MEMORANDUM

From: Alexander Moskovits

To: Larry Semenza, Esquire

Re: *United States v. Silberman*

FACTUAL BACKGROUND

On July 23, 2010, Douglas R. Silberman ("DOB" 4/17/1944) and his companion Michele King ("DOB" 10/17/1948) were traveling eastbound on Interstate 70 ("I-70") in a Tan 2006 Fleetwood Recreational Vehicle, a motor home for all intents and purposes. The cross-country highway travelers were driving through the State of Kansas displaying California Registration 6KFD747. *See* Affidavit for Arrest Warrant ("Affidavit") at p.1.

Kansas Highway Patrol was implementing a "drug ruse" off I-70 at 17:50 hours. *See* Affidavit at p.1 (affiant was "at a *drug ruse* check lane."). The trap used visible signs on I-70 warning motorists of a check lane ahead. Silberman exercised his right to decline the invitation to waive his privacy as to his "home on the road" and "opted-out" of the random inspection of his motor home by taking Exit 322 ("Tallgrass Road") off I-70. Silberman essentially "opted-out" of paying a Fourth Amendment toll for the privilege of driving on the interstate highway. However, the ruse anticipated Silberman's exit.

Kansas Highway Patrol Allen E. Bosley was already lurking at that location under an overpass bridge recording videotape even before the "profile" motor home entered the camera frame covering the inactive, deserted rural intersection "at the bottom of the ramp of Tallgrass Road and I-70." *See* Affidavit at p.1. The patrol officer could barely contain his excitement that a large motor home was his next "drug ruse" target. *See* DVD at 0:36 (Officer: "***Oh Man! This is a good one!***"). The officer proceeded to make a traffic stop.

THE TRAFFIC STOP

The videotape shows that the motor home slowed down upon approaching the deserted rural intersection at the bottom of the exit ramp. There was neither pedestrian nor vehicular traffic at the intersection. Review of the videotape raises a question about the veracity of the averment that there was a "posted stop sign at the bottom of the ramp". *See* Affidavit at p.1. No stop sign can be seen when the camera passes the intersection. [1]

The video supports the position that there was neither a "clearly marked stop line" nor any "crosswalk on the near side of the intersection." *See* Kansas Statute §8-1528(b) (duties of drivers on stop signs). Silberman slowly approached the intersection at the "point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it." *Id*. Facing a deserted rural intersection, Silberman did not have to "yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when [he] mov[ed] across or within the intersection or junction of roadways." *Id*. (brackets added). In the State of Kansas, stop signs indicate "preferential right-of-way." *See* Kansas Statute §8-1528(a). Silberman clearly had the "preferential right-of-way" in the deserted rural intersection. Because Silberman did not violate his statutory duties concerning stop signs under K.S.A. §8-1258, the traffic stop was pretextual by definition. The patrol officer lacked statutory authority to stop the motor home. No traffic violation was committed before the motor home turned south to travel on Tallgrass Road, but the officer was on a preordained "drug ruse" mission to stop, detain, and search the vehicle fitting "the profile." *Please see* DVD at 0:36 (Officer: "***Oh Man! This is a good one!***").

[1] Retained defense counsel Larry Semenza has conscientiously hired an investigator to view the scene and survey all of the road signs posted within the relevant area.

RESEARCH NOTE:

The above is the best defense argument using the language of K.S.A. §8-1528 ("Stop signs and yield signs; duties of drivers (a) Preferential right-of-way may be indicated by stop signs or yield signs as authorized in K.S.A. 8-2008, and amendments thereto. (b) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign ***shall stop*** at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. ***After having stopped***, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways. Such driver shall yield the right-of-way to pedestrians within an adjacent crosswalk.") (emphasis added). No cases were found under the Westlaw annotations, but the mandatory "***shall stop***" language of the statute may validate the stop *if there was indeed a posted stop sign at the intersection*. A California-based traffic law expert consulted on this question described the duty to stop as a "strict liability" irrespective of deserted road conditions.

