill 8 F.4th 617 * (7th 2021)

> After learning of the inappropriate content found on Jackson's cell phone, Jackson's supervising probation officer visited the Facility and searched Jackson's phone. While searching Jackson's Internet history, the probation officer found pornographic websites, including one that appeared to depict underage females. Jackson admitted that another person sent him approximately ten pictures of child pornography, which Jackson said that he deleted. The government later secured a warrant to search the cell phone. After a forensic examination, investigators discovered thirty-seven images of child pornography. United States v. Jackson 866 F.3d 982 (8th 2017)

Defendant Perry argues that officers lacked reasonable suspicion to seize and search his cell phone because he was not on supervised release for any crime that involved a cell phone and because there was nothing in his history to suggest that he used his cell phone for breaking the law or violating his release conditions. (Motion to Suppress Evidence at 13; Doc. #23.) Contrary to defendant Perry's argument, the condition to which Perry agreed, that is to "submit his person, and any property, house, residence, office, vehicle, papers, computer, other electronic communication or data storage devices or media and effects to a search . . . based upon reasonable suspicion of contraband or evidence of a violation of a condition of release"3 was not limited to a search of only those places or objects that Perry had previously used for criminal conduct.
United States v. Perry 2020 U.S. Dist. LEXIS 181854 (W. D.. Miss)
Thus, the defendant's privacy interest in his cell phone "was not diminished or

waived because he accepted as a condition of his probation a clear and unequivocal search provision authorizing cell phone search (he did not)." Id. at 612.

D. The Phone Could Not Be Seized as an Incident to Arrest

Because the iPhone was next to Skyfield in the bedroom at the time of his arrest, the NYPD was entitled to take the iPhone as a "seizure[] incident to arrest." United States v. Handler, 2023 U.S. Dist. LEXIS 47976, 2023 WL 2584217, at *3 (S.D.N.Y. Mar. 21, 2023) (collecting cases). United States v. Skyfield

III. The Warrant Application

AGON'S AFFIDAVIT CONTAINED MATERIAL OMISSIONS AND MISREPRESENTATIONS MADE IN RECKLESS DISREGARD FOR THE TRUTH, NECESSITATING A *FRANKS* HEARING.

The Fourth Amendment requires a warrant application to contain sufficient information to permit the issuing official to decide whether there is a fair probability that a crime has been committed given the circumstances in the application. *United States v. Barbosa*, 896 F.3d 60, 67 (1st Cir. 2018). "An application supporting a search warrant is presumptively valid," *United States v. Gifford*, 727 F.3d 92, 98 (1st Cir. 2013), but a defendant can rebut the presumption and challenge the application at a pretrial hearing, *Barbosa* at 67 (internal quotation marks omitted). This procedure, called a *Franks* hearing, was established by caselaw. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978).

A defendant is entitled to a *Franks* hearing "if he can make a substantial showing that the affiant intentionally or with reckless disregard for the truth included a false statement [or material omission] in the affidavit, which statement was necessary to the finding of probable cause." *Franks* at 155-56; *Barbosa*, 896 F.3d at 68 quoting *United States v. Tanguay*, 787 F.3d 44, 48 (1st Cir. 2015)). Suppression of the evidence seized is justified if, at such a hearing, the defendant proves intentional or reckless falsehood by preponderant evidence and the affidavit's creditworthy averments are insufficient to establish probable cause. *Barbosa* at 68 (citing *Franks* at 56).

An officer's affidavit must demonstrate both probable cause to believe a crime has been committed (the commission element) and probable cause to believe that the enumerated evidence of the offense will be found at the place the officer seeks to search (the nexus element). *United States v. Cordero-Rosario*, 786 F.3d 64, 69 (1st Cir. 2015).

