APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion and Final Judgment in the United States Court of Appeals for the Seventh Circuit (August 3, 2018) . . . . . App. 1

Appendix B Memorandum Opinion and Order in the United States District Court for the Northern District of Illinois, Eastern Division (July 14, 2017) . . . . . App. 25

Appendix C Judgment in a Civil Case in the United States District Court for the Northern District of Illinois, Eastern Division (July 14, 2017) . . . . . App. 46

Appendix D Notification of Docket Entry/Minute Entry in the United States District Court for the Northern District of Illinois, Eastern Division (July 14, 2017) . . . . . App. 48

Appendix E Memorandum Opinion and Order in the United States District Court for the Northern District of Illinois, Eastern Division (August 7, 2016) . . . . . App. 50

Appendix F Memorandum Opinion and Order in the United States District Court for the Northern District of Illinois, Eastern Division (November 9, 2015) . . . . . App. 62

Appendix G Order Denying Petition for Rehearing and Rehearing En Banc in the United States Court of Appeals for the Seventh Circuit (October 4, 2018) . . . . . App. 74

Appendix H Complaint for Search Warrant in the Circuit Court of Cook County, Illinois (May 19, 2010) . . . . . App. 76

Appendix I Search Warrant in the Circuit Court of Cook County, Illinois (May 19, 2010) . . . . . App. 80

Appendix J Government's Response to Defendant Tralvis Edmond's First Set of Requests for Admissions in the United States District Court Northern District of Illinois, Eastern Division (March 24, 2016) . . . . . App. 82

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 17-2734

[Filed August 3, 2018]

TRALVIS EDMOND,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:15-cv-03566 — **Matthew F. Kennelly**, *Judge*.

ARGUED FEBRUARY 6, 2018 —
DECIDED AUGUST 3, 2018

Before RIPPLE, SYKES, and BARRETT, *Circuit Judges*.

RIPPLE, *Circuit Judge*. A jury convicted Tralvis Edmond of possession of heroin with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). The Government's case was based largely on evidence that the police had recovered while

executing a search warrant at a Chicago apartment. The warrant was supported by the tip of a confidential informant who reported purchasing heroin from Mr. Edmond at the apartment.

Following his conviction, Mr. Edmond filed a motion under 28 U.S.C. § 2255, seeking collateral relief from federal custody. He claimed that he had been deprived of the effective assistance of counsel because his trial attorney had not filed a motion to exclude the evidence obtained from the search. The district court evaluated this claim under the familiar two-part analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). The court held that Mr. Edmond's trial attorney had performed below an objective standard of reasonableness. It then concluded that, although the search warrant was not supported by probable cause, the good-faith exception to the exclusionary rule saved the evidence from exclusion. Therefore, the court reasoned, Mr. Edmond had not shown that he was prejudiced by his attorney's deficient performance, and his claim of ineffective assistance failed.

Mr. Edmond now challenges the district court's application of the good-faith exception. We agree with the district court that objectively reasonable police officers could have relied in good faith on the search warrant. Because Mr. Edmond has not shown the requisite prejudice under *Strickland*, we affirm the denial of his § 2255 motion.

App. 3

I

BACKGROUND

A.

On May 19, 2010, Chicago Police Officer John Frano filed a complaint for a search warrant in the Circuit Court of Cook County. The complaint recounted a tip that he had received the day before from a confidential informant, who claimed to have purchased heroin in a basement apartment at 736 North Ridgeway Avenue in Chicago. According to the complaint, the informant had identified Mr. Edmond as the seller and had described the location of the drugs as hidden under a bed in a shoebox. The shoebox contained twenty to thirty golf ball-sized bags, and each bag was filled with ten to thirteen smaller bags of suspected heroin. The complaint also described Officer Frano's efforts to corroborate this tip: he drove the informant past the building to confirm the location of the drug sale and showed the informant a photograph of Mr. Edmond to confirm the seller's identity. Notably, although the complaint specified the date of the informant's tip, it did not specify clearly the date of the alleged drug sale.[1]

In the complaint, Officer Frano attested to the reliability of the informant, who had provided dependable information about narcotics activities for the past five years. The complaint further explained

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[1] The complaint reads, in pertinent part: "On 18 May 2010 RCI [the informant] related to R/O [Officer Frano] that RCI was at the residence of 736 N Ridgeway and in the presence of Edmond, Tralvis E. in the basement apartment." R.3 at 23. It then continues to describe the drug transaction.

that, "[o]n over 6 different occasions in the past two months[, Officer Frano] has acted upon the information provided by this [informant,] and on these occasions [Officer Frano] has recovered illegal narcotics."[2] The complaint did not mention the informant's criminal record, that he was facing felony drug charges at the time, or that a state court recently had revoked his bail and issued a warrant for his arrest. At the time, the Chicago Police Department's standard practices did not require the inclusion of informants' criminal histories in warrant applications.[3] Before presenting the complaint to the issuing judge, Officer Frano obtained the approval of the state's attorney's office. He did not, at any time, bring the informant before the judge for questioning.

