

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA

CR15000052

V.

CR15000053

CR15000247

JESSE LEROY MATTHEW, JR.

**Commonwealth's Memorandum in Reply to  
Defendant's January 6, 2016 Motion to Suppress  
(Motion 18)**

COMES NOW the Commonwealth of Virginia, by and through her counsel, and respectfully requests that this Honorable Court deny the defendant's motion for a hearing under *Franks v. Delaware* and deny the defendant's motion to suppress in this matter, and in support thereof, avers as follows<sup>1</sup>:

**INTRODUCTION**

On Saturday, September 13, 2014, the defendant abducted and murdered Hannah Graham. Numerous witnesses and video evidence demonstrate that Hannah walked from the area of the University of Virginia to the Downtown Mall, where she encountered the defendant. The defendant met Hannah on the downtown mall in the City of Charlottesville and led her to his vehicle. Video witnesses further demonstrate that the defendant was the last person seen with Hannah before he murdered her. After murdering her, he left her body in a secluded location in the County of Albemarle.

On Sunday, September 14, 2014, Hannah's friends reported that she was missing. During the initial police investigation into her disappearance, numerous local, Virginia, and Federal law

<sup>1</sup> The Commonwealth also incorporates its memorandum of November 2, 2015, also filed "under seal", and requests that this Honorable Court consider it in conjunction with this memorandum. That memorandum contains exhibits, such as search warrants and an affidavit, which the Commonwealth also incorporates into this reply.

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enforcement agencies worked in cooperation and spent many ceaseless days looking for Hannah, in the hope that they would find her alive. It took several weeks for law enforcement to locate Hannah's body. The investigation involved numerous law enforcement and civilian agencies and literally hundreds of workers and volunteers.

On Friday, September 19, 2014, Charlottesville Police obtained a search warrant for the defendant's 1998 Chrysler Sebring. At the time, police were also in the process of collecting and documenting Hannah's movements and the defendant's actions from Friday, September 12, and Saturday, September 13. In particular: officers were collecting video evidence; cellphone/text message data; interviewing witnesses; and used a bloodhound. Just before 6 a.m. on Friday, September 19, police located that vehicle at 164 Hessian Hills Way, Apartment 1, Charlottesville.

After arriving at the residence, police spoke to the defendant, who was present. Police then obtained a search warrant for the residence of 164 Hessian Hills Way, Apartment 1. Police executed that search warrant on Friday, September 19, the same day.

On Sunday, September 21, 2014, police obtained a second search warrant for the residence of 164 Hessian Hills Way, Apartment 1. This search warrant sought "A blue and white checkered button-down shirt, maroon shirt, long white shorts, light brown "Crocs" shoes, and a gold colored necklace."

On Monday, September 22, 2014 police obtained a third search warrant for the residence of 164 Hessian Hills Way, Apartment 1, seeking additional evidence.

On Monday, September 22, 2014, police executed both the second and the third search warrant at the residence of 164 Hessian Hills Way, Apartment 1. On Tuesday, September 25, 2014, police obtained and executed a fourth search warrant for the residence of 164 Hessian Hills Way, Apartment 1.

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Exhibits (Search Warrants and Affidavit of Det. Lisa Best) are attached with Commonwealth memorandum of November 2, 2015

**PART ONE: STATEMENT OF FACTS**

The defendant substantially mischaracterizes, misstates, and misrepresents the evidence in this case. In light thereof, the Commonwealth offers the following statement of material facts:

**A. Timeline**

Police were able to develop a partial timeline that established Hannah’s movements and the defendant’s actions from Friday, September 12, and Saturday, September 13. Police began to collect evidence after Hannah’s friends reported her missing on Sunday, September 14. While some of this evidence was available by the early morning hours of Friday, September 19, police had not reviewed all of the videotape evidence and had not interviewed all the witnesses, which included literally dozens of videos containing countless hours of footage, some of which was in a format that was extremely difficult to watch. It would be weeks before police could review all of the videotape evidence and interview all the witnesses.

Nevertheless, the following timeline is an attempt to briefly describe some of that evidence, along with the officer who discovered it and the date when the officer discovered it, if different or available. This timeline only concerns evidence found at the beginning of the investigation.

**Timeline: September 12, 2014**

<u>Officer</u>	<u>Source</u>	<u>Time</u>	<u>Event</u>	<u>Recovery Date</u>	<u>Report Date</u>
Det. Lee Gibson, CPD	Grand Marc Apartment Video	9:33 p.m.	Hannah leaves her apartment		9.15.14
Det. Sgt. Jim Mooney, CPD	Photos from Fig Restaurant	10:48 p.m.	Hannah is with her friends		9.16.14
Det. Braden Kirby, CPD	Witness interviews	11:30 p.m.	Hannah leaves a residence on 14 <sup>th</sup> street	9.15.14	9.15.14

		(approx.)			
Det. Sgt. Jim Mooney, CPD	Witness interviews	11:30 p.m. (approx.)	Hannah leaves a residence on 14 <sup>th</sup> street	9.14.14	9.14.14

