

Defendant maintains that the requisite showing has already been made and he is entitled to a full *Franks* hearing. However, at the pre-*Franks* hearing, in order to supplement and elaborate on Defendant's original motion, Defendant must call the following witnesses:

1) CS-1

- The misrepresentations are regarding CS-1.

2) Former Assistant United State's Attorney J. Gregory Deis.

- The former AUSA provided a letter describing the inaccuracies contained within the filings made to the issuing Magistrate regarding CS-1.

3) FBI Special Agent Bryan M. Butler, who signed the relevant, but false affidavit and who interviewed CS-1.

4) All unknown FBI agents who met, and conspired with, CS-1 and FBI Agent Bryan M. Butler in the underlying matter.

5) Request for written discovery:

- i. Any and all agent notes regarding interviews with CS-1;
- ii. Any and all documents pertaining to CS-1's previous dealings with the FBI and/or law enforcement;
- iii. Any and all documents pertaining to payments made to CS-1 in return for cooperation with the FBI and/or law enforcement; and
- iv. CS-1's criminal history report.

Each of the witnesses and documents requested above are needed to establish the record before the Court. As detailed in Defendant's previous filings (incorporated by reference herein), there are misrepresentations in the affidavit which were, *at a minimum*, made with reckless disregard for the truth. The witnesses and documents above will aid Defendant in demonstrating the recklessness of the misrepresentations, which will then entitle Defendant to a full *Franks* hearing. Mere negligence and mistake do not sufficiently explain the lack of truthfulness regarding the CS in the affidavit which led to Defendant's arrest. Specifically, through these witnesses and documents, Defendant will establish, as required under *Franks*: (1) that the affidavit contained false information; (2) that the false information was included in the affidavit intentionally or with reckless disregard for the truth; and (3) that the false information was necessary to find probable cause. *McMurtrey*, at *17, citing *Franks*, 438 U.S. at 155-56; see also *Harris*, 464 F.3d at 738; *United States v. Whitley*, 249 F.3d 614, 620 (7th Cir. 2001).

As also detailed in Defendant's prior filings, the credibility of the CS was at the heart of the probable cause determination for arrest. The CS at all times directed and was the driving force of the conversations cited in the affidavit. Had the Court known the true background and lack of reliability of the CS, it would not have found proper cause for arrest of Defendant. A *Franks* hearing will demonstrate these facts and should result in the quashing of Defendant's arrest.

The Government, of course, wants to minimize, if not eliminate, the importance of telling the Magistrate the truth about CS-1 and his background. The Government is taking the position that, even if it lied to the Magistrate or recklessly failed to tell the truth, it is of no consequence. The Government is wrong for at least four reasons. First, if the background of CS-1 was not critical then there was no reason to give any information to the Magistrate about CS-1 in the first place. In fact, the Government told the Magistrate about CS-1, it just did not tell the truth. Second, if the background of CS-1 was so insignificant, there was no reason for the Government to return to the Magistrate a second time to say that it did not tell the truth the first time. Third, if the background of the informant was a non-issue, then there was no reason to delay telling the Magistrate the truth about CS-1 when the Government finally did come clean. In fact, the Government delayed telling the Magistrate the truth about CS-1 for four days from the time it allegedly uncovered a “mistake” and until *after* the Representative was indicted. Finally, the Government has not produced, and cannot produce, any law which states that an informant’s background is wholly irrelevant as a matter of law. The Government wants to make the taped recordings the end all and be all, yet dismiss the importance of the informant. However, the Government can no more separate the informant from the tapes any more than an egg can be easily separated from its yolk. They go together.

As a logistical matter, due to the fact that the witnesses and materials are within the exclusive control and/or possession of the Government, the Court may (in

lieu of a subpoena) order the Government to produce the witnesses and the documents.

WHEREFORE, Defendant Derrick Smith respectfully requests that this Court will grant the above requests.

Respectfully Submitted,

/s/ Victor Henderson
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