In addition to false statements, material omissions may also form the basis for a *Franks* Hearing. *Barbosa* at 68. "The required showing is two-fold: first, the omission must have been either intentional or reckless; and second, the omitted information, if incorporated into the affidavit, must be sufficient to vitiate probable cause." *Barbosa* at 67. "Recklessness may be inferred directly from the fact of omission only if 'the omitted information was critical to the probable cause determination.'" *Id*. quoting *Burke v. Town of Walpole*, 405 F.3d 66, 81 (1st Cir. 2005)). Omissions "designed to mislead, or ... made in reckless disregard of whether [it] would mislead, the magistrate in his appraisal of the affidavit" trigger the exclusionary rule. *Id.* quoting *United States v. Colkley*, 899 F.2d 297, 300–01 (4th Cir. 1990)).

"Where the primary basis for a probable cause determination is information provided by a confidential informant, the affidavit must provide some information from which a magistrate can credit the informant's credibility." *United States v. Gifford*, 727 F.3d 92, 99 citing *United States v. Barnard*, 299 F.3d 90, 93 (1st Cir. 2002)). "[A] probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informer has been sufficiently reduced." *United States v. Greenburg*, 401 F.3d 63, 69 (1st Cir. 2005).

A warrant cannot be based on evidence obtained through illegal means. When evaluating affidavits containing "tainted" evidence, the illegally obtained evidence should be set aside and "the remaining content of the affidavit examined to determine whether there was probable cause to search, apart from the tainted averments." *United States v. Ford*, 22 F.3d 374, 379 (1st Cir. 1994) quoting *United States v. Veillette*, 778 F.2d 899, 904 (1st Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986)).

a. Det. Gagnon's Affidavit Was Facially Insufficient to Support a Finding of Probable Cause to Search the Cote Home.

In examining the sufficiency of a warrant, a reviewing court is limited to the facts and opinions contained within the supporting affidavit's four corners. *United States v. Austin*, 991 F.3d 51, 55 (1st Cir. 2021). While significant deference is afforded to the

magistrate judge's initial evaluation of the application, the warrant must be invalidated where the reviewing court finds "no substantial basis to conclude that probable cause existed." *Cordero-Rosario,* 786 F.3d at 69.

A simple assertion of police suspicion, without more, is insufficient to support a finding of probable cause. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). Similarly, "mere conclusory" statements are also insufficient to establish probable cause. *Cordero-Rosario,* 786 F.3d at 69. Where the primary basis for a probable cause determination is obtained from a confidential information, the affidavit must provide some information from which a magistrate can credit the unnamed source's credibility. *United States v. Gifford*, 727 F.3d 92, 98-99 (1st Cir. 2013).

i. Commission Element

In his affidavit, Det. Gagnon did not explicitly state what crime he believed occurred. Based on the "Facts and Circumstances" however, he alleged Mr. Davenport was deliberately attempting to elude arrest. In support of his belief that there was probable cause to believe Mr. Davenport was eluding arrest, Det. Gagnon proffered the following three facts:

(1) First, that following a domestic violence complaint, Mr. Davenport was identified as a suspect. Mr. Davenport had "left/fled" prior to police arrival and a state warrant issued for his arrest stemming from this charge.

(2) That a federal arrest warrant had subsequently issued.

(3) And finally, "[b]ased on officers looking for Demetrius, he is aware police are looking for him and is avoiding police."
Warrant Affidavit at 3.

To elude an arrest, an individual must first be aware that there is a warrant or probable cause for their arrest. Yet, within the four corners of his affidavit, Det. Gagnon offers no facts to support that Mr. Davenport was aware of the warrants for his arrest. As discussed *supra*, an officer's suspicion or mere conclusory statements are insufficient to support a finding of probable cause. Det. Gagnon's suspicions that Mr. Davenport was aware of the warrants, and his conclusory statement that because officers were looking for him, he was aware officers were looking for him and avoiding them, without more, is facially insufficient to support probable cause that a crime was committed. *Gates*, 462 U.S. at 239.

As there must be probable cause as to both the commission and nexus element, on this basis alone, the warrant is invalid.

ii. Nexus Requirement

Even if this Court finds sufficient facts to support a finding of probable cause of the commission element, the affidavit still fails to establish probable cause as to the nexus element. To support his belief that there was probable cause to believe Mr. Davenport would be present at the Cote home at the time of the search, Det. Gagnon proffered the following facts:

(1) On October 20, 2021, he received information from a source of information that Mr. Davenport was "staying at Victoria Choiniere's mother 'Jill's' house located 'near

Turner Street." Det. Gagnon knew Jillian Choiniere lived at 37 Whitney Street – located near Turner Street.