To the practiced eye of a Kansas Highway Patrol trooper, Silberman was driving a "profile" motor home displaying registration from California - a marijuana source state. The highlighted audio recording ("***Oh Man! This is a good one!***") supports a conclusion that the state trooper engaged in the criticized practice of vehicular profiling. However, jurists have applied the breaks at times and some have made clear their opinion that the practice of vehicular profiling is "particularly distasteful." *See e.g. United States v. Hill*, 195 F.3d 258, 267 (6th Cir. 1999) ("We share in the concern that police officers are using the state of the law as *carte blanche* permission to stop and search 'target' or 'profile' vehicles for drugs. Of course, the Supreme Court in *Whren* confirmed that a police officer is legally allowed to stop a vehicle for a traffic violation when there is probable cause for the traffic stop, without regard for the officer's subjective motivation. However, we agree that it is the responsibility of the courts to make sure that police officers act appropriately and not abuse the power legally afforded to them by, among other things, carefully scrutinizing a police officer's testimony as to the purpose of the initial traffic stop.

Although U-Hauls may in fact be used to carry illegal contraband, the potential for police officers to abuse the *Whren* principle is apparent, and when applied to 'target' vehicles such as U-Hauls - which are typically used by lower income people to move who do not have many personal belongings and cannot afford the expense of a professional moving company, or typically used by young college students making their first move from home - the abuse becomes *particularly distasteful*.") (emphasis added; citation omitted).

As the videotape continues, smoke can be seen billowing out of the exhaust pipe of the motor home before Silberman brought his vehicle to a complete stop upon the Kansas trooper "activat[ing] his emergency equipment in an attempt to stop the vehicle." Affidavit at p.1 (brackets added); *see also* DVD at 0:35-0:45 (white smoke billowing out of exhaust pipe). Silberman did ***not*** "attempt to back into an entrance off the roadway" after he stopped. *Compare* Affidavit at p.1 (affiant memorializing contrary observations). Two armed state troopers approached the motor home – one trooper proceeded to the side of the driver while the other proceeded to the passenger's side. Silberman volunteered that he had pulled over because of problems with "overheating." *See* DVD at 1:09-1:26. Although Silberman made a passing reference to a "refrigerator," he did not mention a "cooling unit." *Compare* Affidavit at p.1 (affiant averring that driver said that he was "having problems with his cooling unit."). The trooper explained that the "reason" for the stop was an observed failure to come to "a complete stop at the bottom of the ramp." DVD at 1:27-1:31. The trooper made no mention of a posted stop sign. *Id.* When asked whether he "realize[d]" that he had not come to a complete stop, Silberman said "***no***." *Id.* at 1:31-1:33. *Compare* Affidavit at p.1 (misrepresenting that driver "did realize that he did not stop completely for the sign."). The "sign" was never mentioned during the stop.

After some discussion about the "refrigerator" and the reported "overheating," *see* DVD at 1:34-1:46, the state trooper announced that he would move his police truck and suggested that Silberman "back in there" so that they could "finish up." *Id*. at 1:47-2:29. Silberman backed into the off-road area as instructed by the state trooper, and the trooper parked his vehicle along side of the motor home. *Id*. at 2:30-3:33.

Another marked police vehicle entered the camera frame and, after an inaudible [2] conversation with a trooper at the scene, the new patrol repositioned behind the motor home, thereby preventing Silberman from being able to leave the scene. *Id*. at 3:48-5:36. Thus, a police decision was made that the senior citizen was no longer allowed to leave within less than six (6) minutes of the initial sighting of the motor home. At that juncture, Silberman and his companion were "in custody," *United States v. Rogers*, 391 F.3d 1165, 1170 (10th Cir.2004) (whether someone is in custody is an objective determination based on what a reasonable person would sense), as the travelers were "blocked" from leaving.

