

1
2 UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF COLUMBIA

4 UNITED STATES OF AMERICA,) NO. 21-CR-687 (RC)
5 Plaintiff,)
6 v.) MR. RHINE’S REPLY TO THE
7 DAVID CHARLES RHINE,) GOVERNMENT’S RESPONSE IN
8 Defendant.) OPPOSITION TO HIS MOTION TO
) SUPPRESS UNDER *FRANKS V.*
) *DELAWARE*

9 The government’s response fails to demonstrate the validity of its warrant.
10 Instead, the government’s response emphasizes the need for an evidentiary hearing.
11 First, the government does not and cannot demonstrate that the warrant application
12 established probable cause absent the false information regarding the tipster. Second,
13 none of the messages pointed to by the government say what the warrant claimed the
14 non-existent Facebook post said. The warrant affidavit is false and misleading. And
15 third, the government has introduced nothing to explain how its agents included the
16 false and misleading information without at least reckless disregard for the truth. In the
17 face of the tipster’s assertion that he never made the false statement, the government
18 cannot do so. The Court should order an evidentiary hearing under *Franks v. Delaware*,
19 438 U.S. 154 (1978).

20 First, the government makes a conclusory argument that the warrant affidavit
21 established probable cause even without the false and misleading information. *See* Dkt.
22 No. 80 at 11–14. But this argument fails both because the government *still relies* on the
23 tipster’s information in this recitation (without addressing the remaining false
24 impression of the tipster’s credibility) and because the remaining facts merely indicate
25 that Mr. Rhine was in the area of the Capitol, not that he had committed any crime.
26

1 The government’s recitation of facts remaining in the warrant application
2 without the specific false and misleading statement about the non-existent facebook
3 post still relies on the tipster’s information. The government *cannot help* but rely on the
4 tipster’s claims to argue that the affidavit establishes probable cause. *See id.* at 13. The
5 weight of these claims is significantly diminished by revelation of the tipster’s lack of
6 veracity and basis for their claimed knowledge. *See United States v. Laws*, 808 F.2d 92,
7 100 (D.C. Cir. 1986) (looking to external circumstances to evaluate the reliability of an
8 informant). Indeed, the false statement and related material omissions here deprived the
9 Magistrate Judge of relevant information to assess the tipster’s credibility, and the
10 weight to give the tipster’s claims.

11 An affidavit predicated upon an informant’s tip has been regarded as
12 vulnerable because the tip is hearsay, which, like all hearsay, is
13 susceptible to special concerns of perception and veracity. If the tip is to
14 serve as a basis for a finding of probable cause, the “neutral and detached
15 magistrate” issuing the warrant must have substantial reason to believe
16 that nonetheless the hearsay is reliable. Without that determination, the
17 magistrate would cede his duty to gauge probable cause to the informant
18 and the possibly overzealous law-enforcement officer.
19 *Laws*, 808 F.2d and 94–95 (internal citations omitted). The government’s conclusory
20 argument fails to account for the impact of the false statement and material omissions in
21 falsely bolstering the tipster’s credibility. Indeed, none of the remaining information
22 offered by the tipster indicates that Mr. Rhine engaged in criminal conduct. Rather, the
23 tipster provided text that simply indicate Mr. Rhine was in the vicinity of the Capitol,
24 not that he entered the building or committed any crime. *See Ex. F* (discussed further
25 below).

26 Notably, the government explicitly relied on the tipster to identify a person in
surveillance footage as Mr. Rhine. *See Ex. F* at 14–15. And the tipster only provided an
identification on a single screenshot, noting the generally poor image quality. Even the
screenshot used barely shows the facial features of the person identified. *See Ex. F* at

1 15. The government agent who wrote the affidavit does not claim any personal
2 knowledge of Mr. Rhine nor any meaningful ability to identify him in grainy
3 surveillance footage. *See generally* Ex. F. The tipster's credibility, beyond the false
4 statement, thus carried great weight in the assessment of probable cause. And the
5 government's inclusion of a false claim bolstering the tipster's veracity and basis for
6 information misled the Magistrate Judge about the tipster's credibility. Thus, the
7 tipster's claims, including his identification of Mr. Rhine, can no longer weigh in favor
8 of probable cause.