(2) The Marshals received information from an unnamed source that Mr. Davenport was staying at 37 Whitney Street.

(3) The Marshals surveilled the property and witnessed an individual "matching the description of Demetrius" enter the residence and not exit.

(4) The Marshals received information from a third source that Mr. Davenport was at 37 Whitney Street.

In sum, the factual basis for probable caused offered by Det. Gagnon in his affidavit boils down to three confidential sources, and an alleged corroborating identification by the Marshals. Even if all this information was factually accurate (which as explained *supra*, is not) it is also facially insufficient to support a finding of probable cause.

"A probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informer has been sufficiently reduced. *Gifford*, 727 F.3d at 99 *citing United States v. Greenburg*, 410 F.3d 63, 69 (1st Cir. 2005). To determine whether the affidavit has made the requisite showing, Courts apply a "non-exhaustive list of factors" including:

(1) whether the affidavit establishes the probable veracity and basis of knowledge of the persons supplying hearsay information;

(2) whether an informant's statements reflect first-hand knowledge;

(3) whether some or all of the informant's factual statements were corroborated wherever reasonable or practicable (e.g.) through police surveillance; and

(4) whether a law enforcement affiant assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's provided information.
Id.

In *United States v. Gifford*, the Government defended the sufficiency of affidavit supporting a warrant to search defendant's home for evidence of an illegal marijuana grow operation where the tip came from a confidential informant. *Id*. at 97. In the affidavit where the officer described the informant as "reliable," the Government argued the detailed information provided by the informant - which the officer included in the affidavit - likely indicated first-hand observation where the police had alleged to corroborate the source's information by using records to verify the address and by visiting the property where they alleged to smell "burnt marijuana." *Id*. at 99 -100. On appeal, the First Circuit affirmed the district court's grant of suppression, agreeing that the affidavit lacked any information about the source's purported basis of knowledge and the law enforcement officer's relationship to the source, thus there was insufficient basis to determine the likely accuracy of the source's information. *Id*. at 100. Further, the address information and burnt marijuana, while suggestive of use, was insufficient corroboration of an alleged grow operation. *Id*. Similarly, in *United States v. Ramirez-Rivera*, the First Circuit found the information provided by a confidential informant insufficient to establish probable cause where there was no information about the informant's basis of knowledge and the police did not sufficiently test the reliability of the information. 800 F.3d 1, 28 (1st Cir. 2015).

Unlike in *Gifford*, where the affiant explicitly noted he believed the informer to be "reliable," Det. Gagnon's affidavit provides absolutely no information to enable a court to examine the informants' veracity. Like in *Gifford*, the affidavit makes no mention as to how the Det. Gagnon or the Marshals came to establish a relationship with their sources.[6] Finally with respect to two of the three sources – Det. Gagnon's informant and the Marshals' first source – the affidavit includes no information as to their purported basis of knowledge. With respect to Det. Gagnon's source, their lack of knowledge of the exact address indicates they did not have a firsthand knowledge. Although the Marshals' second CI source appears to indicate that Mr. Davenport was at the residence shortly after the Marshals witnessed the individual who allegedly matched his description, Det. Gagnon affidavit includes no information as to when these three sources alleged to learn this information – just when they relayed it to law enforcement.[7] Therefore, within the four corners of the affidavit, there was no means for a neutral magistrate to discern whether this was accurate information. See *United States v. Charest*, 602 F.2d 1015 (1st Cir. 1979) (affidavit invalidated where information was too stale to provide for issuance of a warrant directing seizure of weapons from defendant's home).

Further, the Marshals alleged corroboration of their sources' information was also insufficient as the conclusory statement of a "male matching the description of Demetrius" lacked the requisite specific factual basis. For a magistrate to properly

[6] A Motion for Early Disclosure of Jenks Material is filed contemporaneously with this matter and the Co-Defendants have also has requested to supplement this pleading with information that may be attained through that Motion.