Three armed troopers coming from three different directions convened to confer and dispersed. This portion of the videotape was "inaudible" during their conversation. *See* DVD at 6:51-7:38. An armed trooper is seen talking to Silberman while he walked next to his motor home with the help of a walking stick. *Id*. at 7:39-7:50. The stationary camera mounted on the trooper's vehicle was left pointing away from Tallgrass Road and other interaction between the senior citizen and the armed state police. *Id*. at 7:50-24:05. Then, the trooper decided to turn his vehicle facing Tallgrass Road and a "***white truck***"

[2] For unknown reasons, the audio portion of the videotape recording is intermittently inaudible throughout the off-road encounter between a squad of armed troopers and the couple driving through Kansas inside their "profile" California-registered motor home. Indeed, none of the communication between the lead trooper and the travelers is captured on tape at the juncture when the trooper purportedly explained *again* the reason for the stop and requested driver's licenses and vehicle documentation. *See* Affidavit at pp.1-2.

parked on the road. *See* DVD at 24:26. The defendants should be able to account for the arrival time of the "***white truck***" and all of its scene maneuvers after the "traffic stop." The "***white truck***" was parked a few yards away and perpendicular to the motor home. *Id*. At least five (5) police vehicles can be counted at the Tallgrass Road scene, including the "***white truck***." *Id*. at 29:47. The audio on the videotape became audible again at 30:41.

Shortly thereafter, the trooper returned the documentation. *Id*. at 31:06-31:16 ("Here's your id. … Here's your registration back… Here's your driver's license back"). According to the Affidavit for Arrest Warrant later authored by the lead trooper, he had "reviewed the documentation provided." Affidavit at p.2. The officer also averred that "[a] check of Silberman's history showed ***extensive drug trafficking history***." *Id*. at p.2 (emphasis added). [3] The trooper then presented Silberman a "written warning" requiring neither a court appearance nor fine. *Id*. at 31:17-31:40. The "written warning" ostensibly gave the reason for the traffic stop according to the trooper's statement to Silberman. *Id*.

The Kansas trooper initiated his questioning as soon as he tricked Silberman into believing that the "traffic stop" had been resolved with a "written warning." *Id*. at 31:41-31:42 ("Can I ask you a question, sir?"). The lead trooper informed Silberman that the troopers present at the scene were part of an "interdiction team" working on the highway detecting "illegal activity." [4] The trooper then asked Silberman whether he was carrying "anything illegal" inside his "truck." Silberman said: "I hope not." *Id*. at 31:43-31:54. The lead trooper asked to search the outside "storage compartments." *Id*. at 31:55-32:00.

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[3] Silberman had ***no such criminal history***, and his identification papers provided enough data (*e.g*., legal name and date of birth, *inter alia*) for a specific police background check. The trooper relied on ***false information*** in order to continue the "drug ruse" encounter.

[4] As noted, the police team was composed of armed officers who surrounded Silberman in five vehicles (including the "***white truck***"), supposedly over a traffic stop. *Id*. at 29:47.

THE SHAM *PRO FORMA* SEARCH

Silberman "consented" to a search of the outside compartments of his motor home while surrounded by the police "interdiction team." *Id*. at 32:02. The trooper then asked if Silberman would be willing to unlock the storage compartments. *Id*. at 32:03-32:11. Four armed officers convened for the "consensual" search. *Id*. at 32:17-32:36.

Silberman may argue that he did not give the troopers voluntary consent to search the outside storage compartments of his motor home. Silberman can support his claim by explaining that certain factors led him to consider himself "in custody" and not free to leave, such that his "consent" was involuntary: (1) he was blocked in at a remote off-road rural location; (2) an "interdiction team" was present at the scene in five police vehicles; (3) the trooper's inquiry regarding illegal contraband immediately followed the return of Silberman's license and other documentation; and (4) all troopers were armed with guns.

Whether Silberman gave his consent to the police search freely and voluntarily is a factual question based on the totality of the circumstances. *See United States v. Pena*, 143 F.3d 1363, 1366 (10th Cir. 1998). The trial court must consider whether the police conduct constituted a coercive show of authority, such that a reasonable person would believe he or she was not free to "decline the officer's requests or otherwise terminate the encounter." *United States v. West*, 219 F.3d 1171, 1176 (10th Cir.2000). Factors tending to show that consent was coerced include the presence of more than one police officer, and any open display of guns, *inter alia*. *See United States v. Turner*, 928 F.2d 956, 959 (10th Cir.1991). Here, Silberman gave his purported "consent" while surrounded by an armed "interdiction team" blocking his motor home in a remote, off-road rural location. Consent is arguably illusory where armed officers surround an unarmed senior citizen.