**Timeline: September 13, 2014**

<u>Officer</u>	<u>Source</u>	<u>Time</u>	<u>Event</u>	<u>Recovery Date</u>	<u>Report Date</u>
Det. Lee Gibson, CPD	Tempo Credit Receipts	12:18 a.m.	Defendant spends \$22.95 at Tempo bar.	9.18.14 (4:40 p.m.)	9.18.14
Det. Lee Gibson, CPD	McGrady's Pub Video	12:44 a.m.	Hannah approaches McGrady's on Preston Ave. from University area, pauses, and walks Eastbound toward the Downtown Mall		9.16.14
Det. Lee Gibson, CPD	Shell Station Video	12:55 a.m.	Hannah approaches Shell on Preston Ave. from McGrady's area and walks Eastbound towards the Downtown Mall		9.16.14
Det. Lee Gibson, CPD	Reid's Supermarket Video	12:56 a.m.	Hannah approaches Reid's on Preston Ave. from McGrady's area and walks Eastbound towards the Downtown Mall		9.16.14
Det. Scott Godfrey, CPD	Text Message	12:56 a.m.	Hannah texts a friend, indicating that she is lost	9.15.14 10:46 a.m.	9.15.14
Det. Lee Gibson, CPD	Crossings Video	12:57 a.m.	Hannah approaches Crossings on Preston Ave. from Shell station area and walks Eastbound towards the Downtown Mall		9.16.14
Det. Sgt. Jim Mooney	Witness Interview	1:00 a.m. (approx.)	Hannah approaches Fellini's walking East on Market Street, turns southbound on 2 <sup>nd</sup> street towards Downtown Mall		9.16.14

Det. Lee Gibson, CPD	Fellini's Video	1:01:41 a.m.	Hannah approaches Fellini's walking East on Market Street, turns southbound on 2 <sup>nd</sup> street towards Downtown Mall		9.17.14
Det. Lisa Best	Witness Interview	1:00 a.m. (approx.)	Defendant walks down the downtown mall. Later, the defendant approaches Hannah and puts his arm around her.	9.18.14 2:51 p.m.	9.18.14
Det. Scott Godfrey, CPD	Text Message	1:05 a.m. (approx.)	Hannah sends a "snapchat" message to a friend	9.15.14 1:00 p.m.	9.15.14
Det. Lee Gibson, CPD	Sal's Video	1:06 a.m.	Hannah walks eastbound on Downtown Mall. Defendant, walking westbound, stops when she passes, waits for her to pass, and then follows her.		9.17.14
Det. Sgt. Jim Mooney, CPD	Tuel's Video	1:08 a.m.	Defendant and Hannah walk side by side eastbound on Downtown Mall		9.16.14
Det. Lee Gibson, CPD	Tempo Credit Receipts	1:10 a.m.	Defendant's credit card charged \$15.30 at the bar for drinks.	9.18.14 (4:40 p.m.)	9.18.14
Det. Lisa Best	Witness Interview	1:10 – 1:15 a.m. (approx..)	The defendant enters Tempo restaurant with Hannah and buys drinks with his card.	9.18.14 2:51 p.m.	9.18.14
Det. Lee Gibson, CPD	Red Pump	1:18 a.m.	Defendant and Hannah walk together north on 4 <sup>th</sup> Street NE away from Downtown Mall. Defendant has his arm under Hannah's arm.	9.17.14	9.20.14 <sup>2</sup>
Ofc. Bradley Harvey, CPD	Text Message, Witness Statement	1:20 a.m. (approx..)	Hannah texts friend, stating that she is stuck downtown near 9 <sup>th</sup> and 14 <sup>th</sup> Street	9.14.14 4:30 p.m.	9.14.14

<sup>2</sup> Police only watch a few minutes of this video on September 17 and do not see the relevant portion of the video, showing Hannah and the defendant, until September 20.

Ofc. Braden Kirby	Norcross Station Video	1:24 a.m.	Vehicle, believed to be the defendant's, travels southbound on 4 <sup>th</sup> Street SE [note: Police later learn that it is not the defendant or his vehicle]		9.18.14
<b><i>Hannah Graham is Never Seen Alive Again</i></b>					
<b><i>Searchers Find Her Body on Saturday, October 18, 2014</i></b>					

Police also collected other video from other locations, but did not locate any evidence. At the Federal Courthouse, only video from the back lot was available. Police did not see Hannah walk through the back lot of the Federal Courthouse. Police also collected video from their in-car cameras to determine if any vehicles, including ones entering or leaving the City Yard near Preston Avenue, had video of Hannah. They did not. Hannah did not appear on other videos, including from businesses on Water Street. Police ultimately visited every business or establishment that might have video in the downtown area.

**B. Bloodhound Participation**

While attempting to locate Hannah, police called in a Bloodhound handler, Buck Garner, who was a deputy with the Louisa County Sheriff's Department. Charlottesville Police called him to assist on four occasions during the initial days of Hannah's disappearance. First, Charlottesville Police asked him to assist them in attempting to trail Hannah's scent at a location in Waynesboro, but no trail or indication of Hannah's scent was found. Second, Charlottesville Police asked him to assist them in trailing Hannah's scent from the area of Preston Avenue and 14<sup>th</sup> Street. Second, Charlottesville Police asked him to assist them in trailing Hannah's scent away from the area of the Downtown Mall, which led to a mulch pile in the Woolen Mills area. Finally, Charlottesville Police asked him to assist them at the residence of 164 Hessian Hills Way, Apartment 1.

Garner's Downtown Mall Track

On September 16, 2014, Charlottesville Police asked Garner to attempt to locate Hannah's scent beginning at her location viewed on video at Reid's Supermarket, 600 Preston Avenue. Det. Steve Cason, Det. Scott Godfrey, Det. Lisa Best, and Det. Bradley Pleasants accompanied Garner.