The judge issued the warrant, and the Chicago Police Department executed a search of the Ridgeway apartment on May 20, 2010. Officers recovered two loaded handguns, three grams of heroin, and eight grams of cocaine. Mr. Edmond was not present during the search but was arrested later. On June 1, 2011, he was charged in a federal indictment with: (1) possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1); (2) possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); and (3) possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

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[2] *Id.*

[3] The Chicago Police Department's policy has since changed.

The case proceeded to trial.[4] The Government presented testimony from police officers involved in the search, including Officer Frano. Mr. Edmond did not testify. The jury found him guilty of the firearm and heroin charges but acquitted him of the cocaine charge. Thereafter, the district court imposed a sentence of 84 months' imprisonment. Mr. Edmond filed a direct appeal, at which point his attorney (the same one who represented him at trial) filed a motion to withdraw. We dismissed the appeal under *Anders v. California*, 386 U.S. 738, 744 (1967). *See United States v. Edmond*, 560 F. App'x 580 (7th Cir. 2014).

B.

On April 22, 2015, Mr. Edmond filed a pro se motion under 28 U.S.C. § 2255 to set aside his conviction and sentence. He claimed that he had received ineffective assistance of counsel at trial. In particular, he challenged his attorney's decision not to file a motion to suppress the evidence recovered in the search of the Ridgeway apartment. He submitted that the warrant authorizing the search was not supported by probable cause. As a result, he claimed, the search was unlawful

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[4] Prior to the trial, Mr. Edmond filed a motion to suppress post-arrest statements that he had made to Officer Frano. He claimed that he did not waive voluntarily his *Miranda* rights. The court held a suppression hearing, where Officer Frano testified. The defense cross-examined Officer Frano but did not present any of its own witnesses. The court denied the motion; that ruling is not challenged in this appeal.

and the evidence was excludable as fruit of the poisonous tree.[5]

The district court ordered an evidentiary hearing on Mr. Edmond's claim and appointed counsel to represent him. The hearing had two parts, which mirrored the familiar two-part test for assessing claims of ineffective assistance of counsel under *Strickland*. First, the court considered whether Mr. Edmond's trial attorney had performed in an objectively unreasonable manner. The court concluded that his attorney's performance fell below the requisite standard because, based on a misunderstanding of the law,[6] the attorney had decided not to file a suppression motion. *See Gardner v. United States*, 680 F.3d 1006, 1012 (7th Cir. 2012) (concluding that an attorney's "misapprehension of law" is objectively unreasonable).

The court then held the second part of the hearing to consider the other part of the *Strickland* inquiry: whether Mr. Edmond had suffered prejudice as a result of his attorney's deficient performance. The parties

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[5] Mr. Edmond also argued that his trial attorney provided ineffective assistance by failing to call him to testify at the suppression hearing regarding his post-arrest statements. Mr. Edmond has not pursued that argument on appeal.

[6] Specifically, the attorney erroneously believed that Mr. Edmond did not have Fourth Amendment standing to challenge the search because he did not live permanently at the Ridgeway apartment, where his girlfriend and children lived. However, as the district court correctly noted, "the defendant's status 'as an overnight guest [was] alone enough to show that he had an expectation of privacy in the home' that was reasonable and protected under the Fourth Amendment." R.32 at 6–7 (quoting *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990)).

agreed that the evidence seized from the search was critical to the Government's case, so the court focused on "whether Edmond ha[d] shown a reasonable likelihood that a motion to suppress would have been successful had counsel filed it."[7] This inquiry required a showing that the search warrant was not supported by probable cause and that the good-faith exception did not apply to save the evidence despite any constitutional infirmities with the warrant.