Silberman ***closed the access door*** to his motor home before he began to open the outside compartments. *See* DVD at 32:36. The lead trooper ("362") responded to a call conveying police-coded data, including a "10-27" (driver's license report) and a "10-29" (check for warrants), as Silberman began to open the compartments. *Id*. at 33:01-33:10. [5] The lead trooper seemed sensitive to his body microphone capturing dialogue at the scene when another trooper pointed to the "***white truck***" and made a remark. *Id*. at 34:01-34:09 ("You want me to look into that?"). The lead trooper appears to place his hand over his mic as a non-verbal cue to his fellow officer to refrain from speaking. *Id*. at 34:08-34:09.

The "interdiction team" began the search of the outside storage compartments at 34:59. The lead trooper would later aver that "[d]uring a search of the compartments, an odor of raw marijuana was detected." *See* Affidavit at p.2, ¶4; *but see* DVD at 38:32 (lead trooper noting odor of "weed ***or freon***"). The lead trooper requested Silberman's consent to search the interior of the motor home, but Silberman refused to give consent. *Id*. at 39:13-39:36 ("…I'd rather you ***not*** search it.") (emphasis in original).

When Silberman refused to consent to a search of the interior of his motor home, he was told to "step to the front" as the trooper was "going to run his dog." *Id*. at 39:44; Affidavit at p.2, ¶4 (affiant "then deployed [his] certified narcotics police service dog to sniff the vehicle."). The name of the "certified" dog was "*Foos*" (ph.). The government must produce *Foos's* training, performance, and certification records to defense counsel.

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[5] The trooper returned the documentation at 31:06-31:16 and obtained consent to search the outside storage compartments at 32:02. The radio call with "10-27" and "10-29" data was received at 33:01. This timeline exposes the trooper's reckless disregard for the truth because the same trooper later averred that he had "reviewed the documentation" and had run a "check of Silberman's history [that] showed ***extensive drug trafficking history***" ***before*** he returned the documentation and ***before*** he sought and obtained consent to search the outside storage compartments. *See* Affidavit at p.2, ¶¶2-3 (emphasis added).

POLICE MISCONDUCT – "THE WHITE CLOTH DOG TRICK"

Immediately before running the dog, one of the two troopers wearing police caps was gripping a "***white cloth***" in his left hand ***before*** re-entering one of the compartments that had already been searched with the consent of Silberman. *See* DVD at 39:59-40:03. After the dog ***entered that compartment*** and leaped into the interior of the motor home, the same trooper went back inside ***that compartment*** and emerged with the "***white cloth***" inside his left hand and ***smelled its fragrance***. *Id*. at 41:54. He later returned to the same compartment and dropped the same or another "***white cloth***" on the ground. *Id*. at 45:22. The same trooper later furtively picked up the "***white cloth***," shook the cloth, and ***again smelled its fragrance***. *Id*. at 46:11-46:16. [6] Because these service dogs are trained and reinforced with drug-scented cloths, the specter of police misconduct lurks in this case. A possibility exists that the police engaged in the routine positive reinforcement game of "***hide & seek***" the scented cloth rather than allow the dog to conduct an "unguided" sniff.

INAPPROPRIATE FACILITATION OF FOURTH AMENDMENT VIOLATION - "THE OPEN DOOR LEAP TRICK"

It is important to underscore that Silberman ***closed the door*** of his motor home when he first descended to open the outside storage compartments. *See* DVD at 32:36. The access door to the interior of the motor home was opened by one of the troopers to ostensibly ***order*** the passenger to exit the motor home before the dog sniff. *Id*. at 40:11. [7] There were six officers present at the scene, and the door was deliberately left wide open.

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[6] Other troopers had also joined in fussing inside that compartment, *id*. at 40:10-41:00, and one of those troopers later placed something into his right pocket. *Id*. at 45:11-45:13.

[7] Other than to improperly facilitate the canine's entry into the motor home, there was no logical justification for the troopers to open the access door of the motor home to order the passenger to exit the ***interior*** of the vehicle to facilitate a canine sniff of the ***exterior***.

While Silberman and his companion were ***ordered*** to stand away from the motor home, the lead trooper ***unleashed*** his "trained to sniff" canine on the motor home. *Id*. at 40:53.

