

NORTH CAROLINA  
LENOIR COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO:

**STATE OF NORTH CAROLINA**

vs.

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**MOTION TO SUPPRESS**  
**SEARCH**

NOW COMES the defendant, by and through counsel, pursuant to N.C.G.S. §§15A-972, et seq.; the Fourth and Fourteenth Amendments to the United States Constitution; and Article I, Sections 19, 20 and 23 of the North Carolina Constitution, and moves this Court for suppression of the search and seizure of the **ITEM** worn by the defendant on **DATE**, for the following reasons:<sup>1</sup>

1. The defendant has been indicted for **CHARGES**. The State has given notice that it intends to seek the death penalty in this case.

2. On **DATE**, at about **TIME**, officers of the **CITY/TOWN** Police Department were called to **ADDRESS**. On the floor of the apartment was **VICTIM'S NAME**. On **DATE**, **VICTIM'S NAME** died, without regaining consciousness.

3. On **DATE**, at approximately **TIME**, Detective **NAME** of the **CITY/TOWN** Police Department obtained a search warrant to seize a **ITEM** from the defendant. In the search warrant, the defendant is noted as "**NAME/DESCRIPTION**". To obtain this search warrant, Detective **NAME** submitted an affidavit setting forth alleged facts.

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<sup>1</sup>See attached Affidavit of counsel

The affidavit is attached hereto, marked "Exhibit A", and incorporated herein by reference.

4. Before the search warrant was obtained on **DATE, OFFICER'S NAME** interviewed **WITNESS/ADDRESS**. According to a police report of this interview, **WITNESS** told Officer **NAME** that, "'Around 3:30 a.m. or 4:00 a.m. on Wednesday, [his girlfriend] **NAME**,... almost ran into a black male who was walking around the side of our apartment... This guy looks to be 6 feet tall and was wearing a black goose coat with a hood and the hood had fur around it. He appeared to be broad built".

5. In the search warrant, Detective **NAME** said **WITNESS** provided a description of a black male seen leaving the victim's residence at approximately 3:30 a.m. on the morning of February 6, 2002.

6. Though **WITNESS** saw a black male approximately six feet tall with a broad build, he did not see this individual leave the victim's apartment.

7. The police interviewed **WITNESS**. He indicates that he was shown photographs of possible suspects during the day on February 7, 2002. **WITNESS** indicates that he identified a photograph he was shown at that time. See **WITNESS's** sworn affidavit attached hereto, marked "Exhibit B", and incorporated herein by reference. There is no indication included in Detective **NAME's** search warrant affidavit that **WITNESS** made any photographic identification of any person. In fact, there is no indication in any of the police reports that **WITNESS**, or any other witness interviewed by the **CITY/TOWN** Police, were shown any photographs.

8. On February 7, 2002, before 8:00 p.m., the **CITY/TOWN** Police also questioned **WITNESS's** girlfriend, **NAME**. According to the police report, **GIRLFRIEND** told the **CITY/TOWN** Police that, around 3:00 a.m. on Wednesday, February 6, 2002, she saw a heavy set black male come from around the apartment. He stated, "What's up?". See the statement of **GIRLFRIEND** attached hereto, marked "Exhibit C", and incorporated herein by reference. No information from the interview was included in the search warrant.

9. **GIRLFRIEND** was interviewed by the defense. During the day on February 7, 2002, Officers of the **CITY/TOWN** Police Department showed **GIRLFRIEND** books of photographs in an effort to identify the individual she had seen during the early morning hours of February 6, 2002. She did not make any identification at that time. A few days after this, **GIRLFRIEND** returned to the **CITY/TOWN** Police Department at the request of Officers and was shown a sheet of paper showing five to six photographs on it. **GIRLFRIEND** remembers picking a guy out of the photographs. **GIRLFRIEND** was not sure how many times she looked at photographs. **GIRLFRIEND** does not specifically remember signing, initialing, or dating any photograph. **GIRLFRIEND** indicates that she remembers having to look up at the black male and that he was wearing a big dark coat and she thinks it may have had a hood on it. **GIRLFRIEND** states that the black male came from beside the apartment building. She does not know if he came from an apartment; and, if he did, she has no idea what apartment. See affidavit of **GIRLFRIEND**, attached hereto, marked "Exhibit D", and incorporated herein by reference.

