# 11-4416-cr

IN THE

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

*Appellee,*

—against—

RAJ RAJARATNAM,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## REPLY BRIEF FOR DEFENDANT-APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

## INTRODUCTION

Ironically, like its wiretap affidavit, it is what the government does *not* say in its brief that is most important. The government nowhere denies its "nearly full and complete *omission*" from its sworn wiretap application of "the sum and substance," "heart and soul," and "most important part" (SA39, 40, 43) of its conventional investigation of Appellant. Neither does it deny its legal obligation under Title III and the Constitution to have made such disclosure, or that its failure to do so "deprived Judge Lynch of the opportunity to assess what a conventional investigation of [Appellant] could achieve," and made it "impossible" for him to make "a reasoned evaluation of the necessity of employing wiretaps," SA40-43. The government cites no case—none—that has upheld a search after such a pervasive collapse of the government's duty of candor and nullification of the judicial review process. Because no case ever has.

The government's no-apologies argument, instead, is that an affidavit so misleading that it made prior, informed judicial review impossible was not material because, in its view, prior, truthfully informed judicial review is not material to either the Fourth Amendment or Title III. Equally good—perhaps even better, in the government's view—is *post hoc* judicial review years after the wiretap in which the government spins a new and different justification for the search, liberated from the content of the original affidavit, and blessed with the full benefit

of hindsight. Worse still, the government's theory does not stop with necessity determinations or wiretaps; it would become the new normal for all judicial determinations underlying all search warrants.

Alternatively, the government argues that this Court must close its mind to the truth and accept its pervasively misleading affidavit at face value because it was not "outright false"; it was just filled with intentionally misleading "omissions." And according to the government, that is just fine. Br. 49-55.

The government thus presents this Court with a stark take-it-or-leave-it choice: The Court must either (i) take at face value an affidavit that, in fact, is pervasively untrue, and thereby license the government to mislead, or (ii) adopt an unprecedented rule allowing after-the-fact makeovers of the justifications for a search warrant. Either way, the government's proposed paradigm cannot coexist with a system of meaningful, prior judicial review. One must give way. The question here is which one.

Congress has answered that question: Title III's plain text mandates statutory suppression if the "full and complete" statement of "facts submitted by the applicant" to the *authorizing court* does not establish both probable cause and necessity. 18 U.S.C. §§ 2518(1)(b)-(c), (3) & 10(a); *see United States v. Giordano*, 416 U.S. 505 (1974).

The Constitution gives the same answer: "[P]rior review by a neutral and detached magistrate" is required before law enforcement may "inva[de] *** a citizen's private *** conversation"; "post-surveillance judicial review" will not suffice. *United States v. U.S. District Court*, 407 U.S. 297, 316, 318 (1972).

When, as here, the government deliberately or recklessly disregards the truth of its sworn affidavit, the only way to enforce that command of antecedent judicial scrutiny is by "subtracti[ng]" out the offending allegations, *United States v. Awadallah*, 349 F.3d 42, 65 (2d Cir. 2003), and insisting that the "remaining content" of the *original* affidavit—not belatedly added, new-and-improved governmental allegations—must itself be sufficient to sustain the search warrant, *Franks v. Delaware*, 438 U.S. 154, 156 (1978).

The government does not even pretend that its affidavit survives that settled test. Nor can it distinguish settled precedent mandating suppression. The government's ambition, instead, is to unsettle that law and either (i) substitute after-the-search review of after-the-fact allegations for antecedent judicial review or, alternatively, (ii) reduce *Franks* to a Maginot Line that is readily outflanked by misleading statements, creative untruthfulness, and intentional misdirection. Either way, the government is unblinking in its insistence that the law entitled it to keep Judge Lynch in the dark, to swear out before him in an *ex parte* proceeding an affidavit riven with misleading assertions, reckless omissions, outright falsity, and

admitted boilerplate, and to make it impossible for the judge to do his job. If the Court does not hew to settled precedent mandating suppression here, it will consign federal judges and the *ex parte* judicial-review process to the same treatment going forward.[1]

## I. TITLE III MANDATES SUPPRESSION

Here is what the government leaves undisputed:

- Title III's text unambiguously mandates *prior* judicial authorization. 18 U.S.C. § 2518(3).
- Title III requires a "full and complete statement" of necessity and probable cause to the judge issuing the wiretap warrant. 18 U.S.C. §§ 2518(1)(b)-(c).

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[1] Understandably eager to change the subject, the government devotes more briefing to marshalling the evidence against Appellant than to answering either the implications of its position or precedent. But "a search is not" and cannot be "made legal by what it turns up." *United States v. Di Re*, 332 U.S. 581 (1948). Embedded in the government's arguments, moreover, is still more factual overreaching. The government's brief asserts (Br. 47) that Agent Kang's repeated excision of exculpatory language from the Roomy Khan calls was caused by "transcription errors." That is false, as the government has now confessed (at Appellant's urging). *See* USAO 5/4/12 Letter to Clerk. In addition, while the government can read the record in the light most favorable to its verdict, it cannot assert as fact imagined conversations between Khan and Appellant (Gov. Br. 8-9), when the government neither called her to testify nor introduced any recordings. The claim that Rajiv Goel "tipped" Appellant in return for money (Br. 6) likewise overreaches as Appellant's financial assistance to his friend was made *years* before the earnings information at issue, and Goel himself denied any such "nexus." Trial Tr. 2008, 2062, 2069, 2072-2073.

- The affidavit's necessity allegations were not "full and complete"; they were instead "nearly a full and complete *omission*" of required information. SA40.
- The affidavit's probable cause allegations were not "full and complete"; they instead "omitted and misstated important information" and included "literally false" claims. SA2, 22.
- Title III unambiguously commands that wiretap authorizations be made "on the basis of the facts submitted by the applicant." 18 U.S.C. § 2518(3).
- The district court's *Franks* necessity and probable cause determinations were not "on the basis of the facts submitted by the applicant." *Id*.
- The Supreme Court has held *unanimously* that Title III mandates suppression for failure to comply with statutory requirements that "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, 416 U.S. at 527; *id.* at 548 (Powell, J., concurring).
- The "full and complete statement" requirements for probable cause and necessity "directly and substantially implement the congressional intent to limit" the government's use of wiretaps, *id*. at 527.