[7] As discussed *infra*, there were not two, not three confidential informants and likely one of those two relied upon the statements of the other. See (b)(i).

determine whether the information provided by the source was corroborated, the statement in the affidavit required support of specific facts as to how the male matched Mr. Davenport's description. In this case, as addressed *supra*, the only characteristics the Marshals observed that matched Mr. Davenport was that the individual is also an African-American male.

b. Det. Gagnon's Affidavit Contained Material Omissions and Misrepresentations Made with Reckless Disregard for the Truth.

A law enforcement officer's affidavit generally enjoys a presumption of validity. *Franks*, 438 U.S. at 171. Where a defendant makes a substantial preliminary showing that the officer's affidavit contained knowingly false statements or statements made with reckless disregard for the truth, and where that statement was material to establish probable cause, the Fourth Amendment entitles the defendant to a hearing to further test the affidavit's veracity. *Franks*, 438 U.S. at 155. In addition to false statements, material omissions may also form the basis for a *Franks* Hearing. *Gifford*, 727 F.3d 99-100 (affirming district court finding of reckless material omissions where probable cause was based in part on disparities in electrical usage between defendant's houses and neighbors' houses, where the officer omitted from his affidavit that one of the houses was substantially smaller and defendant operated a horse boarding business).

To demonstrate a reckless disregard for the truth, a defendant must show the affiant "in fact entertained serious doubts as to the truth" *United States v. Ranney*, 298 F.3d 74, 78 (1st Cir. 2002) (internal citations omitted). This may be inferred "from circumstances evincing obvious reasons to doubt the veracity of the allegations." *Id*. With

respect to material omissions, "recklessness may be inferred where the information was critical to the probable cause determination." *Burke v. Town of Walpole*, 405 F.3d 66, 82 (1st Cir. 2005) (internal citations omitted); see *also United States v. Stewart*, 337 F.3d 103, 107 (1st Cir. 2003) (meticulous compliance with the Fourth Amendment requires an agent to determine if "this information is so trivial, remote or irrelevant that no reasonable official could assign it weight in coming to a decision to issue the warrant. Unless an affirmative answer can be given, the information should be included"); *Wilson v. Russo*, 212 F.3d 781 (3rd Cir. 2000) ("omissions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would know that a judge would want to know.")

Under *Franks*, a court's inquiry examines whether the investigation was, as a whole, reckless. *United States v. Roman*, 311 F. Supp. 3d 427, 435 (D. Mass 2018). A deliberate or reckless material misrepresentation or omission by a law enforcement official other than the affiant also may provide basis for a hearing. *Id.* ("The vast majority of courts recognize the *Franks* inquiry should not focus solely on the affiant, because a different rule would permit government officials deliberately to keep from affiants or the court information material to the determination of probable cause and by such conduct avoid the necessity of a Franks hearing") (collecting cases).

In this case, Det. Gagnon's warrant affidavit contained material misrepresentations and omissions in reckless disregard for the truth with respect to the number of confidential sources, the independent basis of knowledge, what information was

provided to the Marshals and when, and finally, the extent of law enforcement's alleged corroboration of the sources' information.

i. The Three Alleged Confidential Sources

In his affidavit, Det. Gagnon wrote there were three different confidential sources that provided information to law enforcement as to Mr. Davenport's whereabouts. The first source provided the information to Det. Gagnon. The remaining two sources provided information to the Marshals, who relayed that information to Det. Gagnon.

Later, the Government alerted defense counsel that it learned of an error in the affidavit: the Marshals had only one source of information, not two. The second source of information cited in Det. Gagnon's affidavit did not exist. The Government also provided undersigned counsel with the following additional information about Det. Gagnon's source, omitted from his affidavit: Det. Gagnon first met the source amidst another criminal investigation. During that time, the source was identified as an active drug user/addict and while the source was not charged with a crime as a result of that investigation, their significant other was both charged and convicted. Det. Gagnon was not aware if the source was under the influence of drugs at the time they provided the information about Mr. Davenport's whereabouts.