9 Furthermore, the other information in the affidavit indicates only that Mr. Rhine
10 was in the vicinity of the Capitol, not that he committed any crime there. Multiple
11 demonstration permits were approved for the area around the Capitol Building on
12 January 6, 2021, particularly for the lawn area on the east side of the building. *See* Ex.
13 N (copies of permits, which were published by BuzzFeed News and are available at
14 [https://s3.documentcloud.org/documents/21059849/leopold-capitol-police-protest-](https://s3.documentcloud.org/documents/21059849/leopold-capitol-police-protest-permits-january-6-common-law-release.pdf)
15 [permits-january-6-common-law-release.pdf](https://s3.documentcloud.org/documents/21059849/leopold-capitol-police-protest-permits-january-6-common-law-release.pdf)).¹ The government has repeatedly chosen to
16 ignore this reality and insists that any person in the vicinity of the Capitol on January 6,
17 2021, must have committed a crime. But this is simply not so.

18 The evidence recited in the warrant applications, which does not rely on the
19 tipster, does no more than suggest that Mr. Rhine was in the vicinity of the Capitol.
20 Even if accepted, this fact merely places him in an area that includes lawful protest.
21 Notably, the cell tower dump and geofence data only place Mr. Rhine in an area that
22 includes the Capitol Building, but also includes space around the Capitol. *See* Ex. F at
23

24 ¹ For example, Ex. N at 48 notes approved protests in areas 8, 9, and 10, all located in
25 the lawns on the east side of the Capitol Building. *See* Architect of the Capitol, U.S.
26 Capitol Grounds Demonstration Areas (Dec. 5, 2012), *available at*
[https://www.uscp.gov/sites/uscapitolpolice.house.gov/files/wysiwyg_uploaded/U.S.%20](https://www.uscp.gov/sites/uscapitolpolice.house.gov/files/wysiwyg_uploaded/U.S.%20Capitol%20Grounds%20Demonstration%20Area%20Map.pdf)
[0Capitol%20Grounds%20Demonstration%20Area%20Map.pdf](https://www.uscp.gov/sites/uscapitolpolice.house.gov/files/wysiwyg_uploaded/U.S.%20Capitol%20Grounds%20Demonstration%20Area%20Map.pdf).

1 12 (a cell tower dump indicated a phone associated with Mr. Rhine “was identified as
2 having used a cell site consistent with providing service to a geographic area that
3 included the interior of the U.S. Capitol building.”), 13 (“Google location data shows
4 that a device associated with phone number [] was within or around the U.S. Capitol on
5 January 6, 2021 between the time of 2:24 PM and 4:47 PM.”).

6 Furthermore, as discussed further below, the various *other* statements and
7 exchanges shared by the tipster include no statement or admission of Mr. Rhine
8 entering the Capitol building, rather they at most recite observations of the actions of
9 other people. Indeed the sole text message contained in the warrant affidavit states:
10 “Thanks. I witnessed ZERO violence. I saw no ‘proud boys’. Capitol police removed
11 barriers and let people in.” Ex. F at 14. Nothing in this text discusses any action taken
12 nor crime committed by Mr. Rhine. Absent the false statement, and related omissions,
13 the affidavit simply does not establish probable cause.

14 Second, the government’s argument that the statement was not false or
15 misleading is unpersuasive, and contrary to its own prior position. The government
16 omits important parts of the warrant affidavit to *try* to bend the affidavit’s claims into
17 claims that are *close to* truthful. The government argues that the only claim in the
18 affidavit at issue is the sentence: “[The tipster] did not see [Ms. Rhine’s] actual
19 [Facebook] post, but saw a screen shot sent to him by his friend referring to RHINE
20 entering the U.S. Capitol building on January 6, 2021.” Dkt. No. 80 at 14 (quoting Ex.
21 F at 13). But the government ignores the earlier claims in the affidavit that plainly
22 inform this sentence. The affidavit first describes the tipster as having *seen* a facebook
23 post where Mr. Rhine’s wife *stated that Mr. Rhine had entered the Capitol building:*

24 On or about January 10, 2021, a tipster [] called the FBI National Threat
25 Operations Center to report that David Rhine . . . had entered the U.S.
26 Capitol building in Washington, DC on January 6, 2021. Information
provided by [the tipster] included that on January 6, 2021, Rhine’s wife
made a post to Facebook that Rhine had entered the Capitol building

1 during the protest. After seeing the post, TIPSTER 1 confronted Rhine
2 about being in the Capitol building and told him he needed to make a
report about his part in the entering of the Capitol.

3 Ex. F at 12. Furthermore, the warrant affidavit reinforces this false claim that the tipster
4 saw a Facebook post where Mr. Rhine's wife claimed her husband had entered the
5 Capitol Building in its recitation of the March interview:

6 [The tipster] had no indication that RHINE traveled to Washington D.C.
7 in January 2021 until a friend informed him of a Facebook post by
8 RHINE's wife stating that she was proud of her husband because he had
9 been at the January 6th rally and had entered the Capitol. [The tipster] did
not see the actual post, but saw a screen shot sent to him by his friend
referring to RHINE entering the U.S. Capitol building on January 6, 2021.