- The requirement that wiretaps rest on the "facts submitted by the applicant" to the authorizing judge also "directly and substantially implement[s] the congressional intent to limit" the government's use of wiretaps, *id*. at 527.
- Title III's plain text commands statutory suppression for violation of the "full and complete statement" and the "facts submitted by the applicant" requirements. 18 U.S.C. §§ 2515, 2518(10)(a).
- The affidavit's nearly full and complete omission of truthful necessity allegations made "a reasoned evaluation of the necessity of employing wiretaps *** impossible" on the "basis of the facts submitted by the applicant to the authorizing judge." SA43.

The government, accordingly, has no answer to either Title III's textual or *Giordano*'s binding precedential command of suppression. The government instead tries to push Title III aside. That fails too.

*First*, the government argues (Br. 38-43) that this Court applies a *Franks*-style analysis to Title III wiretaps. That is no help since *Franks* equally requires suppression here. *See* Section II, *infra*.

Furthermore, Title III's "nonconstitutional" suppression remedy is broader than "the judicially fashioned exclusionary rule" under the Fourth Amendment, *Giordano*, 416 U.S. at 524, 527; *see United States v. Amanuel*, 615 F.3d 117, 125

(2d Cir. 2010). Accordingly, this Court must "look to the terms of the [wiretap] statute and the intentions of the legislature, rather than to invoke judge-made exceptions to judge-made rules." *United States v. Spadaccino*, 800 F.2d 292, 296 (2d Cir. 1986); *see Jones v. United States*, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring in judgment) ("Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing [wiretaps]. Instead, Congress promptly enacted a comprehensive statute."); Blakey Br. 25-29.

That is why this Court has only applied *Franks* to wiretaps when doing so would comport with or "enhance[] the protection of the defendants" by, for example, policing judicially imposed parameters for a wiretap, as well as its authorization, *United States v. Bianco*, 998 F.2d 1112, 1126 (2d Cir. 1993).[2]

Here, the government is asking the Court to employ *Franks* not to enforce, but to eviscerate Title III's express, textual limitations. Where Title III commands prior judicial approval, 18 U.S.C. § 2518(3), the government wants a *post hoc* judicial assessment years later. Where Title III mandates that wiretap approval rest on the "facts submitted by the applicant," *id.*, the government asks the Court to rely

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[2] *See also United States v. Fermin*, 32 F.3d 674, 676-677 (2d Cir. 1994) (applying *Franks* "residue" analysis consistently with Title III by requiring that probable cause rest on the original facts submitted by the affiant, adding in only omitted exculpatory information); *United States v. Ferguson*, 758 F.2d 843, 849 (2d Cir. 1985) (same).

on facts first developed by numerous witnesses at a *Franks* hearing. Where Title III demands a "full and complete" statement of necessity and probable cause, *id.* § 2518(1), the government says "nearly a full and complete *omission*" and pervasively misleading information work just as well, SA40. Where Title III says the government must explain the conventional law enforcement methods "tried," *id.* § 2518(1)(c), the government says it can bury a multi-year conventional investigation without consequence. Where Title III says the government must show that conventional alternative methods are "unlikely to succeed," *id.*, the government claims entitlement to a wiretap even though it "could have developed more evidence by conventional means and proceeded to indictment of at least some alleged co-conspirators," and conventional techniques "would, in fact, be likely to succeed," SA51, 53.

*Franks* cannot be deployed to cast so much statutory text aside or to "go[] against the grain of the[] [congressional] purposes." *Bianco*, 998 F.2d at 1126.

*Second*, the government argues (Br. 43) that *Giordano* (i) predates the *Franks* decision, and (ii) addresses the requirement that a wiretap be authorized by a statutorily designated official. That hurts rather than helps the government.

*Giordano* predates *Franks* because Title III predates *Franks*. And that means that the Congress that adopted Title III could not possibly have intended for

its straightforward statutory text to be so sweepingly countermanded by a *Franks* doctrine of which it had never heard.

Likewise, that *Giordano* addressed Title III's requirement of high-level Justice Department review only strengthens the call for suppression here. If the absence of "prior, informed judgment" by Justice Department officials requires suppression, 416 U.S. at 515, then *a fortiori* the absence of "prior, informed judgment" by the Article III judge issuing the wiretap warrant also requires suppression. *See United States v. Marion*, 535 F.2d 697, 704 (2d Cir. 1976). Plus Justice Department officials were not informed about the SEC investigation either, Franks Tr. 571, 771, 779, putting this case squarely in the teeth of *Giordano* (regardless of what local "supervisors" knew, Gov. Br. 66).

*Third*, the government's heavy reliance (Br. 37, 41-42) on *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997), is baffling. This Court denied suppression in *Miller* solely because the omission was negligent, *id*. at 664, and thus not the type of intentional transgression that *Franks* addresses and that occurred here. *See Awadallah*, 349 F.3d at 64 (A misrepresentation or omission is "intentional" if it is "the result of the affiant's deliberate falsehood or reckless disregard for the truth."). Furthermore, the Court never had any occasion to address statutory suppression under Title III because the defendants only asked the Court to apply *Franks*. *See, e.g.*, Miller Reply Brief, 1996 WL 33421545, at *31-32; *see also United States v.*

*Ippolito*, 774 F.2d 1482, 1487 (9th Cir. 1985) (upholding suppression under *Franks* without addressing statutory suppression).