In response to the Defense request for additional discovery material pertaining to Det. Gagnon's source – specifically, the confidential informant's basis of knowledge, and additional details with respect to the circumstance under which the source provided the

information to Det. Gagnon –the Government provided the following additional information: Det. Gagnon did not know his source's purported basis of knowledge but Det. Gagnon's confidential source and the Marshals' confidential source were relatives. In other words, Det. Gagnon and the Marshals' source knew each other and Det. Gagnon took no steps to reasonably assure that his source learned their information independently of the Marshals' source. There is a logical inference that the omitted information would prevent the Court from concluding that the two sources relied upon the one source for the [incorrect] information. Therefore, Det. Gagnon omitted from his affidavit that there was a substantial basis to suspect that the two remaining confidential sources of information were, in fact, only one.

It is clear that Det. Gagnon's misrepresentation and omissions with respect to the confidential sources were, at the very least, made with reckless disregard for the truth. In his affidavit Det. Gagnon wrote: "United States Marshals received information from a *separate* source stating Demetrius is staying at 37 Whitney Street in Auburn" and "The U.S. Marshals also received from a *third* source." *Warrant Affidavit at 3* (emphasis added). Det. Gagnon knew he did not have the requisite information to make this determination. Before writing in an affidavit that there were three separate sources of information, a reasonable officer would undertake an investigation sufficient to determine whether, in fact, there existed three separate informants, and whether the informants had independents bases of information. Further, where there was a connection between the two sources, and thus reason to suspect one source may have learned the information from the other, a reasonable officer would include that information in warrant affidavit.

Finally, as probable cause in this case hinged almost entirely on the information from the sources, it was also reckless for Det. Gagnon to omit information pertaining to the potential veracity of his source's information. Specifically, Det. Gagnon should have included in the affidavit his past relationship with his informant, that he knew the individual to be a drug user/addict, and that Det. Gagnon took no steps to determine whether they were under the influence of a drug at the time they provided him information. See *Tanguay*, 787 F.3d at 52-53 (holding further proceeding were required to determine whether officer had a duty to inquire further into informant's possible credibility issues); *United States v. Avery*, 295 F.3d 1158, 1167 (10th Cir. 2002) (holding the omission of the informant's lengthy criminal record required a *Franks* hearing).

a. False Statements Were, At Best, Reckless.

Gagnon's warrant affidavit contained three significant misrepresentations. First, he falsely claimed that Mr. Sanchez was trespassing in an area that was "clearly marked" with a "No Trespassing" sign. Second, he falsely claimed that drug paraphernalia was all over Mr. Sanchez's campsite. Third, and most egregious, Gagnon falsely claimed that Brandon saw Mr. Sanchez with
a firearm. Given the totality of circumstances, Mr. Sanchez has made a substantial showing that these misstatements were made with reckless disregard for the truth and were essential to the finding of probable cause by the justice of the peace. Therefore, Mr. Sanchez is entitled to a *Franks*
hearing.

If these misstatements are excised from the Affidavit, the information remaining would be the following:

- A report that a male displayed what appeared to be a firearm in his waistband.
- Mr. Sanchez fit the description of the male with what appeared to be a firearm.
- Mr. Sanchez was a felon.
- Ms. Morin admitted there were drugs in the tent.
- Mr. Sanchez and Ms. Morin eventually admitted a firearm was left in the tent by someone else.

However, Mr. Sanchez's statement of identity and status as a felon, Ms. Morin's statement about

drugs in the tent, and their statements that someone left a firearm in the tent were the fruits of their
illegal detention. When these tainted statements are set aside, as they must be, probable cause to search the tent is lacking because no crime was reported by the caller. Therefore, Mr. Sanchez is entitled to suppression of the evidence derived from the tent.

b. Gagnon Intentionally or Recklessly Omitted Information That Would Have Vitiated Probable Cause.