10. On February 7, 2002, Officers of the **CITY/TOWN** Police Department interviewed **WITNESS/ADDRESS**. The defense interviewed **WITNESS**. **WITNESS** told the defense about two black males waiting for **VICTIM** on two occasions; one during the afternoon of February 5, 2002, and the other later in the evening on February 5, 2002. One of the black males was approximately six feet tall with his head shaved on the sides. The other black male had corn rows in his hair. One of the men was called "**NICKNAME**". They arrived in a gold Honda Accord. See the Affidavit of **WITNESS** attached hereto, marked "Exhibit E", and incorporated herein by reference. No information from the police interview was included in the search warrant. The Officers showed **WITNESS** photographs of individuals that day. **WITNESS** did not make any identification of any of the photographs he was shown at that time. The next day, **WITNESS** was again shown photographs. **WITNESS** indicates that he picked a guy out of the photo lineup at that time. See affidavit of **WITNESS** attached hereto, marked "Exhibit E".

11. On February 7, 2002, at approximately 2:55 p.m., **CITY/TOWN** Police Officer **NAME** interviewed **WITNESS**. **WITNESS** said, "On Tuesday night, I noticed two black males sitting in front of the apartment. The first black male was around 6'1" or 6'2", and weighed about 170 pounds. His hair was shaved on the side. He was driving a newer model Honda Accord, gold in color. He was wearing a black jacket with 'New York Yankees' on the back, dark pants, and had a black bandana in his back pocket. The second guy was sitting in the Accord. All I noticed was he had corn rows in his hair.". See the statement of **WITNESS**, attached hereto, marked "Exhibit F", and

incorporated herein by reference. No information from this interview was included in the search warrant.

12. According to the Affidavit submitted by the police in support of the search warrant, the Police Officer who found on February 6, 2002, indicate that they observed "an impression circular in shape with striation marks around the outside" on the victim's head. A photograph of the wound is attached to the search warrant. The photograph attached to the search warrant does not contain any reference for measurement or comparison purposes.

13. On February 7, 2002, the defendant was asked to go to the **CITY/TOWN** Police Department. The defendant agreed to go to the Police Department. The defendant was questioned at the **CITY/TOWN** Police Department by Detective **NAME**, Detective **NAME**, and Lieutenant **NAME**. Detective **NAME** noticed that the defendant was wearing a ring and asked to see it. The defendant took the ring off his finger and handed it to Detective **NAME**. Detective **NAME** looked at the ring and showed it to the other two Officers. The Officers chose not to take any photographs of the ring. The Officers chose not to make any measurements of the ring. The Officers chose not to take or make any impressions of the ring for any comparison or illustrative purposes.

14. In the search warrant, Detective **NAME** indicates that "It is the opinions of Detective **NAME**, Lt. **NAME**, and the affiant that this ring is consistent with the shape, size, and markings of the impression found in the forehead of the victim".

15. The opinion that the defendant's ring is "consistent with the impression" found on the forehead of the victim is merely a conclusion without sufficient factual

basis. Such a conclusion cannot and should not support probable cause. See United States v. Ventresca, 380 U.S. 102 (1964).

16. Probable cause to issue a search warrant is found by looking at the “totality of the circumstances” contained within the four corners of the affidavit. Illinois v. Gates, 462 U.S. 213, 237 (1983). “Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not merely serve as a rubber stamp for the police.” United States v. Ventresca, 380 U.S. 102, 108-09 (1964).

17. The duty of this Court in reviewing the affidavit is to ensure that the issuing magistrate had a “substantial basis for concluding that probable cause existed”. Gates, at 214. The affidavit submitted in support of the search warrant in this case begs for information that could have corroborated the information supplied by the affiant. In this case, there were multiple ways in which the affiant could have attempted to corroborate his information and yet the affidavit contains no such corroboration. There was no rational basis for the issuing magistrate in this case to believe that the information supported a finding of probable cause.