The government's other cases (Br. 42) are equally inapt because they involved negligent or unintentional violations, *United States v. Williams*, 737 F.2d 594, 603 (7th Cir. 1984); *United States v. Small*, 423 F.3d 1164, 1172 (10th Cir. 2005); *United States v. Maynard*, 615 F.3d 544, 551 (D.C. Cir. 2010); *United States v. Poulsen*, 655 F.3d 492, 505 (6th Cir. 2011), or the omission or misstatement of only a few isolated facts, neither of which impair the integrity or "affect the fulfillment of any of the reviewing or approval functions required by Congress," *United States v. Chavez*, 416 U.S. 562, 575 (1974); *see United States v. Cole*, 807 F.2d 262, 267 (1st Cir. 1986); *United States v. Guerra-Marez*, 928 F.2d 665, 671 (5th Cir. 1991); *United States v. Milton*, 153 F.3d 891, 896 (8th Cir. 1998).

Here the government "did not merely omit some discrete piece of information possibly relevant to a reviewing court's analysis," but (i) rendered it "impossible" for the authorizing judge to make "a reasoned evaluation of the necessity of employing wiretaps"; (ii) "deprived Judge Lynch of the opportunity to assess what a conventional investigation of [Appellant] could achieve"; (iii) withheld the very information "that must be presented to a court if it is to fulfill its function of determining [necessity]"; and (iv) left the court "at a loss to understand how the government could have ever believed that Judge Lynch could determine

whether a wiretap was necessary to this investigation without knowing about the most important part of the investigation—the millions of documents, witness interviews, and the actual deposition of [Appellant] himself, all of which it was receiving on a real time basis and all of which was being acquired through the use of conventional investigative techniques." SA36, 40, 42, 43. That sweeping misstatement of those facts having "a natural tendency to influence" or most "capable of influencing" the necessity decision, *see Kungys v. United States*, 485 U.S. 759, 770 (1988) (defining material misstatements), is the type of departure from Title III's protective limitations for which *Giordano* mandates suppression, 416 U.S. at 533. *See also Monter v. Gonzales*, 430 F.3d 546, 553 (2d Cir. 2005) (following *Kungys*).

*Fourth*, the government argues that nondisclosure of the "most important part" of its conventional investigation was okay because the criminal authorities did not "direct" the SEC (Br. 24, 51, 65). That is "formalism carried to its extreme." SA45. This is a case where the criminal investigators chose to "piggyback[]" almost completely on the SEC, getting "spoon-fed" a "mountain" of information and materials, SA36, 48, much of which they never even bothered to look at, SA42. That is why the government does not dispute the district court's factual finding that the criminal "investigation was, in sum and substance, the SEC investigation." SA40.

The criminal authorities' lack of independent effort before seeking a wiretap also belies the claim that the conventional investigation had "hit a bit of a wall" (Br. 22). For example, when confronted with six different pieces of evidence connecting the later-cooperating witness, Anil Kumar, with Appellant, SEC attorney/Special AUSA Michaelson admitted that he "hadn't seen that" and "didn't catch that." Franks Tr. 220, 456-458. If the FBI had done some supplementary work itself, it might have caught what the SEC missed.

And the only "wall" that Agent Kang hit was inertia. *See id*. at 502 ("I had some sense that there were a lot of documents."); *id*. at 510 (Kang "never asked for the[] notes" from the 19 SEC interviews); *id*. at 600 (Kang admits "I didn't ask to look at faxes, no."); *id*. at 604 ("I reviewed some of the documents."). Indeed, the district court specifically found that "the government could have developed more evidence by conventional means and proceeded to indictment of at least some alleged co-conspirators," and that some conventional techniques "would, in fact, be likely to succeed." SA51, 53. In short, as soon as it came time for the criminal authorities to roll up their sleeves and undertake some independent conventional effort, just like they had in every prior insider-trading case in history, they ran straight for a wiretap. JA178-79. That is the antithesis of necessity.

Beyond that, the government's relationship with the SEC investigation (Br. 56) is distinctly Janus-like. When trying to explain away its failure under oath to

disclose the reality of the conventional investigative efforts and successes, the government insists that the SEC effort was so disconnected and far-removed that "it never occurred" to Agent Kang (Br. 66) to mention it or the mountain of material it had put into the FBI's hands, SA38.

But then, when arguing at the *Franks* hearing why a differently written affidavit might have established necessity, the government about-faces into a full embrace of the SEC investigation as the proper barometer of the necessity for the criminal investigation, and contends that the *merged SEC/FBI investigation* had "hit a bit of a wall" (Br. 22; Franks Tr. 827 (Goldberg) ("[D]idn't you just testify that you hit the wall[?] *** [T]hose techniques are not working? A. They weren't working for the SEC."). Indeed, the government had to rely on the "SEC investigation" to even colorably argue necessity because the only things that the FBI had done itself was issue some subpoenas *that worked*, successfully approach Khan, and "run[] *** individuals' names through [the FBI] database," Franks Tr. 636; *see* JA178-179; SA39-40.

The government cannot have it both ways. The lengthy conventional investigation cannot simultaneously be both so irrelevant as to justify its omission from the affidavit and yet the central feature of the government's new-and-improved, *post hoc* necessity argument.

## II. THE FOURTH AMENDMENT MANDATES SUPPRESSION

Initially, the government's argument that this Court should "defer[]" to the initial wiretap decision (Br. 36) defies binding Circuit precedent: *De novo* review applies "because [the authorizing judge] did not have an opportunity to assess the affidavit without the inaccuracies." *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000). That the government's affidavit misled six judges (Gov. Br. 12, 16) hardly makes it better.

### A. The Affidavit's Remaining Content Does Not Establish Necessity

#### *1.* Franks *Materiality Turns on Whether the Original Affidavit, Stripped of Wrongful Allegations, Can Sustain the Warrant*

Precedent is clear: The search warrant may be upheld only if, after "the subject of the alleged falsity or reckless disregard is set to one side, there *remains* sufficient content *in the warrant affidavit* to support" probable cause and necessity. *Franks*, 438 U.S. at 171-172 (emphases added). Only the "remaining content," *id*. at 164, or "remaining portions" of the affidavit, *Awadallah*, 349 F.3d at 70 n.22, stripped of governmental wrongdoing, can be considered. This Court thus "gauge[s] materiality by a process of subtraction." *Id*. at 65.