The district court first determined that the warrant was not supported by probable cause. It based its decision primarily on the failure of the complaint to set forth clearly the date on which the informant allegedly purchased drugs from Mr. Edmond at the Ridgeway apartment. That omission, the court explained, undermined the issuing judge's ability to determine whether the complaint "reasonably suggests that evidence of a crime might *currently* be found in the location to be searched."[8] Although other factors weighed in favor of finding probable cause, such as the firsthand nature of the informant's observations, the court did not think that these countervailing considerations overcame the "staleness" of the informant's tip.[9]

Despite this conclusion about probable cause, the court found that the good-faith exception to the exclusionary rule applied. According to that exception,

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[7] R.52 at 3–4.

[8] *Id.* at 6 (emphasis in original).

[9] *Id.* (alteration omitted).

evidence obtained in violation of the Fourth Amendment is nevertheless admissible if the officers conducting the unlawful search relied in good faith on a search warrant. *United States v. Leon*, 468 U.S. 897, 918–23 (1984). Because the receipt of a warrant constitutes prima facie evidence of good faith, Mr. Edmond had the burden to show that the exception should not apply. *See United States v. Pappas*, 592 F.3d 799, 802 (7th Cir. 2010). In an effort to shoulder that burden, he advanced two arguments: first, that the complaint was so lacking in indicia of probable cause as to render official reliance on it entirely unreasonable; and second, that Officer Frano had acted in reckless disregard of the truth by omitting from the complaint damaging information about the informant's criminal history and pending criminal charges.

The court rejected both of these arguments. First, it held that the complaint contained sufficient indicia of probable cause to justify good-faith reliance on the warrant. The court noted that the warrant contained detailed information about the location and packaging of the drugs, Officer Frano's corroboration of both the apartment's location and the seller's identity, and evidence of the informant's recent reliability. Second, the court concluded that Officer Frano had not acted with reckless disregard for the truth. It credited Officer Frano's testimony that he had omitted the informant's criminal history based on the then-common practice of the police department and that he was unaware of the informant's recent bail revocation and arrest warrant. The court also considered the informant's proven reliability and that Officer Frano had obtained the approval of the state's attorney before applying for the warrant. Taken together, this evidence persuaded the

court that Officer Frano "did not intend to mislead the judge regarding the informant's credibility."[10] Having rejected both of Mr. Edmond's arguments, the court denied his § 2255 motion.

Mr. Edmond now challenges the district court's determination that the good-faith exception applies to defeat his showing of prejudice. He maintains that the trial judge would have granted a motion to suppress and that, therefore, he was deprived the effective assistance of counsel under *Strickland*.

II

DISCUSSION

We review de novo the district court's legal conclusions, including its determination that the good-faith exception applies. *United States v. Koerth*, 312 F.3d 862, 865 (7th Cir. 2002). We review the court's underlying factual findings and credibility determinations for clear error. *Id.*

To establish ineffective assistance of counsel, a petitioner must show (1) that his trial attorney's performance fell below an objective standard of reasonableness, and (2) that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687–96. The focus of the present appeal is whether Mr. Edmond suffered any prejudice from his attorney's failure to file a motion to suppress the evidence seized from the Ridgeway

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[10] *Id.* at 15.

search.[11] The parties agree that this evidence was critical to the prosecution's case. Therefore, in order to demonstrate prejudice, Mr. Edmond must show a reasonable likelihood that, but for his counsel's error, a motion to suppress the evidence would have been granted. *See id.* at 694 (requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

The Government contends that "even if [Mr. Edmond's] attorney had filed a motion to suppress, he would have lost."[12] The Government urges us to apply the good-faith exception to the exclusionary rule set forth in *Leon*. There, the Supreme Court explained that the exclusionary rule is a judicially created remedy designed to protect Fourth Amendment rights by deterring police misconduct. *Leon*, 468 U.S. at 906. Given the rule's prophylactic purpose, "evidence obtained in violation of the Fourth Amendment is nonetheless admissible if the officer who conducted the search acted in good faith reliance on a search warrant." *Pappas*, 592 F.3d at 802 (citing *Leon*, 468 U.S. at 922–23). Because the receipt of a search warrant is prima facie evidence of good faith, the burden falls on the defendant to demonstrate one of the following scenarios:

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[11] Because we affirm based on the good-faith exception, we need not consider the Government's alternative argument that Mr. Edmond's trial attorney performed in an objectively reasonable manner.

[12] Government's Br. 12.

> (1) the issuing judge wholly abandoned his judicial role and failed to perform his neutral and detached function, serving merely as a rubber stamp for the police; (2) the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (3) the issuing judge was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.