Using a few short verbal commands, the lead trooper triggered the canine sniff. The canine rushed to the first compartment but did not enter it. The lead trooper read his service dog's behavior as "I *think* he's already in odor." *Id.* at 41:08 (emphasis added). The "trained" animal did enter the same storage compartment where the trooper gripping "***the white cloth***" had just re-entered just seconds before with some others. *Id*. at 41:11. There was re-continuing police manipulation of the second outside storage compartment up until four (4) seconds before the canine went inside the same storage compartment. *See* DVD at 40:03-41:07. Other than affirmative grunts from the officers hinting that the canine entry signified an "alert," there was no conclusive oral confirmation of an "alert" by any of the officers present at the scene before the canine leaped into the motor home following a few "key" verbal commands given by the dog handler (*e.g*., "*Here, Foos!*"). *Id*. at 41:11-41:20. The unfettered canine was able to leap into the motor home because the access door was deliberately left open by the police team. *Id*. at 41:20. [8]

Because the dog supposedly "indicated" a non-specific narcotic odor according to his police handler, a full search of the interior of Silberman's motor home then followed. Affidavit at p.2, ¶4 ("A positive indication of a narcotic odor was indicated by the dog. A subsequent search of the vehicle's interior revealed numerous packages of a green leafy substance suspected to be marijuana."). It is also significant to note that the affiant

[8] *See United States v. Lujan*, 2010 WL 3965923 (10th Cir. 2010) (dog's instinctive leap into a car is not a Fourth Amendment violation *unless an officer improperly facilitates the entry into the vehicle*) (*citing United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989)). Silberman had no chance of closing the door as he was under police orders to stand away from his motor home. The lead trooper asked if Silberman had any animals inside when his trained dog leaped into the motor home, *an entry improperly facilitated by the police*.

mentioned neither the door left open by his police team nor the subsequent "dog's leap" into the motor home at 41:20. *See* Affidavit at pp.1-3. Defendants appear handcuffed on camera shortly thereafter. *See* DVD at 48:48.

The training and performance records of the "certified" canine that "indicated" to the exterior storage compartment of the motor home may add another material omission to the total tally of affiant's misconduct showing his reckless disregard for the truth. *See United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993) ("[A] dog alert might not give probable cause if the particular dog had a poor accuracy record.").

CONCEALED BACKSCATTER X-RAY SCANNERS – "THE WHITE TRUCK"

The Kansas trooper's vehicle carrying the dash-mounted camera faced away from the Tallgrass Road scene for the first 24:26 minutes of the "traffic stop" for a purported out-of-state motorist's failure to come to a full stop at a deserted off-ramp intersection. Once the camera was re-positioned to face the motor home parked right off the rural road, a white undercover backscatter x-ray vehicle (the aforementioned "***white truck***") is seen a few yards away and perpendicular to the "profile" vehicle targeted by the "drug ruse." [9]

[9] Defense counsel recognized the undercover backscatter x-ray truck based on his prior experience with the new scan-search technology that has been "granted" to Kansas police by the Department of Homeland Security. *See* [*insert grant information LS, Esq. found*]. Defendants must be able to recall all maneuvers taken by the "***white truck***" at the scene. Indeed, a lateral pass of the truck, perhaps to "*image* the motor home," was subsequently captured by the video camera. *Id.* at 52:54. A manufacturer's promotional video of the x-ray technology touts that trained operators can "search" any given "target" through a foot of metal by pointing a hand-held x-ray gun, even from a distance of several yards. The motor home was well within the range. The unreported presence of this x-ray search technology at the scene supports an adverse inference that the affiant concealed a covert x-ray search of the "profile" motor home prior to the staging of a sham *pro forma* search. *See* Affidavit (omitting material fact that "***white truck***" parked near the motor home was a backscatter x-ray truck).

The Sworn Affidavit filed in support of the arrests completely omits any reference to the presence of the backscatter-x-ray technology inside the "***white truck***" parked at the scene. The anatomy of the "drug ruse" implemented here by the Kansas highway troopers raises serious concerns about police misconduct that is arguably "shocking to the conscience." But for the misrepresentations and omissions of material facts within the police affidavit, there was no probable cause to search Silberman's motor home, and all of the evidence obtained from the illegal search must be suppressed as "fruits of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471 (1963). The arrests were the direct result of an illegal search and seizure procedure that violently violated the Fourth Amendment.