In addition to false and tainted statements, Gagnon's affidavit is laden with omissions. Gagnon omitted 1) the caller's identity and pending criminal charges, 2) that the caller did not feel
threatened, and 3) that the caller was unwilling to prosecute if the male was found. There can be little doubt that these details were essential to evaluate the caller's veracity and whether a crime involving a firearm was reported.

Regarding the informant, Brandon Edwards, Gagnon failed to identify him as the source of information about a firearm being in Mr. Sanchez's tent, failed to include his inducement of Brandon's statement, and failed to include his recent history of committing crimes of dishonesty. This omitted information—especially the bribe—was critical to assess the veracity of Brandon's

accusation, which was the only direct evidence that a firearm was probably in the tent at the time Gagnon left to apply for the warrant. Gagnon also omitted Samantha's statement denying that Mr.
Sanchez had a firearm, which weakened the strength of Brandon's accusation. And he omitted Samantha's statement that another individual came through the area with a firearm around the time
that J.O. made his report. An alternative suspect with a firearm who fled the area reduced the probability that Mr. Sanchez possessed a firearm that would be found in his tent.

In sum, recklessness may be inferred directly from Gagnon's omission of information critical to the probable cause determination: the veracity of witnesses, contradictory accounts, and
the nature of the criminal conduct at issue. Accordingly, Mr. Sanchez has made a substantial showing that he is entitled to a *Franks* hearing. Had the foregoing omitted information been incorporated into the affidavit, especially the fact that Brandon was bribed to make his statement, a warrant to search Mr. Sanchez's tent would not have issued. Therefore, Mr. Sanchez is entitled to suppression of the evidence derived from the tent.

WHEREFORE, Mr. Neves respectfully requests that the Court grant this Motion to Suppress or in the alternative set the matter for an evidentiary hearing.

AGON'S AFFIDAVIT CONTAINED MATERIAL OMISSIONS AND MISREPRESENTATIONS MADE IN RECKLESS DISREGARD FOR THE TRUTH, NECESSITATING A *FRANKS* HEARING.

The Fourth Amendment requires a warrant application to contain sufficient information to permit the issuing official to decide whether there is a fair probability that a crime has been committed given the circumstances in the application. *United States v. Barbosa*, 896 F.3d 60, 67 (1st Cir. 2018). "An application supporting a search warrant is presumptively valid," *United States*
v, Gifford, 727 F.3d 92, 98 (1st Cir. 2013), but under certain conditions, a defendant can rebut the
presumption and challenge the application at a pretrial hearing, *Barbosa* at 67 (internal quotation marks omitted). This is called a *Franks* hearing after the case that established the right to such a hearing. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978).

A defendant is entitled to a *Franks* hearing "if he can make a substantial showing that the affiant intentionally or with reckless disregard for the truth included a false statement in the affidavit, which statement was necessary to the finding of probable cause." *Franks* at 155-56; *Barbosa*, 896 F.3d at 68 (quoting *United States v. Tanguay*, 787 F.3d 44, 48 (1st Cir. 2015)). Suppression of the evidence seized is justified if, at such a hearing, the defendant proves intentional
or reckless falsehood by preponderant evidence and the affidavit's creditworthy averments are insufficient to establish probable cause. *Barbosa* at 68 (citing *Franks* at 56).

In addition to false statements, material omissions may also form the basis for a *Franks* Hearing. *Barbosa* at 68. "The required showing is two-fold: first, the omission must have been either intentional or reckless; and second, the omitted information, if incorporated into the affidavit, must be sufficient to vitiate probable cause." *Barbosa* at 67. "Recklessness may be inferred directly from the fact of omission only if 'the omitted information was critical to the probable cause determination.'" *Id*. (quoting *Burke v. Town of Walpole*, 405 F.3d 66, 81 (1st Cir. 2005)). Omissions "designed to mislead, or ... made in reckless disregard of whether [it] would

mislead, the magistrate in his appraisal of the affidavit" trigger the exclusionary rule. *Id.* (quoting *United States v. Colkley*, 899 F.2d 297, 300–01 (4th Cir. 1990)).