Id. (quoting *United States v. Elst*, 579 F.3d 740, 744 (7th Cir. 2009)). Mr. Edmond contends that he has shown both that the complaint was fatally lacking in indicia of probable cause and that Officer Frano acted in reckless disregard of the truth. For the reasons set out below, we cannot accept these contentions.

A.

Mr. Edmond first claims that Officer Frano's complaint was so wanting in indicia of probable cause as to render official reliance on the search warrant unreasonable. Mr. Edmond primarily contends that Officer Frano's complaint was "plainly deficient" due to its omission of a "specific 'temporal guidepost' in order to establish probable cause."[13] He maintains that no reasonable officer could have relied in good faith on the warrant, given the complaint's lack of temporal information about the alleged drug sale. Other indicia of probable cause, he submits, fail to overcome the

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[13] Appellant's Br. 12, 15 (quoting *United States v. Koerth*, 312 F.3d 862, 869 (7th Cir. 2002)).

staleness of the information in the complaint. Although we agree that staleness can undermine an officer's otherwise reasonable reliance on a warrant, the complaint here contained sufficient evidence of timeliness, as well as other indicia of probable cause, to justify application of the good-faith exception.

"Probable cause is established when, considering the totality of the circumstances, there is sufficient evidence to cause a reasonably prudent person to believe that a search will uncover evidence of a crime." *United States v. Harris*, 464 F.3d 733, 738 (7th Cir. 2006). When a complaint is based on an informant's tip, the probable cause analysis turns on five factors: (1) whether the informant acquired firsthand knowledge of the reported events, (2) the amount of detail provided, (3) the extent of corroboration by the police, (4) the interval of time between the reported events and the warrant application, and (5) whether the informant appeared before the issuing judge. *United States v. Glover*, 755 F.3d 811, 816 (7th Cir. 2014). Because probable cause is based on the totality of circumstances, "a deficiency in one [factor] may be compensated for … by some other indicia of reliability." *Id.* (second alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 233 (1983)); *see also United States v. Johnson*, 655 F.3d 594, 600 (7th Cir. 2011) ("[N]o one factor necessarily dooms a search warrant.").

The focus of the parties' disagreement is the fourth factor: the interval of time between the reported events and the warrant application. The district court believed that probable cause did not exist largely because the complaint did not specify *when* the informant was at the Ridgeway apartment. As the court noted,

"[s]taleness is highly relevant to the legality of a search for a perishable or consumable object, like cocaine."[14] This approach makes good sense; probable cause measures the likelihood of uncovering evidence of a crime *at the time of* the search. We also have explained, however, that an issuing judge should not withhold a warrant due to the age of the reported information "[i]f other factors indicate that the information is reliable and that the object of the search will still be on the premises." *United States v. Lamon*, 930 F.2d 1183, 1188 (7th Cir. 1991) (alteration in original) (quoting *United States v. Batchelder*, 824 F.2d 563, 564 (7th Cir. 1987)). Accordingly, if a complaint indicates "ongoing, continuous criminal activity, the passage of time becomes less critical." *Id.* (quoting *United States v. Shomo*, 786 F.2d 981, 984 (10th Cir. 1986)).[15]

Although the district court found that the lack of a precise time stamp for the drug sale undermined probable cause, the complaint was not entirely lacking in indicia of timeliness. A reasonable officer, reading the complaint in its entirety, could have interpreted the complaint as timely. Although the district court read

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[14] R.52 at 6 (alteration in original) (quoting *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012)).

[15] *See also United States v. Mitten*, 592 F.3d 767, 775 (7th Cir. 2010) (applying good-faith exception, despite lack of date for one reported drug sale and imprecise date for another reported sale, because complaint indicated pattern of ongoing drug dealing); *United States v. Prideaux-Wentz*, 543 F.3d 954, 958–59, 963 (7th Cir. 2008) (finding no probable cause where complaint relied on stale information, but applying good-faith exception in part because complaint indicated "ongoing continuous criminal activity").

the complaint as silent about the date of the alleged sale, it is not objectively unreasonable to read it differently. The complaint states that "[o]n 18 May 2010[, the informant] related to [Officer Frano] that [the informant] was at the residence of 736 N Ridgeway and in the presence of Edmond."[16] While certainly not a model of clarity, this statement could be interpreted reasonably to mean that the informant was at the Ridgeway apartment on May 18, 2010—not just that the informant passed the information to Officer Frano on that day.[17]

The complaint also contains other indicia of timeliness. For example, in describing the informant's reliability, Officer Frano explained that the informant had provided information leading to the recovery of narcotics on more than six different occasions in the prior two months. This suggests that Officer Frano was meeting regularly with the informant and that the informant's tips had been timely. Officer Frano applied for the Ridgeway warrant on May 19, 2010, one day after the informant told him about the transaction with Mr. Edmond. When combined with the informant's history of providing timely tips, this time frame could

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[16] R.3 at 23.