THE DEFENDANTS ARE ENTITLED TO A *FRANKS* HEARING

Silberman and his co-defendant have been charged with the knowing possession of approximately 200 kilograms of marijuana with the intent to distribute in violation of 21 U.S.C. §841(a)(1). The case has been filed in the United States District Court for the District of Kansas, the Honorable Richard D. Rogers presiding.

An evidentiary hearing must be ordered by the district court in this important case of constitutional magnitude pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (defendant may challenge a facially sufficient affidavit when an officer affiant included deliberate or reckless falsehoods or omitted facts that were material to issuing a warrant). Because the police affiant who executed the "Affidavit for Arrest Warrant" in this case omitted the presence of the x-ray search technology at the scene of the "drug ruse" and affirmatively misrepresented that a police background check revealed that Silberman had an "extensive drug trafficking history", *see* Affidavit at p.2, this case also presents the inevitable question about the proper remedy to deter such egregious police misconduct.

Under *Franks v. Delaware*, *supra*, a defendant can request an evidentiary hearing regarding the veracity of a warrant affidavit. Before Silberman can claim entitlement to a *Franks* hearing, he must allege deliberate falsehood or reckless disregard for the truth, and the allegations must be accompanied by an offer of proof. *Franks*, 438 U.S. at 171. Sworn affidavits of competent witnesses should be provided to the court or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. *Id*. If the requirements are met, then Silberman must show that the remaining content of the warrant affidavit is insufficient to support a finding of probable cause. *Id*. at 171-72. *See United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997) ("Under *Franks*, a hearing on the veracity of the affidavit supporting a warrant is required if the defendant makes a substantial showing that the affidavit contains intentional or reckless false statements and if the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause.") (*citing Franks*, 438 U.S. at 155-56); *United States v. Avery*, 295 F.3d 1158, 1166 (10th Cir. 2002) ("The standards of deliberate falsehood and reckless disregard set forth in *Franks* apply to material omissions, as well as affirmative falsehoods.")(*quoting United States v. McKissick*, 204 F.3d 1282, 1297 (10th Cir. 2000)). If the district court concludes by a preponderance of the evidence that the challenged affidavit contains "intentional or reckless false statements," *Kennedy*, 131 F.3d at 1376, or "material omissions," *McKissick*, 204 F.3d at 1297, "then the district court must suppress the evidence obtained pursuant to the warrant." *Id*. If the court concludes that the corrected information would not have altered the court's decision after considering the evidence presented at a *Franks* hearing, then the fruits of the challenged warrant need not be voided. *Id*. at 1297-98; *see also Kennedy*, 131 F.3d at 1376.

In a case where the defendant alleges information was intentionally omitted from an affidavit, the existence of probable cause is determined by examining the affidavit as if the omitted information had been included and determining whether the affidavit would still give rise to probable cause. *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996); *United States v. Knapp*, 1 F.3d 1026, 1029 (10th Cir. 1993) (a knowing or reckless omission from a warrant application violates the Fourth Amendment only if the omitted material would vitiate probable cause) (*citing Stewart v. Donges*, 915 F.2d 572, 582-583 (10th Cir. 1990) (prohibition applies to intentional or reckless omissions of material facts, which, if included, would vitiate probable cause)).

The omission of the presence of the new backscatter x-ray technology at the scene of this "drug ruse" also supports an adverse inference that the Kansas troopers concealed a warrantless x-ray search that preceded a staged "sham" search of the motor home. *Cf. United States v. Whitworth*, 856 F.2d 1268, 1281-82 (9th Cir. 1988) ("We do not believe it is proper for law enforcement officials to withhold information regarding prior searches of the same premises from magistrates considering warrant applications. …The affiant could affirmatively state that nothing obtained in the first search is being relied on in seeking the warrant. At that point, the magistrate can properly evaluate the situation and determine whether probable cause still exists."). A plenary *Franks* evidentiary hearing is required to explore whether or not a prior x-ray search was withheld from the affidavit. If the roadside search was the result of a prior x-ray search deliberately omitted from the warrant affidavit, then the district court should apply the "fruit of the poisonous tree" doctrine to suppress all of the contraband seized.