Garner's bloodhound began at Reid's Supermarket on Preston Avenue, across from the Shell station. He continued walking eastbound on Preston until he reached 4<sup>th</sup> Street NW. He then turned south on 4<sup>th</sup> Street NW and continued until he reached West Main Street. At West Main Street, he turned East on West Main Street. He crossed the intersection at Ridge/Ridge McIntire and continued east past the Federal Courthouse.

Garner's dog then proceeded onto the Downtown Mall, using the entrance between the Omni Hotel and the Charlottesville Ice Park/Main Street Arena. He then proceeded back onto Water Street and continued east on Water Street past the metered lot and along the front of the Water Street Parking Garage. At the far, east corner of the Water Street Parking Garage, he then turned south on 4<sup>th</sup> Street SE to the intersection of 4<sup>th</sup> Street SE and Garrett Street. At that point, Garner stopped the track.

Garner noted that due to time, terrain, and elements, Hannah's scent could have physically moved and drifted from her original walking path. Def. Mot Ex. 7. He also noted that the scent trail had numerous "scent voids." Def. Mot Ex. 7. He also noted that the scent had "moved towards Garret Street," noting a change from its original location. Def. Mot Ex. 7. Pedestrian and vehicle traffic were a factor. Def. Mot Ex. 7. Ultimately, he terminated the effort due to the time spent, heat, and contamination. Def. Mot Ex. 7.



Garner's Woolen Mills Track

On September 17, 2014, Charlottesville Police asked Garner to attempt to locate Hannah's scent beginning at the Downtown Mall. Det. Steve Cason, Det. Lee Gibson, Det. Kirby, and Det. Bradley Pleasants accompanied Garner. Neither Det. Lisa Best nor Det. Sgt. Jim Mooney attended.

Garner began in the area where police had seen Hannah on video on the downtown mall. Garner observed a trail that worked towards the east end of the Downtown Mall. Def. Mot. Ex. 10. However, as the dog trailed onto East Market Street, Garner observed that the scent trail was "broken." Def. Mot. Ex. 10.

Garner concluded that there was a "strong indication" that Hannah had been in the area of the mulch piles located in the back lot of the property. He did not conclude how Hannah had arrived at Woolen Mills, either on foot, by car, or any other manner. However, an extensive search of the area failed to locate any trace of Hannah.

Bloodhound Work at 164 Hessian Hills Way, Apartment 1.

On September 19, 2014, Charlottesville Police arrived at the defendant's residence at 164 Hessian Hills Way, Apartment 1 to execute a search warrant on his Chrysler Sebring. While there, they asked Garner to bring his bloodhound to the scene. They also asked a cadaver dog to examine the vehicle, but the cadaver dog handler indicated that there was not a "strong scent" present. Def. Mot. Ex. 11.

Garner's dog first indicated a scent associated with Hannah on the passenger side door of the defendant's vehicle. Garner's dog also located scent associated with Hannah on the asphalt in the area this vehicle was parked. Def. Mot. Ex. 12.

Garner's dog walked around the vehicles and buildings in the area. The dog showed a focused interest in the front door of the defendant's apartment, examining it between three and five times. Det.

Mot. Ex. 11, 14. The dog indicated Hannah's scent on and around the threshold and sides of the foyer door. Def. Mot. Ex. 12. The dog also indicated the same scent on the lower portion of the defendant's entry door. Def. Mot. Ex. 12. He never went to any other apartment. Def. Mot. Ex. 11, 12. Although Garner concluded that Hannah had not personally been walking around at the location, he did conclude that her scent was present. Def. Mot. Ex. 11, 12.

The dog then led Garner to the rear of the apartment building and again showed interest in the rear entrance of the defendant's apartment. Def. Mot. Ex. 11. There, Garner's dog again indicated that Graham's scent was present. Def. Mot. Ex. 11, 12. Garner told Captain Gary Pleasants that there was a 60% chance that Hannah's scent was present at the defendant's residence. Def. Mot. Ex. 11.

Garner told Det. Mooney that the chances were approximately "60/40" that Hannah's scent had been there. Det. Mot. Ex. 14. Det. Sgt. Mooney informed Det. Gibson of that fact. Based on that, Det. Sgt. Mooney asked the defendant for permission to look inside his residence for Hannah. Det. Gibson explained police would only be looking for Hannah and would not be searching in drawers or conducting any more than a search for her person. The defendant agreed.

Garner's bloodhound had also shown interest in a dumpster near 164 Hessian Hills Way, Apartment 1. Def. Mot. Ex. 12. As a result, Officer Alex Bruner donned a protective suit and conducted an extensive search of the contents of the dumpster.

### **C. First Search Warrant For 164 Hessian Hills Way, Apartment 1.**

Det. Lisa Best applied for and obtained a search warrant on September 19, 2014, for 164 Hessian Hills Way, Apartment 1. Police executed the warrant that day at 10:00 a.m.. This search warrant sought "Black pants, women's midriff top, white women's shoes, women's undergarments, Citizen Eco-Drive watch, Apple Iphone 5S bearing serial number DNPMONDFFFK, pink Iphone case, a proximity key, long

white shorts, white shirt, trace evidence such as but not limited to hairs and fibers, latent prints, biological material, a cell phone bearing phone number 434-960-5198.”