[17] We note parenthetically that we cannot accept the Government's argument for applying the good-faith exception based on Officer Frano's *intent* to communicate the date of the drug sale. *See United States v. Koerth*, 312 F.3d 862, 871 (7th Cir. 2002) (noting that the good-faith analysis is "objective" and "based solely on facts presented to the" issuing judge, without reference to an officer's "subjective intentions or knowledge" (quoting *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988))).

support a good-faith belief that the information in the complaint was not incurably stale.

Furthermore, although the district court found that the complaint did not evidence ongoing criminal activity, the complaint could be understood as conveying that a certain amount of future drug deals beyond the single reported sale would occur at the Ridgeway apartment. Indications of "ongoing, continuous criminal activity" render "the passage of time … less critical" to the probable cause analysis. *Lamon*, 930 F.2d at 1188 (quoting *Shomo*, 786 F.2d at 984). The complaint here did not report multiple drug sales and thus is not comparable to the affidavits in *United States v. Mitten*, 592 F.3d 767 (7th Cir. 2010), and *United States v. Prideaux-Wentz*, 543 F.3d 954 (7th Cir. 2008).[18] However, it did describe a significant quantity of drugs at the apartment: twenty to thirty golf ball-sized bags, each containing ten to thirteen smaller bags of suspected heroin. Although this fact alone does not establish a pattern of ongoing criminal activity,[19] such a significant quantity of individually wrapped drugs reasonably suggests that Mr. Edmond planned multiple further drug deals.

In the context of the good-faith analysis, we have remarked that issuing judges "do not operate in a vacuum, shielded from knowledge of drug operations in

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[18] *See supra* note 15.

[19] *Cf. United States v. Lamon*, 930 F.2d 1183, 1188–89 (7th Cir. 1991) (finding a pattern of ongoing criminal activity when an informant recounted drug sales from both the defendant's residence and automobile and indicated that the defendant had retained more than an ounce of cocaine after the latest sale).

the real world." *Koerth*, 312 F.3d at 870 (quoting *United States v. Perry*, 747 F.2d 1165, 1169 (7th Cir. 1984)). Just as judges can infer that "evidence is likely to be found where [drug] dealers live," *id.* (quoting *Lamon*, 930 F.2d at 1188), they also can infer that a significant quantity of individually packaged drugs is likely to be distributed over time through multiple drug deals, *cf. United States v. Hython*, 443 F.3d 480, 489 (6th Cir. 2006) ("[I]n some cases, a warrant may be issued on the basis of an inference."). Assessing the staleness of information in a complaint is never a mechanical process. *See Prideaux-Wentz*, 543 F.3d at 958 ("There is no bright-line test for determining when information is stale … ." (alteration omitted) (quoting *United States v. Koelling*, 992 F.2d 817, 822 (8th Cir. 1993))); *see also Hython*, 443 F.3d at 485 (acknowledging that drug-distribution crimes "exist[] upon a continuum ranging from an individual who effectuates the occasional sale … to an organized group operating an established … drug den"). Given these practical realities, a reasonable officer could have believed that the complaint indicated a likelihood of multiple future drug sales at the Ridgeway apartment. Accordingly, an officer could have concluded within reasonable bounds that the temporal deficiencies in the complaint were less critical to the probable cause analysis than they would have been under other circumstances.

The other factors informing probable cause cut in both directions. On the one hand, the informant's entire tip was based on firsthand knowledge, and the complaint provided ample detail about where the drugs were hidden and how they were packaged. These facts support a reasonable belief in probable cause.

On the other hand, Officer Frano's efforts to corroborate the tip were minimal; rather than verifying the informant's account through independent means, he sought confirmation from the informant himself. *See United States v. Robinson*, 724 F.3d 878, 884–85 (7th Cir. 2013) (affording little probative value to corroboration where police drove the informant past the location of a reported crime and showed the informant a photograph of the suspect from a police database, which "shed[] little light on the central question" whether the reported crime was committed).[20] *But see United States v. Sims*, 551 F.3d 640, 644 (7th Cir. 2008) (considering an informant's identification of an implicated location as one of many factors weighing in favor of probable cause); *United States v. Jones*, 208 F.3d 603, 607 (7th Cir. 2000) (same). Lastly, the informant did not appear before the issuing judge when Officer Frano applied for the warrant.