18. The facts which support the defendant’s argument that the affiant acted in bad faith or in reckless disregard of the facts are the same facts which the defendant submits in support of the argument that violations under Franks v. Delaware, have also occurred. However, if this Court determines that the affidavit, on its face, is void of probable cause, there is no need to conduct a Franks analysis.

19. In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held that, if a defendant makes an initial showing that a warrant affidavit contained an intentionally or recklessly false statement that was necessary to the finding of probable cause at the time the warrant was issued, he is entitled to a hearing. "Because it is the magistrate who must determine independently whether there is probable cause... it would be an unthinkable imposition upon his authority if a warrant affidavit revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment". Franks, 438 U.S. at 165 (*citation omitted*). The Fourth Circuit has extended Franks to apply to omissions, in addition to false statements. United States v. Colkley, 899 Fd.2d 297, 300-301 (Fourth Circuit 1990).

20. The defendant is informed and believes that he is entitled to a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). In Franks, the Supreme Court held:

Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the alleged false statement is necessary to finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. Id., at 155-156.

21. Thus, a defendant challenging the validity of a search warrant under 15A-978(a) has the burden of showing by preponderance of the evidence, first that the affiant acted in bad faith or acted with a reckless disregard for the truth including a false statement in the warrant affidavit, and second that the false statement was necessary to a finding of probable cause. State v. Elliott, 69 N.C. App. 89 (98-99), 316

S.E.2d 632 (1984). Once the defendant satisfies the above requirements, then the false material in the affidavit is to be disregarded and the sufficiency of the warrant affidavit is to be judged on the basis on the remaining material. Franks v. Delaware, 438 U.S. 154 (1978); State v. Louchheim, 296 N.C. 316, 250 S.E.2d 630 (1979).

22. If at the hearing, the Court determines that the affidavit does contain such a false statement, and that, in the absence of that statement, probable cause did not exist to support issuance of the warrant, the Court ordinarily must exclude the evidence obtained pursuant thereto. Franks thus serves to prevent the admission of evidence obtained pursuant to warrants that were issued only because the issuing magistrate was misled into believing that there existed probable cause. *See also* United States v. Jones, 913 Fed.2d 174, 176 (Fourth Circuit 1990).

23. Once the material misrepresentations of facts are deleted or the material omissions of fact are added to the challenged affidavit, the probable cause analysis must follow the “totality of the circumstances test” set out in Illinois v. Gates, *supra*. However, the Court in Gates also warned that the magistrate must still be provided with enough information to allow him to determine whether he is simply being provided with the “bare conclusions of others”. Id. at 239.



24. The affidavit sets out evidence of material misrepresentations, falsehoods, and omissions of fact, which were knowingly made by the affiant and with reckless disregard for the truth. Such false and misleading statements in the affidavit used to obtain the search warrant resulted in violation of the defendant's Fourth Amendment rights because the "statement[s] [were] necessary to finding a probable cause". Wilkes v. Young, 28 F.3d 1362, 1365 (Fourth Circuit 1994) (*quoting Franks v. Delaware*, 438 U.S. 154, 156 (1978)). When these material misrepresentations and omissions are corrected, there is no probable cause in the affidavit to believe that the ring would contain or be any evidence. The result is the search was illegal and all tangible evidence must be suppressed.

25. The defendant is informed and believes that the search warrant lacks probable cause and is therefore in violation of the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution; and under Article I Sections 19, 20 and 23 of the North Carolina Constitution.

WHEREFORE, defendant prays:

1. That the Court hold a suppression hearing in this matter; and
2. That this Honorable Court issue an Order suppressing the seizure of defendant's ring and testimony relative thereto, together with any after-gained evidence or testimony, and further rule the same inadmissible in support of the charges set out in the above numbered indictments.

RESPECTFULLY SUBMITTED this the \_\_\_\_\_ day of \_\_\_\_\_, 2004.

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**Name/Address**