10 Ex. F at 13. The Court should reject the government's efforts to remove the final
11 sentence from its context. The specific words used by the affiant, and their context,
12 matter because they drive the inferences drawn by the judge issuing the warrant. *See*
13 *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir.1993) (affiant reckless in telling
14 magistrate that drug-sniffing dog showed "interest" in defendant's bag, but omitted
15 information that dog had not gone into "alert").

16 Here, the government initially drew the only logical conclusion from these
17 claims in the affidavit—that "[t]he tipster explained that, though he had not personally
18 seen the Facebook post *in which the defendant's wife referred to the defendant*
19 *entering the Capitol on January 6, he had seen a screenshot of the post, which a*
20 *friend had sent to him.*" Dkt. No. 59 at 41 (emphasis added). Only after the
21 government spoke to the tipster again, did it acknowledge the falsity of this claim. Dkt.
22 No. 71 at 2.

23 The government points to various *other* messages or texts that the tipster may
24 have been referring to in an attempt to avoid the plain falsity of the claims in the
25 affidavit. But none of these other messages invoked by the government include *any*
26 claim by Mr. Rhine's wife that Mr. Rhine had entered the Capitol Building or

1 committed any crime. Again, these messages refer only to claims about things Mr.
2 Rhine may have witnessed in the vicinity of the Capitol, not inside the building itself.
3 *See* Dkt. No. 80, Govt Exs. A, B. None of these could be mistaken for a claim that Mr.
4 Rhine *entered the Capitol Building and committed a crime* without at least reckless
5 disregard for the truth.

6 Finally, the government also makes a conclusory argument that government
7 agents did not act with reckless or intentional disregard for the truth. *See* Dkt. No. 80 at
8 16. The government’s theory on this point is not entirely clear. On the one hand, the
9 government suggests that the tipster is now mistaken about what he saw. *See id.* (“the
10 tipster’s confusion—nearly two years after his FBI interview—about the type of
11 messages at issue cannot refute what the documentary record makes clear: the tipster
12 saw—and forwarded to the FBI—a screenshot of a message in which Ms. Rhine
13 attempted to explain away her husband’s entry into the Capitol building on January 6,
14 2021.”). In the alternative, the government claims that its agents misunderstood the
15 actual messages forwarded by the tipster. *See id.* (“Rhine’s assertion (ECF No. 73 at 9-
16 10) that the FBI agents acted with reckless disregard for the truth (or worse), which is
17 based on the same misapprehension of the documentary evidence, is even more far-
18 fetched.”). Neither argument is persuasive.

19 The government does not so much as acknowledge that the tipster has said that
20 *he never told agents* that he had seen or received a screenshot of a Facebook post
21 where Mr. Rhine’s wife claimed that Mr. Rhine entered the Capitol Building. *See* Ex.
22 M. This demonstrates that agents investigating and preparing the affidavit acted with at
23 least reckless disregard for the truth. As detailed above, the warrant affidavit very
24 clearly indicates that the tipster *actually saw and received* a screenshot of a Facebook
25 post where Mr. Rhine’s wife claimed that Mr. Rhine *entered the Capitol Building*. *See*
26 Ex. F at 12–13 (quoted above). This is simply not so. *Nothing* that the tipster sent to

1 government agents includes a claim by Mr. Rhine’s wife that Mr. Rhine entered the
2 Capitol Building or committed any other crime. *See* Dkt. No. 80, Govt Exs. A, B. The
3 tipster has affirmed that he did not falsely claim otherwise to agents. *See* Ex. M. That
4 leaves the false statement, and related omissions, as the result of the agents’ actions.
5 The agents were more than capable of including actual messages or screen shots in the
6 affidavit for the Magistrate Judge to review—indeed, they did so. *See* Ex. F. The choice
7 to mischaracterize information they had or that was reported by the tipster, rather than
8 simply provide the actual images received, demonstrates at least reckless disregard for
9 the truth.

10 Mr. Rhine has made more than a sufficient showing to warrant a *Franks*
11 evidentiary hearing. The Court should reject the government’s contorted arguments to
12 claim otherwise. The Court should order an evidentiary hearing on this Motion and
13 should subpoena the previously identified witnesses (the relevant government agents
14 and the tipster) to testify at that hearing.

15 DATED this 30th day of January 2023.

16 Respectfully submitted,

17 *s/ Rebecca Fish*

18 *s/ Joanna Martin*

19 Assistant Federal Public Defenders
20 Attorneys for David Charles Rhine
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