The lack of meaningful corroboration and the unavailability of the informant for questioning generally weigh against a finding of probable cause. *Glover*, 755 F.3d at 816. That said, these factors are primarily relevant to check the informant's credibility and, accordingly, do not undermine good-faith reliance when there is strong, countervailing evidence that the informant is reliable. *Cf. id.* at 818 (noting that omissions about an informant's reliability are less

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[20] *See also United States v. Radovick*, No. 2:13-CR-112-PPS-PRC, 2014 WL 1365434, at *5 (N.D. Ind. Apr. 7, 2014) (describing similar corroboration as "a meaningless exercise because essentially all it meant was the informant was corroborating himself").

important when the complaint is extensively corroborated).

Here, there was significant evidence of the informant's reliability. In the prior two months, the informant had provided six tips that led to the recovery of illegal narcotics. *Cf. United States v. Searcy*, 664 F.3d 1119, 1123 (7th Cir. 2011) (finding informant reliable where "the informant's previous dealings with the police led to three arrests in the past six months"). Furthermore, Officer Frano credibly testified that the informant had never provided false information in the past. Given the informant's positive track record, a reasonable officer could have thought that the complaint gave rise to probable cause despite the weak corroboration and the informant's absence before the issuing judge.[21] "It is also noteworthy that Officer [Frano] sought and obtained the approval of the … State's Attorney before presenting his warrant request to the" issuing judge. *Mitten*, 592 F.3d at 776 n.4; *see also Pappas*, 592 F.3d at 802.

When assessed in its entirety, the complaint was not so lacking in indicia of probable cause as to render a police officer's reliance on the validity of the warrant

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[21] Contrary to Mr. Edmond's arguments, the informant's criminal history and pending criminal charges do not necessarily undercut the reliability of his tip. *See Mitten*, 592 F.3d at 774 ("A motive to curry favor[] … does not necessarily render an informant unreliable." (quoting *United States v. Olson*, 408 F.3d 366, 371 (7th Cir. 2005))); *Koerth*, 312 F.3d at 870 (indicating that "*statements against [one's] penal interest*" tend to be reliable and that an informant with a motive "to strike a bargain with the police[may have] a strong incentive to provide accurate and specific information" (emphasis in original)).

objectively unreasonable. A litigant "establishes unreasonable reliance [on a warrant] if 'courts have clearly held that a materially similar [complaint] previously failed to establish probable cause' or the [complaint] is 'plainly deficient'" on its face. *Glover*, 755 F.3d at 819 (quoting *United States v. Woolsey*, 535 F.3d 540, 548 (7th Cir. 2008)). We do not have here the kind of stale and conclusory complaint that we have held cannot support good-faith reliance. *See, e.g.*, *Owens v. United States*, 387 F.3d 607, 608 (7th Cir. 2004) (declining to apply the good-faith exception where a "barebones affidavit" stated merely that "three months earlier an informant had bought 'a quantity of crack' … at a house believed to be [the petitioner's] residence," with no indication of the quantity of drugs or the reliability of the informant). Even though the district court invalidated the warrant due to temporal deficiencies in the complaint, those deficiencies were "not so egregious as to render [the officer's] belief in the warrant's validity unreasonable." *Mitten*, 592 F.3d at 773. We therefore cannot accept Mr. Edmond's first argument.[22]

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[22] Mr. Edmond encourages us to follow *United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011), and *United States v. Hython*, 443 F.3d 480 (6th Cir. 2006), where the Fourth and Sixth Circuits declined to apply the good-faith exception to save evidence from tainted searches. Mr. Edmond fails to recognize, however, the critical differences between the warrant applications in those cases and the complaint here. Unlike Officer Frano's complaint, which included some indicia of timeliness, the applications in both *Doyle* and *Hython* did not include any indication of the time frame in which the reported events occurred. *See Doyle*, 650 F.3d at 463, 475 n.16 (noting that the warrant application provided "zero indication as to when [the alleged crime] was committed," and the lieutenant who drafted the application admitted that "no time

B.