Among the items that police seized were: bedding, fibers, a wallet, light khaki shorts, black camisole, men’s white shorts, pillow with stains, two shirts, two pairs of underwear, and a check with a latent print.

**D. Second and Third Search Warrants For 164 Hessian Hills Way, Apartment 1.**

On Sunday, September 21, 2014, Detective Michael Arcoraci of the Albemarle County Police Department obtained a search warrant for 164 Hessian Hills Way, Apartment 1. This search warrant sought: “A blue and white checkered button-down shirt, maroon shirt, long white shorts, light brown “Crocs” shoes, and a gold colored necklace.” On Monday, September 22, 2014, police obtained a third search warrant for 164 Hessian Hills Way, Apartment 1, seeking additional evidence. Police executed those warrants on September 22, 2014, at 12:19 p.m. Police seized additional evidence, including shorts, a shirt, and other clothing.

## **PART TWO: Law & Analysis**

Det. Lisa Best's affidavit contained information which she had collected from witnesses, video evidence, and other law enforcement officers, and did not deliberately include any false statements. Likewise, the affiant was not reckless in evaluating the accuracy of the information provided by witnesses, video evidence, and other law enforcement officers, nor in omitting certain details about which the defendant now complains. The defendant, who bears the burden of showing knowing falsity or reckless disregard, cannot meet the threshold necessary to trigger an evidentiary hearing.

### **Section I: The Defendant's Request For a *Franks* Hearing Must Fail**

#### **A. The Warrant's Presumption of Validity**

A presumption of validity attaches when a search is conducted pursuant to a warrant issued by a neutral and detached magistrate or judicial officer. *Lebedun v. Commonwealth*, 27 Va. App. 697, 711 (1998) (citations omitted). Therefore, where the police conduct a search pursuant to a judicially sanctioned warrant, the defendant must rebut the presumption of validity by proving that the warrant is illegal or invalid. *Id.* (citations omitted).

The defendant faces a high burden in his attack on the search warrant.

First, the defendant must make a substantial preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included by the affiant in support of the warrant. *Franks v. Delaware*, 438 U.S. 154, 155 (1978). To make this showing, the defendant must offer proof. *Franks*, 438 U.S. at 171; *Davis v. Commonwealth*, Record No. 0693-14-1, Slip Op. at 8 (Va. Ct. App., November 24, 2014, Published). In order to make such a showing, a defendant first must point out the deficiency with specificity, and then include a statement of supporting reasons, and prepare affidavits or sworn (or otherwise reliable) statements of witnesses. *Franks*, 438 U.S. at 171, *Davis*, Slip Op. at 8.

Second, the defendant must demonstrate that the allegedly false statement was necessary to the finding of probable cause. *Id.* at 156. The Fourth Amendment does not require a hearing to be held at the defendant's request unless and until he meets both of these conditions. *Id.*; *Barnes v. Commonwealth*, 279 Va. 22, 33 (2010).

Because the defendant cannot meet these high burdens, his arguments fail.

Law enforcement is not required to include all known information in a search warrant affidavit. *West v. Commonwealth*, 16 Va. App. 679, 689 (1993). To even be permitted to challenge a search warrant, a defendant may not simply allege the negligent omission of facts; in fact, it is not even enough to merely allege an *intentional* omission of fact in a search warrant affidavit. *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (internal quotation marks omitted). Instead, the omission must be the product of a "deliberate falsehood or of reckless disregard for the truth." *Colkley*, 899 F.2d at 301 (Citing *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684). Mere negligence in recording the facts relevant to a probable-cause determination is not enough. *Id.* (citing *Franks*, 438 U.S. at 170, 98 S.Ct. at 2683). Moreover, the Court must then also find that the omission was designed to mislead, or made in reckless disregard of whether it would mislead, the magistrate. *Id.* (Cited in *Commonwealth v. Bickford*, Record No. 0706 -11 - 2, Slip Op. at 9 (Va. Ct. App. 2011, Unpublished)

The procedure required by *Franks* is deliberately strict. The defendant must make a specific motion *and* an offer of proof before this Court may hold a hearing on the veracity of the information contained in an affidavit for a search warrant. *Bickford*, Slip Op. at 9, n. 2 (Noting that the Commonwealth may waive that requirement by failing to object). In a recent case arising from a similar attack on a search warrant affidavit in 2010, the Virginia Supreme Court explained the manner in which a *Franks* hearing must proceed:

"In order even to obtain an evidentiary hearing on the affidavit's integrity, a defendant must first make '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. (internal citations omitted).

*Barnes v. Commonwealth*, 279 Va. 22, 31-32 (2010). The *Barnes* case involved an assertion by the defendant that the police detective had failed to include possibly exculpatory information in the search warrant affidavit. *Id.* In *Barnes*, the Virginia Supreme Court emphatically reinforced the applicability of the *Franks* regime and provided an instructive opinion for a review of the process by which a defendant may collaterally attack an affidavit. *Id.* The *Barnes* court repeated that a defendant cannot merely *allege* falsity. Instead, he must make a detailed offer of proof: “This showing ‘must be more than conclusory’ and must be accompanied by a detailed offer of proof (internal citations omitted). *Barnes*, 279 Va. At 31-32.

In this case, the defendant has completely failed to make any offer of proof whatsoever. He offers no affidavits or sworn statements, other than that of counsel, and simply *alleges* that Det. Best made materially false statements with the intent to mislead the magistrate. *Franks* prohibits that tactic. He attaches police reports, which this Court has never admitted in a motion to suppress as an offer of proof. For that reason alone, this Court must deny the defendant’s motion.