The Fourth Amendment to the United States Constitution provides, in part, that "no Warrants shall issue but upon probable cause, supported by Oath or affirmation." Here, if the defendant's challenge is successful, then the fruits of the search must be suppressed, just as if probable cause was lacking on the face of the original affidavit. *Franks*, 438 U.S. at 155-56. Omitting the critical fact that a prior warrantless backscatter x-ray search occurred would show intentional police deception. In accordance with the high hurdle set by *Franks*, the deliberate omission that the roadside search was staged in accordance with the preceding results of a concealed x-ray search would demonstrate that the affiant intended to mislead the issuing court and that the inclusion of the x-ray search would have negated any finding of probable cause and proven police misconduct instead. By "reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw" and that to "allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning." *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985).

Silberman may also attack the veracity of the averments in the affidavit because he has presented a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and that "the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. Had the court been properly advised that Silberman had no trafficking history instead of the "extensive drug trafficking history" affirmatively misrepresented, the court would not have found probable cause and would have scrutinized the rest of the affidavit for other reckless falsehoods and omissions.

The misrepresentation that Silberman had "an extensive drug trafficking history" cannot be dismissed as an "innocent" mistake because the affiant misrepresented that he checked Silberman's background before returning his documentation and obtaining his consent to search the exterior storage compartments. *See* footnote 5, *supra* (lead trooper received call with "10-27" and "10-29" data when Silberman had already begun to open compartments). *Compare United States v. Dozier*, 844 F.2d 701, 705 (9th Cir. 1988) (holding that a *Franks* hearing was not required even though the affiant had misled the issuing court as to defendant's prior criminal record by simply misreading a rap sheet). The district court in *Dozier* determined that the misstatement was the product of mere negligence because the affiant simply did not know how to properly read the rap sheets. In this case, the affiant presented a recklessly false and misleading misrepresentation that Silberman had an "extensive drug trafficking history" according to a fabricated check. *See* Affidavit at p.2, lines 7-8; *Franks*, 438 U.S. at 164 n.6 ("police [can] not insulate one officer's deliberate misstatements merely by relaying it through an officer/affiant personally ignorant of its falsity."); *United States v. Kennedy*, 131 F.3d 1371, 1376-77 (10th Cir. 1997) (government may be held accountable for statements in application for a search warrant made not only by the affiant but also for the statements made by other government employees which were deliberately or recklessly false or misleading insofar as such statements were relied upon by affiant in making affidavit).

If the district court ultimately learns that the police affiant deliberately concealed the presence of a backscatter x-ray at the scene because police surreptitiously "scanned" the motor home ***before*** the "sham" search that ensued, suppression of all fruits derived therefrom should be required. The affiant's calculated omission deliberately concealing

the presence of the backscatter x-ray at the off-road search site supports the inference that a prior warrantless x-ray search was conducted and that the "imaging" was followed by a "sham" search elaborately staged with an eye toward obtaining a "foreseen" outcome.

Here, the court will have to squarely face an important issue of first impression. There are no published or unpublished precedents addressing the surreptitious police use of backscatter x-ray technology to detect contraband traveling on America's highways. Backscatter x-ray imaging technology threatens to eviscerate rights protected under the Fourth Amendment, as it enables the police to "see through" dense material "at will."

The surreptitious police use of backscatter x-ray search technology at the scene of a police "ruse" bears all of the hallmarks of a "police state," as that phraseology has been defined by the United States Supreme Court even before George Orwell published his dystopian novel *Nineteen Eighty-Four* in 1949. *Johnson v. United States*, 333 U.S. 10, 17 (1948) ("An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, ***and the police state where they are the law***.") (*quoting* Fourth Amendment) (emphasis added).

CONCLUSION

In light of all of the foregoing, the preliminary showing made by Silberman that the affidavit filed in support of his arrest was infected by the affiant's reckless disregard for the truth entitles him to a plenary *Franks* hearing. *See* Backscatter Imaging, *infra*.

A driver can be X-rayed with no protection and never know what hit him.