"Where the primary basis for a probable cause determination is information provided by a confidential informant, the affidavit must provide some information from which a magistrate can credit the informant's credibility." *United States v. Gifford*, 727 F.3d 92, 99 (citing *United States v. Barnard*, 299 F.3d 90, 93 (1st Cir. 2002)). "[A] probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informer has been sufficiently reduced." *United States v. Greenburg*, 401 F.3d 63, 69 (1st Cir. 2005).

A warrant cannot be based on evidence obtained through illegal means. When evaluating affidavits containing "tainted" evidence, the illegally obtained evidence should be set aside and "the remaining content of the affidavit examined to determine whether there was probable cause to search, apart from the tainted averments." *United States v. Ford*, 22 F.3d 374, 379 (1st Cir. 1994) (quoting *United States v. Veillette*, 778 F.2d 899, 904 (1st Cir. 1985), *cert. denied*, 476 U.S.
1115 (1986)).

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BOP

Although the indictment does not name any co-defendants or co-conspirators, the government has provided Cardenas-Salcido with discovery further detailing the alleged conspiracy, including search warrants that detail the alleged drug distribution and the names or descriptions of co-conspirators. See ECF No. 34 at 2. The government also has pointed out specific portions of the discovery that contain co-conspirator statements about Cardenas-Salcido's alleged conduct. Cardenas-Salcido does not explain why these disclosures are inadequate, let alone why he's unable to prepare a defense to the conspiracy charge without knowing the identities of the unindicted co-conspirators.
United States v. Cardenas-Salcido 2024 U.S. Dist. LEXIS 185919 *
United States v. Cardenas-Salcido

Shanks moves for a bill of particulars. Specifically, Shanks moves for: (1) the government to identify the names of unindicted co-conspirators and their known aliases; (2) the times, places, and dates on which the conspiracy began; (3) information on which Shanks and each co-conspirator joined and withdrew from the conspiracy; (4) a description of any and all overt acts in furtherance of the alleged conspiracy; (5) the names of all participants of any overt acts; (6) the

means used to accomplish objectives of the conspiracy; (7) a description of any of Shanks' alleged roles and overt acts in furtherance [*10] of the conspiracy; (8) and any other information that would help Shanks prepare his defense.
United States v. Shanks

The Government argues that the information contained in the indictment, along with what it has provided in discovery, is "more than sufficient" to allow Defendant to prepare his defense, minimize any surprise at trial, and plead against double jeopardy in the future. (Doc. 695 at 6-8). The Government details the discovery it has provided, including law-enforcement reports, search warrants, lab results, cell phone extractions, toll data, text messages, photographs, surveillance video, and Defendant's own criminal [*17] history. Id. at 2. Specifically, the Government discusses in some detail events that occurred involving Defendant and a host of others (including four co-defendants identified by name) on July 18, 21, and 30, 2019. Id. at 2-3. The Government recites facts related to suspected drug transactions that occurred on those dates, all of which involve Defendant, and maintains that it has produced evidence cataloguing the details of those transactions in the course of discovery. Id. Defendant did not file a reply brief.
United States v. Johnson**2022 U.S. Dist. LEXIS 183767 ***

And finally, Mr. Barnes has access to the redacted FBI report, which the Court viewed in camera at the request of the parties following oral argument. Counsel for Mr. Barnes conceded at oral [*52] argument that the report describes a series of transactions between an individual and Mr. Barnes; counsel further represented that the report contained allegations that the individual delivered kilograms of cocaine to Mr. Barnes. (ECF No. 153, at 27:16-23.) The Government argues that the redacted report provides sufficient detail to provide Mr. Barnes with the identity of at least one other co-conspirator. And after reviewing the redacted report, the Court agrees. The involved FBI report is detailed and quite specific as to the nature and circumstances of the involved events underlying the charge at Count One and even though certain (but not all) names are redacted for the confidentiality concerns noted above, the balance of the unredacted FBI report leaves no doubt as to the key facts that if proven would easily support the charge at Count One. The Court therefore concludes that Mr. Barnes—today—has sufficient information to prepare his defense in advance of trial.

United States v. Barnes 2021 U.S. Dist. LEXIS 241876 *
United States v. Barnes