**B. The Omissions Claimed by the Defendant Fail to Necessitate a *Franks* Hearing**

The defendant’s conclusory allegations are insufficient to necessitate a *Franks* hearing. The aim of *Franks* is to allow a criminal defendant an avenue to attack an affidavit that was designed to mislead the magistrate into issuing a warrant for which no probable cause existed—“the specter of intentional falsification.” *Franks*, 438 U.S. at 168. For that reason, the Court noted that the requirement of truthfulness by the affiant

does not mean “truthful” in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant’s own knowledge that sometimes must be garnered hastily. But surely it is to be ‘truthful’ in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

*Franks*, 438 U.S. at 165.

In this case, the defendant makes several specific allegations, albeit without any offer of proof as required by *Franks*. Those allegations are:

1. Detective Best omitted the “fact” that the video evidence and witnesses statement from Fellini’s contradicted Garner’s bloodhound’s trail on Water Street. Def. Mot. At ¶14, 15
  - a. In fact, Garner had stated that the trail on Water Street was broken and appeared to have drifted from her original path, which meant that the Fellini’s video was consistent with the bloodhound’s trail. Def. Mot. Ex. 10, Best Aff. ¶8.
  - b. Also, in fact, there is no evidence of where Hannah went between 12:57 a.m., at the Crossings, and 1:01 a.m., at Fellini’s, or how she got there, and the defendant can cite no evidence of that.
  - c. Also, in fact, Garner had stated that the trail on Water Street was consistent with Hannah having walked down the Downtown Mall. Garner stated that, even though at the time, no evidence had demonstrated that Hannah had walked down the Downtown Mall. Best Aff. ¶9, ¶12.
  - d. Also, in fact, Det. Best was not aware of the Fellini’s video or witness statement at the time that she wrote the search warrant affidavit. ¶12.
2. Det. Best omitted the “fact” that Garner’s bloodhound determined that Hannah’s scent indicated that she walked, rather than traveled in an automobile, from the Downtown Mall to Woolen Mills. Def. Mot. At ¶X.
  - a. In fact, Det. Best believed that Graham was traveling in a vehicle. Best Aff. ¶15.
  - b. Also, in fact, after learning of the trail down to Woolen Mills, Det. Best attempted to obtain videos along Market Street in an effort to find the defendant’s vehicle on video traveling down Market Street from the Downtown Mall to Woolen Mills. Best Aff. ¶15. In a case where every minute counted, Det. Best’s actions demonstrate

that she believed the evidence demonstrated that the defendant and the victim traveled down Market Street.

- c. Also, in fact, the trail was a “broken” trail. Def. Mot. Ex. 10.
  - d. Also, in fact, Det. Best was not involved with that trail. She had learned from other officers that Hannah’s trail proceeded down Market Street to Woolen Mills, but not that it began on the Downtown Mall. Best Aff. ¶14.
  - e. Also, in fact, Garner had stated that the large scent in the area of 316 4<sup>th</sup> Street SE appeared to have drifted down from the Downtown Mall, where Hannah appeared to have stopped for a short time. Best Aff. At ¶10.
3. Det. Best mischaracterized the location where Garner’s dog ended his track down Water Street. Def. Mot. At ¶18
- a. In fact, Det. Best believed that the location where Garner’s dog ended his track along Water Street was consistent with the defendant driving near the area of Norcross Station in his vehicle. Best Aff. ¶13, ¶15.
4. Det. Best omitted the “fact” that the defendant’s vehicle drove southbound from Norcross station, while Hannah appeared to travel eastbound to Woolen Mills on foot. Def. Mot. At ¶19 – 21.
- a. In fact, as noted, if the defendant first drove southbound from Norcross station, he could easily have turned eastbound to Woolen Mills. Best Aff. At ¶15.
  - b. In fact, Garner would not say whether Hannah was on foot or in a vehicle; defense counsel indicates in an affidavit Garner’s bloodhound is not capable of tracking humans traveling in an automobile and jumps to the conclusion in his motion that Hannah must therefore have been traveling on foot. This statement is not factually



accurate; if the vehicle's window(s) are open, scent can travel from the vehicle and Garner's dog is able to detect that scent.

5. Det. Best omitted the fact that a cadaver dog did not alert to the presence of odors. Def.

Mot. At ¶123

a. In fact, even according to the defendant's own evidence, the actual finding was that the cadaver dog handler indicated that there was not a "strong scent" present. Def.

Mot. Ex. 11.

b. In fact, that failure to detect a "strong scent" only indicates that the defendant did not have Hannah's dead body in his car and has no bearing on the fact that he abducted and murdered her. Best Aff. ¶17.

c. Also, in fact, Det. Best was not aware of the cadaver dog's participation. Best Aff. ¶16.

6. Det. Best mischaracterized Garner's dog's actions at the defendant's residence. Def. Mot. ¶24 - 26.

a. In fact, Garner's dog indicated that Hannah's scent was present, although she herself may not have been present. Def. Mot. Ex. 11, 12. Det. Best properly concluded that this fact demonstrated probable cause to search the residence for evidence regarding Hannah's abduction. Best Aff. ¶18, ¶19.

b. Also, in fact, Garner indicated that either Hannah was at or near the dumpster at the defendant's apartment or that some of her articles <sup>were</sup> ~~were~~ in the dumpster. Best Aff. ¶19.