Mr. Edmond next submits that the good-faith exception should not apply because Officer Frano acted in reckless disregard of the truth. He emphasizes that the complaint does not mention the informant's criminal history, pending criminal charges, or recent bail forfeiture and arrest warrant. These omissions, he claims, distorted the issuing judge's understanding of the informant's credibility and, therefore, the finding of probable cause.

"We review the district court's determinations of fact, including the determination of deliberate or reckless disregard for the truth, for clear error." *United States v. Williams*, 718 F.3d 644, 649 (7th Cir. 2013). "A showing of reckless disregard requires more than a showing of negligence and may be proved from circumstances showing obvious reasons for the affiant to doubt the truth of the allegations." *Id.* at 650. Here,

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frame whatsoever" was given to the issuing judge); *Hython*, 443 F.3d at 486 ("[T]he affidavit offers *no clue* as to when this single controlled buy took place." (emphasis added)).

Furthermore, in both *Doyle* and *Hython*, there was scant *other* evidence of probable cause to compensate for the lack of temporal information. *See Doyle*, 650 F.3d at 463 (noting that the affidavit "failed to indicate that the pictures allegedly possessed … were in fact pornographic," thus omitting an important "indication that the [alleged] crime had been committed"); *Hython*, 443 F.3d at 486 n.1 (noting that affidavit did "not establish the reliability of either the tipster or the … supplier" and did not "make sure that they were not carrying drugs at the time of the controlled buy"). Not only did Officer Frano's complaint include some indicia of timeliness, it also included detailed information about the alleged crime and a proven record of the informant's past reliability.

in evaluating Officer Frano's testimony, the district court was conducting "a subjective inquiry [into] the officer's state of mind." *Id.* On appeal, our task is not to repeat this same inquiry; rather, we must "determine whether, based on the totality of the circumstances, it was reasonable for the district court to conclude that law enforcement did not doubt the truth of the [complaint]." *Id.*

As part of the hearing on Mr. Edmond's § 2255 motion, Officer Frano testified about his preparation of the complaint and explained why he had omitted the challenged information. Officer Frano readily admitted that, when preparing the complaint, he knew about the informant's criminal history and pending drug charges. He explained, however, that the Chicago Police Department did not require officers to include this information at the time and that he had no reason to question the informant's credibility. *See United States v. Taylor*, 471 F.3d 832, 840 (7th Cir. 2006) ("[A]n informant's criminality does not in itself establish unreliability.").[23] Notably, the informant never had given him false information, and the informant's prior convictions and pending charges did not relate to crimes of untruthfulness.[24]

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[23] We do not suggest, however, that such information is not relevant and probative in the overall assessment of an application for a warrant. *See United States v. Glover*, 755 F.3d 811, 817–18 (7th Cir. 2014).

[24] It is again noteworthy that Officer Frano obtained the approval of the state's attorney before applying for the warrant, even though the complaint did *not* mention the informant's criminal history. *See United States v. Pappas*, 592 F.3d 799, 802 (7th Cir. 2010).

Officer Frano also testified that, at the time of the probable cause hearing, he was unaware of the informant's recent bail revocation and outstanding arrest warrant.[25] Although Mr. Edmond presented a criminal history report that indicated that an arrest warrant had been issued for the informant days before the probable cause hearing, the court believed Officer Frano's testimony that he was unaware of the outstanding warrant at that time. The court also took account of the fact that Officer Frano did not "get [the informant] off the hook" after obtaining the warrant; indeed, the informant was sentenced to one year in prison for the felony drug charges.[26] The court credited these explanations and found that Officer Frano did not act in reckless disregard of the truth.

The district court did not clearly err in crediting Officer Frano's testimony that "he was not trying to hide anything from the judge"[27] or "mislead the judge regarding the informant's credibility."[28] We have considered the totality of the circumstances, including the informant's proven reliability, the standard practices of the police department at the time, and the officer's plausible testimony. Based on this record, it was entirely reasonable for the court to conclude that Officer Frano did not doubt the truth of the allegations

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[25] Evidence of the arrest warrant "bore directly" on the informant's credibility. *United States v. Williams*, 718 F.3d 644, 653 (7th Cir. 2013).

[26] R.52 at 13.

[27] *Id.*

[28] *Id.* at 15.

in the complaint. Accordingly, we reject Mr. Edmond's claim that Officer Frano acted in reckless disregard of the truth.

Conclusion

Despite the temporal deficiencies in Officer Frano's complaint, we are confident that an objectively reasonable officer could rely in good faith on the resultant search warrant. The complaint contained some indicia of timeliness, and, when combined with the other evidence of probable cause, it justified good-faith reliance by the officers executing the search. Furthermore, the district court did not commit clear error in assessing Officer Frano's state of mind when he prepared the complaint.