The *Franks* and *Awadallah* process of subtraction guts the government's affidavit. Indeed, because the affidavit in this case was "nearly a full and complete *omission*" of the "most important part" (SA39, 40) of the necessity showing, what very little non-misleading and non-boilerplate content remains after this Court's

"process of subtraction," *see* Opening Br. 37-42, necessarily cannot "suffice," *Canfield,* 212 F.3d at 717. An affidavit cannot simultaneously be emptied of the "heart and soul" (SA43) of what the law demands—presenting functionally a null set—and still be full enough for the Fourth Amendment.

Nowhere in its brief does the government even mention *Franks*' "remaining content" test nor deny the obvious outcome of that rule for its nearly full and complete omission here. The government has chosen simply to ignore the controlling legal test dictated by binding precedent and thus has waived any argument that, with the misleading content eliminated, its affidavit survives Fourth Amendment scrutiny.

Instead, the government tries to change the rules, contending that either (i) the wiretap application should be evaluated with all of its original content intact, because it was, in the government's view not "outright false"—only "misleading" (Br. 49), or (ii) the government can scrap its original affidavit entirely and make a brand new, post-search "minimally adequate" (not full and complete) showing of necessity (Br. 36, 55; *see* Br. 59 (adding "*additional information* about the progress of the SEC's investigation") (emphasis added)). Both arguments are at war with binding precedent.

### *2. Misleading Allegations Must Be Eliminated*

The government first tries to dodge the "remaining content" test by arguing that this Court must take the affidavit's entire necessity argument at face value because its allegations were "accurate" (Br. 49). To be clear, in so asserting, the government does not dispute, let alone establish clear error in, the district court's factual findings concerning the FBI's and SEC's merged investigation or the affidavit's "glaring omission" of those efforts and their successes. SA36, 37-40, 51. Instead, the government's argument simply equates "accurate" with not "outright false," and then leaps to a "necessity" conclusion (Br. 49) by dismissing the district court's fact findings as the mere identification of "*omission[s]*" that made the affidavit's allegations "misleading" (Br. 49, 52, 54; original italics); *see id*. at 51 (calling "omitted facts" a not "false" allegation).

The government's argument, in other words, is that its "misleading impression [was] not a lie"; "[i]t was [just] being economical with the truth."[3]

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[3] The argument echoes this famous exchange:

> **Lawyer:** What is the difference between a misleading impression and a lie?
> **Sir Robert Armstrong**: A lie is a straight untruth. **Lawyer**: What is a misleading impression—a sort of bent untruth? **Armstrong**: As one person said, it is perhaps being "economical with the truth."

Malcolm Turnbull, THE SPYCATCHER TRIAL 75 (1988).

That cannot be right. Surely the government cannot hold itself to a *lesser* standard of truthfulness than its citizenry, including all the individuals it has sent to prison for statements made "false," 18 U.S.C. § 1001, through "half-truths where there is a duty to speak the truth," U.S. Attorney's Manual, Criminal Resource Manual § 912; *see, e.g.*, *United States v. Cisneros*, 26 F. Supp. 2d 24, 42 (D.D.C. 1998) (prosecution under 18 U.S.C. § 1001 based on defendant's "obligation to refrain from telling half-truths or from excluding information necessary to make the statements accurate").

After all, the problem with half-truths is that the authorizing judge can never know which half she has. *See Franks*, 438 U.S. at 169 ("The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations."); Retired Judges Br. 12-15. And that is particularly true with respect to necessity, which is an affirmative duty to come forward and "*inform* the authorizing judicial officer of the nature and progress of the investigation," *United States v. Concepcion*, 579 F.3d 214, 218 (2d Cir. 2009) (emphasis added), and to "*reveal* what, if any, investigative techniques were attempted prior to the wiretap request" and their outcomes, *United States v. Lilla*, 699 F.2d 99, 104 (2d Cir. 1983) (emphasis added).

More importantly, the government's argument gravely depreciates how destructive of the warrant process its intentionally misleading statements and

omissions are. That is why *Franks* requires courts to "set[] aside the allegedly misleading statements," *United States v. Salameh*, 152 F.3d 88, 113 (2d Cir. 1998), not just outright false statements, and to "delete those technically true, though misleading, statements contained in the affidavit to which the omissions pertain," *Ippolito*, 774 F.2d at 1486 n.1. *See Canfield*, 212 F.3d at 717 (subtraction rule applies to "false or misleading information"); *United States v. Ferguson*, 758 F.2d 843, 848 (2d Cir. 1985) ("Omissions from an affidavit that are claimed to be material are governed by the same rules" as false statements.). *Salameh*, *Canfield*, and *Ferguson* are binding precedent; the government's argument simply ignores them.

Furthermore, the government's contention that its allegations were not false is just plain wrong, ironically omitting at a number of turns the most troubling language in the already omission-riddled affidavit that it is attempting to defend.

Federal Grand Jury: The government's not "false" argument (Br. 50-51) leaves out the last sentence of the allegation: "The issuance of grand jury subpoenas likely would not lead to the discovery of critical information and *undoubtedly would alert* the TARGET SUBJECTS to the pendency of this investigation." JA108 (emphasis added). Yet Agent Kang knew that the FBI had already issued 19 grand jury subpoenas that undoubtedly had *not* alerted the target subjects and had produced helpful information. SA40, 42 n.23; Franks Tr. 596.

That statement is false and must be deleted even under the government's strained materiality test.