7. Det. Best omitted the fact that Officer Viera had reviewed video from Water Street. Def.

Mot. ¶16.

- a. In fact, Officer Viera had only reviewed video from one establishment, Have Food Will Travel, and only for the period of 1:00 a.m to 3:30 a.m. Def. Mot. Ex. 9.
- b. As noted above, Garner himself notes that Grahams scent could physically have moved and drifted from her original walking path and had numerous “voids”. Def. Mot. Ex. 7.
- c. Also, in fact, Garner had stated that the large scent in the area of 316 4<sup>th</sup> Street SE appeared to have drifted down from the Downtown Mall, where Hannah appeared to have stopped for a short time. Best Aff. At ¶10.

In this case, the defendant complains that Detective Best misrepresented the evidence by failing to include contradictory evidence from Garner’s bloodhound. As Detective Best makes clear, however, the limited information that she had at the time demonstrated that Garner’s bloodhound track was *consistent*, rather than inconsistent, with the video evidence and witness statements and implicated the defendant.

The defendant repeatedly makes two fundamental mistakes in interpreting Garner’s findings.

First, the defendant conflates a finding of “Hannah’s current presence” with “Hannah’s scent.” In other words, the defendant argues that if Hannah was not present, her scent must not have been present either and there would be no evidence regarding her abduction in that location. Of course, that completely misunderstands the evidence. Garner’s dog repeatedly found evidence of Hannah’s scent, indicating that there may be evidence at the scene, even in places where he could conclude Hannah herself may not be currently present. Def. Mot. Ex. 11, 12

Second, the defendant conflates the dog’s physical location and the current location of Hannah’s scent and Hannah’s actual location at the time of the offense. Garner’s report and his statements to the officers were clear that Hannah’s scent had “drifted” and that his dog did not travel

the same path that Hannah had traveled on September 13, 2014. The defendant contends in his memorandum that Garner “found Ms. Graham’s trail on Water Street rather than on Main Street.” Def. Mot. ¶16. Notably, this sentence lacks a citation; it lacks a citation because it is a mischaracterization of Garner’s observations. Simply stating the dog’s path does not accurately reflect the evidence in this case or what Garner told the officers on September 16, 2014.

The defendant does not agree with Det. Best’s interpretation of the evidence. However, in challenging the search warrant in this case, it is not enough that the defendant disagree with Detective Best’s interpretation. He must demonstrate that Detective Best *knowingly and deliberately* misrepresented the truth, or acted with reckless disregard for the truth with the intent to mislead the magistrate. As the Fourth Circuit noted in *Miller v. Prince George’s Co.*,

“Reckless disregard” can be established by evidence that an officer acted “with a high degree of awareness of [a statement’s] probable falsity,” that is, “when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.

475 F.3d 621, 627 (4th Cir. 2007) (quoting *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000) (internal quotation marks omitted)). In this case, Det. Best’s affidavit demonstrates she had no such doubts. The defendant fails to offer any evidence to the contrary.

The defendant argues that *U.S. v. Jacobs* requires an officer to clearly state that a dog did not “alert” when describing that a dog “showed an interest” in a particular location. But as *U.S. v. Holleman* points out, the defendant misreads *Jacobs*. First, the defendant fails to note that, in *Jacobs*, the police used a second dog and that dog did not give any indication on the package in question at all. *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993). In this case, there was no such evidence.

Second, a dog’s failure to “indicate” as trained is not fatal to a finding of probable cause. *U.S. v. Holleman*, No. CR12-0040, Slip Op. at 24 (N.D. Iowa, 2012)(Citing *United States v. Clayton*, 374 Fed. Appx. 497, 502 (5th Cir. 2010) (“Although [the dog] did not passively indicate or sit in this instance, our

Fourth Amendment jurisprudence does not require drug dogs to abide by a specific and consistent code in signaling their sniffing of drugs to their handlers."). The critical issue is not whether the dog "alerted" or "indicated," but whether his change of behavior, together with the totality of the circumstances, provided probable cause to believe that evidence could be found in the location. *Holleman, Id.* In this case, Garner's statements to Captain Pleasants and Det. Sgt. Mooney made clear he believed there was a "fair probability" Hanna's scent was present at the defendant's residence.

Taken as a whole, these alleged omissions were not designed to mislead the magistrate and *Franks* requires defendants to allege more than an intentional omission. *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (internal quotation marks omitted). Instead, the omission must be the product of a "deliberate falsehood or of reckless disregard for the truth." *Colkley*, 899 F.2d at 301 (Citing *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684). Mere negligence in recording the facts relevant to a probable-cause determination is not enough. *Id.* (citing *Franks*, 438 U.S. at 170, 98 S.Ct. at 2683.)

The defendant may argue that Det. Best failed to verify the information that she had collected. That argument, however, fails to even merit a *Franks* review. A police officer's mere negligence "in checking or recording the facts relevant to a probable-cause determination" is not enough to necessitate further inquiry. See *Burns v. Commonwealth*, 261 Va. 307, 327 (2001)(upholding a search warrant affidavit attacked on similar grounds.)

Therefore, the defendant clearly fails to meet the high burden of showing deliberate falsity or reckless disregard of the truth so as to overcome the presumption of validity of the search warrant. *Franks*, 438 U.S. 171.