The district court was also correct that the "boilerplate assertion that 'the issuance of grand jury subpoenas likely would not lead to the discovery of critical information,' blinks reality," because "[g]rand jury subpoenas *** had already led to a mountain of incriminating circumstantial evidence." SA42 n.23. So that allegation is also false and must be deleted.

The government argues (Br. 50) that the paragraph "was only meant to refer to witness subpoenas," but that is not what it says. Nor would it have been proper to leave a common tool like document subpoenas unaddressed. Anyhow, that argument exemplifies "the problem with falling back on boilerplate." SA42 n.23. The allegation that "[w]itnesses who could provide additional relevant evidence to a grand jury have not been identified," JA107, led the authorizing judge far astray from the investigative truth that investigators, in fact, had interviewed numerous potential witnesses and had identified a dozen others still to be approached, SA39, 41.

The government next insists (Br. 51) that it was fine not to disclose all that—to assert the opposite under oath—because none of those witnesses "admitted any insider trading." But telling a judge that people cannot be identified and telling a judge that people have been identified but will not confess is not the

same thing at all. "Necessity" does not mean "having to do some work because the suspects use phones and did not spontaneously confess." If it did, wiretaps would be routine in almost every crime. The argument, in other words, fails to "enlighten *** as to why this *** case presented problems different from any other *** case," *Lilla*, 699 F.2d at 104.

Search Warrants: Again the government's argument omits the key misstatement: that the locations of records "have not been fully identified, *if at all*." JA111 (emphasis added); *contrast* Gov. Br. 54. The misleading statement is that locations had not been identified at all, when, "unknown to Judge Lynch," SA41, the government had located over four million documents, SA42. That false allegation must be deleted.

Trading Records: Agent Kang said that a subpoena for such records was not an investigative option because securities clearing firms "sometimes alert the traders" and, "[a]ccordingly, I believe it would jeopardize the investigation to request more detailed records from clearing firms." JA108. The falsity is that the FBI itself had already issued three subpoenas for trading records without any such jeopardizing consequence, SA40; Kang Exs. 34; Franks Tr. 596, and the SEC had profitably issued more than 200 subpoenas for that and similar information without tipping anyone off, SA38. So that statement cannot be credited in the *Franks* materiality inquiry either.

The government's supposedly "accurate" allegation that trading records, combined with other information possessed by the government, could not identify sources (Br. 51-52), is false too, as the records did precisely that here, identifying both Khan and Rajiv Goel. *See* SA39 & SA48 (review of, *inter alia*, "trading records" had helped to "build[] circumstantial cases of insider trading and identified several possible sources of inside information"); JA77; Franks Tr. 604.

Witness Interviews: The "bland[] assur[ance]" that "interviewing [Appellant] and other targets *** is 'too risky at the present time'" defies the factual reality that the government had interviewed or deposed over twenty Galleon employees, including two interviews and a follow-up deposition of Appellant, SA41.

The government insists (Br. 52) that the paragraph "plainly focused" on interviews by criminal authorities. Yet that is not what it says. SA41; JA108-110. In any event, the distinction is irrelevant given the unchallenged factual finding that the FBI had adopted the SEC's investigation as its own, and that Appellant had been interviewed by criminal authorities investigating his expenditure of funds without any of the consequences portended, Franks Tr. 597. Deleting that misleading allegation cuts yet another leg out from under any necessity finding.

Finally, the government's assertion now that its "ten paragraphs" were not "generalized and conclusory" boilerplate (Br. 55) contradicts the government's

admission that the grand jury, interviewing witnesses, and document search warrant allegations were largely boilerplate. JA176-177 (AUSA Goldberg). Of the remaining paragraphs, five—those concerning toll records, trading records, undercover agents, arrests, and wire surveillance—were literally cut and pasted almost verbatim from earlier wiretaps with only the names of people, stocks, dates, and confidential-source references changed. *See* SA41, 42 n.23, 45; Post Hr'g Reply Br. Ex. A (Filed Oct. 18, 2010); Franks Tr. 795 (toll records paragraph possibly copied "from a wire for a narcotics investigation"). So they do not count either. *See, e.g.*, *Concepcion*, 579 F.3d at 218; *Lilla*, 699 F.2d at 104. And even assuming that allegations of "slapdash" physical surveillance count, SA50 n.24, and that the government's claim that it could not effectively continue to use Roomy Khan is credited even though it did keep using her, JA118-125, the affidavit still falls woefully short of a non-false necessity showing—even assuming that not being "outright false" was the government's only obligation under oath.

### *3. The Government Cannot Add New Factual Allegations at the Materiality Stage*

The government's second effort to avoid the precedentially prescribed "remaining content" test goes to the other extreme, arguing that, if misleading content is to be eliminated, the government gets to do those allegations all over again, substituting in brand new factual allegations and sending those off for post-search judicial ratification (Br. 56-62). That argument is not only legally

foreclosed, but also would deliver a crippling blow to the principle of meaningful antecedent judicial review under the Fourth Amendment—a profound problem that the government's 74-page brief never gets around to addressing.

When the government misleads a court under oath by omitting and misstating the information most important to the court's judgment, the law does not give the government a second bite at the apple. To the contrary, as Appellant's Opening Brief explained (Br. 42), the Supreme Court specifically held in *U.S. District Court* that, even though the government showed that it "readily would have gained prior judicial approval" for a wiretap, the failure properly to obtain a warrant upfront is fatal; "post-surveillance judicial review" cannot sustain the wiretap, 407 U.S. at 317-318. Only "a prior judicial judgment" counts. *Id*. at 317; *see Katz v. United States*, 389 U.S. 347, 357 (1967) (similar). The government simply ignores that binding Supreme Court precedent.

Likewise, this Court's rule is one of "subtraction," not *addition* of the government's new, hindsight-spawned factual allegations. *Awadallah*, 349 F.3d at 65. "[R]elated facts which were also known at the time of the application *** lie outside the scope of a proper *Franks* inquiry because the relevant question is whether the *remaining portions* of the affidavit give rise to probable cause." *Id*. at 70 n.22. "Allowing the government to bolster the magistrate's probable cause determination through post-hoc filings," as the government argues, "does not

satisfy the Fourth Amendment concerns addressed in *Franks*," *United States v. Harris*, 464 F.3d 733, 739 (7th Cir. 2006). Instead, "what will sustain the warrant must already be within it." *Baldwin v. Placer Cnty.*, 418 F.3d 966, 971 (9th Cir. 2005).

*Awadallah* proves the point. The affidavit had misleadingly omitted that Awadallah was "cooperative" with the FBI, and this Court agreed that such *exculpatory* information was properly added, simply clarifying that "Awadallah was 'cooperative' with the FBI agents in the sense that he responded to questions." *Id.* at 67, 69.

But this Court specifically declined to consider any of the new "facts about Awadallah's interactions with the FBI" (Gov. Br. 60) pressed by the government at the *Franks* hearing to counter the newly added exculpatory information, such as allegations that Awadallah had "become confrontational" and "did not want to go to New York." U.S. Reply Br., *Awadallah*, *supra*, 2002 WL 32819122, at *51 (2d Cir. Dec. 13, 2002). If the government's theory here were correct, all of those "true facts" (Br. 59) would have been considered in the materiality inquiry. But because none of those facts were disclosed in the government's affidavit, this Court declared them off-limits. *Awadallah*, 349 F.3d at 70 n.22.

The district court reasoned that the "entire premise of the *Franks* approach is that the court must consider information that did not appear in the original

affidavit." SA46. The court accordingly permitted the government to replace the original affidavit's repeated allegations that conventional techniques would compromise the investigation with the completely different story that literally scores of demands for information and interviews had not compromised the investigation, but that the SEC/FBI investigation had "hit the wall." *See* SA49, 52-53 (relying on facts that first "emerged from the [*Franks*] hearing").

That badly misunderstands *Franks* and *Awadallah*. To be sure, sometimes the government's misleading allegations cannot effectively be eliminated just by deleting the offending allegation (*e.g.*, because of the omitted information's cross-allegation impact). When that happens, the *misleadingly* omitted information—and only that which was misleadingly omitted—may be added to the affidavit to prevent the government from gaining any advantage from its wrongdoing. *See Awadallah*, 349 F.3d at 69; *Bianco*, 998 F.2d at 1126 (adding information negating the government's showing of need for a roving bug); *Cole*, 807 F.2d at 267-269 (adding information misleadingly omitted about agent's access to subject's home); *Canfield*, 212 F.3d at 719 (adding information negating informant's credibility).

But even then, the court's consideration of new information omitted from the warrant affidavit must be "limited to facts that d[o] not support a finding of probable cause" or necessity. *Harris*, 464 F.3d at 739. "Considering new information *** that supported" the government's application, as the district court

did so extensively here (SA49-54), is "beyond the trial court's analytical reach" in a *Franks* materiality inquiry. *Harris*, 464 F.3d at 739.

That has to be the rule. If the government that misled the court can do it all over again, the constitutional (and statutory) rule of prior informed judicial authorization would be thrown out the window, and deliberately or recklessly misleading the court would become a cost-free endeavor.

Actually, it is worse than that. Under the district court's and government's approach, intentionally misleading the court will affirmatively behoove the government by affording it the ability to substitute new facts later if needed, which it cannot do if it just negligently omits critical information from its affidavit. *See Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 n.8 (1971) (mistaken omission "cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate").

*Franks*' and *Awadallah*'s tightly cabined rule for correcting the government's misleading omissions thus ensures that deliberately or recklessly misleading omissions are treated no better than negligent omissions. "A contrary rule" would not only irrationally prefer intentional to negligent misrepresentations, but also would "render the warrant requirements of the Fourth Amendment meaningless." *Whiteley*, 401 U.S. at 565 n.8. The "bulwark of Fourth Amendment

protection"—prior, informed, independent judicial review—would be "reduced to a nullity" if the government, "having misled the magistrate, *** was able to remain confident that the ploy was worthwhile," *Franks*, 438 U.S. at 164, 168. *See Katz*, 389 U.S. at 359 ("[A]ntecedent justification" is a "constitutional precondition" of wiretap surveillance.); National Legal Aid & Def. Ass'n Br. 11-16.[4]

Finally, even if the government were correct that misleading the authorizing judge should be rewarded with a post-search mulligan, inclusion of all of the government's *post hoc* evidence would not salvage its case. Even with the *Franks* hearing evidence, the district court found it "likely true *** that the government could have developed more evidence by conventional means and proceeded to indictment of at least some alleged co-conspirators." SA51. The government had identified "likely sources of inside information regarding several different companies," SA37, and had "develop[ed] substantial circumstantial evidence of insider trading by [Appellant] and numerous associates," SA48 (not "some evidence," Gov. Br. 57).

[4] The government (Br. 61) misreads *United States v. Finley*, 612 F.3d 998 (8th Cir. 2010), which held only that courts may consider new facts to identify falsity or to establish the affiant's state of mind, *id*. at 1003 n.7. It is only the materiality inquiry that must be confined to the affidavit's "remaining content" to avoid "denud[ing] the [necessity] requirement of all real meaning." *Franks*, 438 U.S. at 156, 168.

Given that just "two limited avenues of [conventional] investigation" created an "exceptionally close" case of necessity in *Concepcion*, 579 F.3d at 219, this case falls far outside necessity's bounds. Indeed, it seems it was largely the district court's retrospective view that conventional methods would not produce what the wiretap itself produced that caused it to find necessity. SA52-54. But such 20/20 necessity-hindsight is forbidden and, in fact, sharply underscores the defects endemic in the government's paradigm of post-search judicial review of post-search fact allegations. *See Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("after-the-event justification for the *** search" is "far less reliable").