**PART TWO Section II: Even If The Court Disregards the Statements Alleged to be False,  
The Search Warrant Is Still Facially Valid**

Even if the Court were to exclude the evidence alleged by the defendant to be false in the affidavit, there remains probable cause to search the defendant's residence, and no hearing is required. Merely false information is still not enough to even merit a *Franks* hearing. In addition, the false information must be essential to the probable cause determination: "If, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." *Id.* at 171-72.

As the Court noted in *Franks*,

In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*Franks*, 438 at 155-56; *Gregory v. Commonwealth*, 46 Va. App. 683, 694 (2005) (a defendant must also show "that the falsehood or omission negated the basis upon which the probable cause determination was made.").

The crucial question in determining whether a search warrant is supported by probable cause is whether the item to be seized is likely to be found in the place to be searched. *United States v. Lalor*, 996 F.2d 1578, 1582 (4th Cir. 1993). "Probable cause is far short of certainty. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity, and not a probability that exceeds 50 percent, either." *United States v. Seiver*, No. 11-3716 (7th Circuit August 28th, 2012). This means the probable cause standard does not demand any showing that a police officer's belief regarding criminal activity be "correct or more likely true than false." *Slayton v. Commonwealth*, 41 Va. App. 101, 106, 582 S.E.2d 448, 450 (2003) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983))(quoted in *Byrd v. Commonwealth*, 57 Va.App. 589, 595, 704 S.E.2d 597, 599-600 (2011)).

In this case, the First Search Warrant affidavit demonstrates probable cause to search 164 Hessian Hills Way, Apartment 1, even in the absence of the information regarding Garner's dog. The search warrant details the following facts:

1. Hannah left friends just after midnight on September 13, 2014, and had last communicated with friends at approximately 1:00 a.m. on that date. First Search Warrant (hereinafter "1<sup>st</sup> SW") Aff. ¶1 - 4. She had traveled near McGrady's Pub and east to the area of Preston and Harris Street. 1<sup>st</sup> SW Aff. ¶5.
2. Hannah's phone had been turned off since 1:00 a.m. on September 13, 2014, and there has been no communication with her or activity by her, which her friends and family believe is consistent with her being abducted. 1<sup>st</sup> SW Aff. ¶6.
3. Hannah is walking east along the Downtown Mall on a video from Sal's restaurant at 1:06 a.m.. 1<sup>st</sup> SW Aff. ¶7.
4. The defendant is walking west in the same video, but after Hannah passes, he crosses the Downtown Wall and begins to walk east behind Hannah. 1<sup>st</sup> SW Aff. ¶7, 15. In a separate video from Tuel's Jewelry, farther east on the Downtown Mall, Hannah and the defendant are walking beside each other. 1<sup>st</sup> SW Aff. ¶8, 15.
5. A witness saw a man, consistent with the defendant, walk up to Hannah and put his arm around her after 1:00 a.m. The witness then saw them arrive at Tempo restaurant together, and the defendant bought drinks with his card at approximately 1:10 or 1:15 a.m. The witness positively identified Hannah as the person with the defendant. 1<sup>st</sup> SW Aff. ¶9-11.
6. Another witness observed the videos from the downtown mall of the defendant and positively identified him. This witness stated that the witness was 100% sure it was him and identified his vehicle as a "burnt orange, fast and furious type car." 1<sup>st</sup> SW Aff. ¶15.

7. Police obtained the defendant's credit card transactions from Tempo restaurant, which confirmed his purchase of drinks at 1:10 a.m. using his Visa card. 1<sup>st</sup> SW Aff. ¶12.
8. A vehicle matching the make, model, and color of the defendant's vehicle, a 1998 Orange Chrysler 2D Coupe, is on video leaving the area of Norcross Station, 316 4<sup>th</sup> Street SE at 1:25 a.m.<sup>3</sup> 1<sup>st</sup> SW Aff. ¶13, 15, 18.
9. The defendant owns a 1998 Orange Chrysler 2D Coupe registered to his residence at 164 Hessian Hills Way, Apartment 1. 1<sup>st</sup> SW Aff. ¶17.
10. Police located the same vehicle at his residence at 164 Hessian Hills Way, Apartment 1, on September 18, 2014. 1<sup>st</sup> SW Aff. ¶18.
11. When police arrived at 164 Hessian Hills Way, Apartment 1, on September 19, 2014, the police explained to the defendant that he was on video buying drinks with Hannah. The police pointed out that national media attention had been fixated on Hannah's disappearance and video of both Hannah and the defendant had been on television and media. The defendant simply stated "I was pretty drunk that night, I don't remember" and refused to provide any other information. 1<sup>st</sup> SW Aff. ¶21.<sup>4</sup>
12. The defendant then asked to get his passport, or paperwork to get a passport, from his vehicle. He stated that he had just gotten it that week. 1<sup>st</sup> SW Aff. ¶23.
13. The defendant asked when he could get his vehicle back, and police told him they would call him. They asked for his cellphone number, but the defendant refused to provide it. 1<sup>st</sup> SW Aff. ¶24.

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<sup>3</sup> Police initially believed that the vehicle in this video was the defendant's vehicle. However, after viewing the video from Red Pump restaurant on September 20, police discovered that the vehicle in the video was not the defendant's vehicle.