The government trumpets (Br. 58) that Appellant and his associates exchanged information over the telephone and "provided almost no evidence of insider trading" when interviewed. But if that were enough, the necessity requirement would be pointless as that argument fails to distinguish this case from any other *criminal* case. *See Lilla*, 699 F.2d at 104. One suspects that use of the telephone and failure to confess during interviews is rather the rule than the exception.

It is, moreover, a particularly high bar to show why a wiretap was necessary here because Congress viewed wiretaps as categorically unnecessary to the prosecution of insider trading, 18 U.S.C. § 2516(1), and wiretaps have been

unnecessary in every single insider-trading case prior to this one for half a century, SA51.

### B. The Affidavit's Remaining Content Does Not Establish Probable Cause

The government's effort to defend the court's probable-cause ruling suffers from the same statutory and constitutional problems. With respect to the literally false statement that the key confidential informant had "not yet been charged with any crimes," when in fact she had been convicted of felony fraud, SA21-22, the government argues (Br. 46) that its falsity was fine because her "conviction was for a crime *she committed with [Appellant]*." That, alas, is another misstatement. The government "attempted to establish insider trading by [Appellant] without success" when Khan was convicted. SA22.

Anyhow, *Franks* itself is clear that false allegations must be deleted, 438 U.S. at 156. The government cannot add in those additional factual allegations now. If it wanted them there, it should have told the truth the first time.

Moreover, whether Khan's self-serving "cooperation" in an earlier attempt to inculpate Appellant supported or undermined the credibility of her second effort to cast blame on him was a decision that the Constitution unqualifiedly assigned to the authorizing judge. "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences *** [but that] i[t] require[s] that those inferences be drawn by a

neutral and detached magistrate." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Furthermore, the untainted portions of the affidavit that survive the *Franks* "process of subtraction," *Awadallah*, 349 F.3d at 65—consisting chiefly of a toll analysis that showed Appellant in contact with an Intel employee and communications by other Galleon associates—reflected nothing more with respect to Appellant than a professional investment manager's "commonplace" "meeting with and questioning corporate officers and others who are insiders," *Dirks v. SEC*, 463 U.S. 646, 658-659 (1983).

### C. The District Court's Finding That The Government Acted With Reckless Disregard Is Not Clearly Erroneous

The district court found that the government made its repeated false statements and omissions in the wiretap affidavit with reckless disregard for the truth, SA2, 20-25, 44-45, and this Court reviews that factual determination only for clear error, *United States v. Trzaska*, 111 F.3d 1019, 1028 (2d Cir. 1997). The government's effort to overturn that factual finding lacks merit at multiple levels.

#### *1. The Misleading Statements' Extensiveness and Content Confirm Recklessness*

Most fundamentally, the sheer volume of misleading statements, outright false claims, and repeated omissions of *known* facts defies the government's effort to dismiss its affidavit's pervasively misleading content as a coincidental series of

unrelated accidents. Statements made under oath to a federal judge should be treated with the utmost gravity by all officers of the court, doubly so in *ex parte* proceedings, and triply so by those who represent the United States government.

Here, the government did exactly the opposite, turning the warrant process into a sharp-elbowed game of Twenty Questions, with the court permitted to learn only that which the government chose to tell it. *See* Retired Judges Br. 12-15. There is nothing even arguably negligent about telling the court an outright falsehood concerning when the key informant began cooperating, *knowing* that the true cooperation history was very different. Nor is it arguably negligent to tell the court that the informant "ha[d] not yet been charged with any crimes" when the affiant *knew* that the informant had previously been convicted of felony fraud, a conviction "peculiarly probative" of credibility, SA25. Agent Kang left the information out not because he negligently forgot, but because he "didn't see the value" in telling the judge that unhelpful truth. Franks Tr. 573. And it strains credulity to argue (Gov. Br. 47) that Agent Kang not once, not twice, but thrice just "accidentally" happened to cut out of his recitation of Appellant's consensual calls *only* those words that tended to exculpate Appellant. SA23-24.

And that was just the beginning. Agent Kang then unilaterally decided that Judge Lynch did not need to know about the most important parts of the merged FBI/SEC investigative efforts and their success in producing a veritable mountain

of evidence. Franks Tr. 571 ("All the information that the SEC received, *** yes, it was helpful[.]"). Instead, he threw into his affidavit paragraph after paragraph that was irreconcilable with the known truth—swearing under oath that (i) the location of records had not been identified "at all" when he *knew* that four million documents had been located and turned over, SA38; (ii) subpoenas could not be used to obtain trading records when he *knew* that the FBI and SEC had repeatedly issued such subpoenas, SA38, 40; (iii) interviews would tip off suspects when he *knew* that nearly two dozen interviews and depositions had not tipped anyone off, SA38; (iv) witnesses could not be identified when he *knew* that dozens of witnesses had been and continued to be identified, SA38-39; and (v) information obtained through conventional means would not be useful to the criminal investigation when he *knew* that such information had been of extensive use.[5]

Ordinary common sense forecloses calling such a pervading pattern of government-favoring and ball-hiding incidents that blindfolded the district court

[5] The government's argument (Br. 51) that individuals are not intimidated by civil investigations ignores the reality of the SEC's ability to destroy a business or an individual's career, the history of criminal prosecutions for making false statements to the SEC, *see, e.g.*, *United States v. McDermott*, 277 F.3d 240, 241 (2d Cir. 2002) (perjury prosecution for lies during SEC deposition), and that "the possibility of criminal investigation *** [is so] well known" that the SEC must put those interviewed on notice of the need to invoke the Fifth Amendment if they wish to preserve that right, *United States v. Stringer*, 535 F.3d 929, 940-941 (9th Cir. 2008). *See* SA37 n.22. Anyhow, if "witnesses take a criminal investigation

"accidental." And the government's effort now to read its allegations with hairsplitting nuance and coded language (Br. 50-53) simply underscores how broken its view of the *ex parte* warrant process and the government's duty of candor is.