<sup>4</sup> When police reviewed Det. Lee Gibson's audio recording of that conversation after the initial investigation, the actual conversation was "like I was really drunk and I don't really..." Det. Sgt. Mooney said "you don't remember that?" and the Defendant said "No." Det. Sgt. Mooney then asked "do you not remember her or do you not remember being down there?" The defendant stated "I remember being down there."

That information, in the totality of the circumstances, clearly demonstrated probable cause that 164 Hessian Hills Way, Apartment 1, would contain evidence of Abduction in violation of Va. Code §18.2-47, in particular, clothing, trace evidence, or the defendant or victim's cellphone.



**PART TWO Section III: Even If The Court Finds the Warrant Invalid, The Second Search Warrant Is Valid and the Police Would Inevitably Have Discovered the Evidence**

As noted in the Commonwealth's memorandum of November 2, 2015, even if the Court were to find that the First Search Warrant is invalid, the Second Search Warrant is still presumed to be valid. The police, therefore, would inevitably have discovered the evidence in this case.<sup>5</sup>

On Sunday, September 21, 2014, police obtained a second search warrant for the residence of 164 Hessian Hills Way, Apartment 1. This search warrant sought "A blue and white checkered button-down shirt, maroon shirt, long white shorts, light brown "Crocs" shoes, and a gold colored necklace. On Monday, September 22, 2014, police obtained a third search warrant for the residence of 164 Hessian Hills Way, Apartment 1, seeking additional evidence. On Monday, September 22, 2014, police executed both the second and the third search warrant at the residence of 164 Hessian Hills Way, Apartment 1.

Detective Michael Arcoraci of the Albemarle County Police Department obtained this search warrant. Detective Arcoraci's search warrant first includes the sworn statements provided by Det. Lisa Best and other Detectives, who had previously sworn to the truth of those statements before a magistrate. Detective Arcoraci then included new information in his affidavit, information which he had learned after police executed the First Search Warrant at 164 Hessian Hills Way, Apartment 1.

This new information was that a video obtained from Red Pump Restaurant, 401 East Main Street, shows the defendant and Hannah walking up the 4<sup>th</sup> Street sidewalk towards E. Market Street. 2<sup>nd</sup> SW Aff. ¶26. This video confirmed that the defendant was the last person seen with Hannah while she was alive and before she disappeared. Police obtained this video from a source independent of the First Search Warrant and independent of Garner's dog. Thus, even if Garner's information were

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<sup>5</sup> As noted earlier, the Commonwealth respectfully requests to incorporate its memorandum under seal of November 2, 2015, which addresses this issue particular in detail.

excluded from the search warrant, police inevitably would have returned to 164 Hessian Hills Way, Apartment 1 to search for the clothing seized in this case.

**PART THREE: The Scope of the Warrant Was Lawful Within the Bounds of Clearly Established Virginia Precedent**

The defendant complains that the scope of the warrant was unlawful. The scope of the warrant was entirely within the bounds of clearly established Virginia precedent.<sup>6</sup>

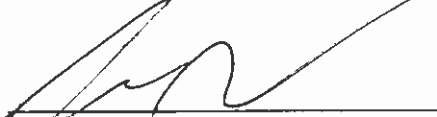
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<sup>6</sup> As noted earlier, the Commonwealth respectfully requests to incorporate its memorandum under seal of November 2, 2015, which addresses this issue particular in detail

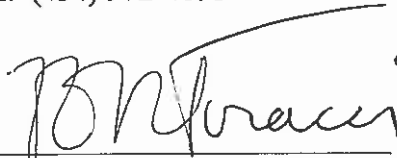
**CONCLUSION**

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court deny the defendant's request for a hearing pursuant to *Franks v. Delaware* and deny the defendant's motion to suppress in this matter.

Respectfully Submitted:



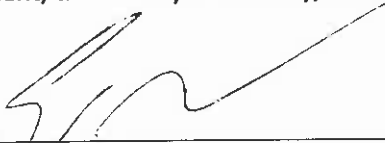
Elliott Casey  
Assistant Commonwealth's Attorney  
County of Albemarle  
410 East High Street  
Charlottesville, Virginia 22902  
(434) 972-4072  
Fax: (434) 972-4093



Robert Tracci  
Commonwealth's Attorney  
County of Albemarle  
410 East High Street  
Charlottesville, Virginia 22902  
(434) 972-4072  
Fax: (434) 972-4093

**Certificate of Service**

I, Elliott Casey, hereby certify that I delivered the preceding memorandum in opposition to motion to suppress to the below-listed counsels for defendant, this 7<sup>th</sup> day of January, 2016, by the below-indicated manner.

  
\_\_\_\_\_  
Elliott Casey  
Assistant Commonwealth's Attorney

Douglas Ramseur, Esq.  
Office of the Capital Defender  
1602 Rolling Hills Drive, Suite 212  
Henrico, Virginia 23229  
By Electronic Mail: [dramseur@cde.idc.virginia.gov](mailto:dramseur@cde.idc.virginia.gov)

Michael Hemenway, Esq.  
801 East Jefferson Street  
Charlottesville, Virginia 22902  
By Electronic Mail: [Hemenwaylaw@aol.com](mailto:Hemenwaylaw@aol.com)

Katherine Jensen, Esq.  
Office of the Capital Defender  
201 Granby Street, Suite 200  
Norfolk, Virginia 23510  
By Electronic Mail: [kjensen@cde.idc.virginia.gov](mailto:kjensen@cde.idc.virginia.gov)