***2. The Court Hewed to Circuit Precedent***

The government's claim of legal error in "inferring recklessness" where "omitted information was clearly critical to assessing the legality of the search," SA20 n.13, ignores Circuit precedent permitting just such an inference of *mens rea*. *See United States v. Reilly*, 76 F.3d 1271, 1280 (2d Cir. 1996) ("bare-bones description" of information "critical to a search warrant application *** was almost calculated to mislead"); *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991).

The government complains (Br. 63-64) that the district court ruled that recklessness "*must*" be inferred "whenever" withheld information is clearly critical. The district court did no such thing. *See* SA20 n.13 (recklessness "may" be inferred); SA18 (recklessness requires subjective "serious doubts"). The district court simply applied the commonsense principle, consistent with the law of this Circuit and others, that a subjective state of mind may be proved by circumstantial

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more seriously," then criminal interviews would be more "likely to succeed." SA53.

evidence. SA19; *see United States v. Ranney*, 298 F.3d 74, 78 (1st Cir. 2002); *Bruning v. Pixler*, 949 F.2d 352, 357 (10th Cir. 1991) ("clearly critical" test).[6]

Finally, the government suggests that inferring subjective intent from the importance of the omitted information collapses the state-of-mind and materiality prongs under *Franks*. Not so. And if the government had not abandoned this Court's "remaining content" test, it would have understood that. The recklessness test focuses on the obvious relevance of an individual piece of information to the officer. *Franks* materiality focuses on the legal sufficiency of the cumulative remaining content of the affidavit, which collectively may be able to compensate for the omission of critical information. For example, failure to reveal that an eyewitness had a history of lying to police would be reckless, but probable cause might remain if there were also fingerprint evidence. *See, e.g.*, *United States v. Ketzeback*, 358 F.3d 987, 990-991 (8th Cir. 2004) (omitted information could be "clearly critical" but not material).

To be sure, the overlap is likely to be greater in necessity cases because that inquiry is, by its nature, more of a seriatim process of elimination than a collective

[6] The passing references in the affidavit to SEC information compounded, rather than ameliorated, the problem by misleadingly suggesting only a tangential link between the two investigations, rather than the truth of the FBI's extensive dependency on the SEC's work. SA44-45. "The United States may not, however, recklessly *** support this application as though the right hand knows not what the

assessment like probable cause. But that does not mean that reckless disregard does not mean what this Court has long said it means. And if it meant what the government says, then a court could *never* draw an inference of recklessness, which *Reilly* forecloses.

* * * * *

What gets lost amid all the arguments is a very simple proposition: *Franks* is supposed to protect privacy and the integrity of the *ex parte* warrant process. It is not supposed to protect the government from the consequences of its own misconduct at the expense of individual privacy and the judicial-review process.

## III. THE ERRONEOUS JURY INSTRUCTION REQUIRES REVERSAL OF COUNTS 6-14

The government's attempt to defend the district court's prejudicially erroneous "factor, however small" (JA432-433) jury instruction on the element of causation strays almost as far from statutory text as its arguments under Title III. Indeed, the government nowhere discusses the actual language of the securities fraud statute. The government instead places signal reliance on *United States v. Royer*, 549 F.3d 886 (2d Cir. 2008), which approved "in some way informed" as a proper causation standard, *id*. at 899 n.12.

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left hand does." *In re Application for Interception*, 2 F. Supp. 2d 177, 178 (D. Mass. 1998).

But *Royer* has been overtaken by *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011), which held that such an unusually diluted causation standard as "factor however small" is permissible only where statutory text expressly so provides, *id*. at 2642-2643. The securities fraud statute, which governs both civil and criminal fraud, contains no such language, but instead incorporates "traditional notions of proximate causation," *id.* at 2644 n.14. The government's argument that the same statutory language should mean different things in the civil and criminal context is foreclosed. This Court "must interpret the statute consistently, whether [the Court] encounter[s] its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). The rule of lenity commands that "the lowest common denominator *** must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). *McBride* thus "casts doubt" on *Royer* sufficient to permit departure from it. *Wojchowski v. Daines*, 498 F.3d 99, 105 (2d Cir. 2007).

Finally, a properly instructed jury would not "have necessarily returned a verdict of guilty." *United States v. Ferguson*, --- F.3d ----, 2011 WL 6351862, at *10 (2d Cir. Dec. 19, 2011). As the government acknowledges (Br. 10-11), the defense "introduced hundreds of analyst reports and news articles," including "a large volume of research reports and news articles that were available to the public" that provided legitimate bases for Appellant's trades. By reducing to near-nothingness the statutory element of causation, the "however small" instruction

prevented the jury from crediting those other sources of information as causing Appellant's trades and from distinguishing between trades caused by legal sources of information and those alleged to be the product of inside information.

* * * * *

The government's affidavit in this case disdained its obligations under Title III and the Constitution to provide the authorizing judge a truthful, forthright, full, and complete demonstration of both necessity and probable cause. The government omitted or misstated the very facts most capable of influencing the necessity and probable cause determinations because, bluntly, it "didn't see the value of" providing the true facts to Judge Lynch, Franks Tr. 573, or of letting the authorizing judge independently draw the inferences from those true facts. The judicial authorization process, in other words, was treated like a formulaic ritual to be skirted, rather than an independent constitutional process to be respected.

That same attitude explains why the government's brief simply shrugs off the constitutional, statutory, and precedential implications of after-the-search judicial ratifications based on a new factual record. But the bottom line is that the government's unapologetic claim of entitlement to be "economical with the truth" in *ex parte* proceedings cannot coexist with independent judicial review. Sustaining this search will simply invite more of the same.

## CONCLUSION

For the foregoing reasons and those stated in Appellant's opening brief, the judgment of conviction and sentence should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 8,489 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as expanded by this Court's order of May 14, 2012.

/s/Hyland Hunt
Hyland Hunt

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