Because the court properly applied the good-faith exception, Mr. Edmond has failed to demonstrate any prejudice resulting from his attorney's failure to file a motion to suppress. He therefore has not satisfied the test under *Strickland* for establishing ineffective assistance of counsel. Accordingly, we affirm the district court's denial of his § 2255 motion.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

August 3, 2018

Before: KENNETH F. RIPPLE, Circuit Judge
DIANE S. SYKES, Circuit Judge
AMY C. BARRETT, Circuit Judge

No. 17-2734	TRALVIS EDMOND, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee
Originating Case Information:	
District Court No: 1:15-cv-03566 Northern District of Illinois, Eastern Division District Judge Matthew F. Kennelly	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment**(form ID: **132**)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 15 C 3566

[Filed July 14, 2017]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TRALVIS EDMOND,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Tralvis Edmond was convicted in 2012 of drug and gun charges and sentenced to a term of imprisonment. He has moved under 28 U.S.C. § 2255 to set aside his conviction and sentence based on ineffective assistance of counsel. Edmond claims that his trial counsel rendered ineffective assistance by (1) failing to file a motion to suppress evidence seized during a search and (2) failing to call Edmond to testify at a hearing on a motion to suppress statements he was claimed to have made while in custody.

The Court conducted an evidentiary hearing on Edmond's first claim on June 16, 2016. The Court then determined that trial counsel's failure to file the motion to suppress was objectively unreasonable but reserved for later determination the issue of whether this failure prejudiced Edmond. *See United States v. Edmond*, No. 15 C 3566, 2016 WL 4179176 (N.D. Ill. Aug. 7, 2016). The Court now considers the issue of prejudice as well as Edmond's second claim for ineffective assistance of counsel based on counsel's failure to call Edmond to testify at the suppression hearing. For the reasons stated below, the Court denies Edmond's section 2255 motion.

Background

Edmond was convicted on firearms and narcotics charges, and the Court sentenced him to a prison term of eighty-four months. He has moved under 28 U.S.C. § 2255 to set aside his conviction and sentence, alleging ineffective assistance of counsel. Specifically, Edmond contends that his trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence seized via the execution of a search warrant at 736 N. Ridgeway in Chicago. The evidence seized included the key evidence that was the basis for the charges against Edmond: two loaded firearms and significant amounts of heroin and crack cocaine packaged for distribution. Edmond also contends that his trial counsel rendered ineffective assistance by failing to call him to testify at a hearing held by the judge then assigned to the case on a motion trial counsel had filed seeking to suppress a post-arrest statement that Edmond had given to the authorities.

The standard governing both of Edmond's claims for ineffective assistance of counsel is the familiar two-part test established by *Strickland v. Washington*, 466 U.S. 668 (1984). The first question is whether counsel's action or inaction was objectively unreasonable. The second question is whether the defendant was prejudiced as a result of counsel's action or inaction. *See id.* at 687-88, 693.

The Court appointed counsel to represent Edmond in the section 2255 proceedings and held an evidentiary hearing to address certain contested factual issues. The Court elected to address first the question of whether Edmond's trial counsel had acted in an objectively unreasonable way in failing to file a motion to suppress the evidence seized in the search of the home on N. Ridgeway. The Court concluded that Edmond had made the necessary showing, specifically that counsel's decision not to file a motion to suppress was based on an objectively unreasonable misunderstanding of the law of Fourth Amendment "standing." *See Edmond*, 2016 WL 4179176, at *5.

This leaves the following questions for the Court's determination: 1) whether Edmond was prejudiced by counsel's failure to file the motion to suppress the fruits of the search; 2) whether counsel's failure to call Edmond to testify at the hearing on the motion to suppress his statement was objectively unreasonable; and 3) if so, whether Edmond was prejudiced by counsel's failure to call him to testify at that hearing.

On June 27, 2017, the Court held an evidentiary hearing regarding whether Edmond was prejudiced by counsel's failure to file the motion to suppress the fruits of the search. Specifically, the parties were asked

to present evidence addressing whether Officer Frano, the Chicago police officer who obtained the search warrant, acted with reckless disregard for the truth when applying for the warrant. The Court will discuss this evidence in greater detail later in this opinion.

Discussion

A. Motion to suppress fruits of search

As indicated, the Court previously concluded that trial counsel's decision not to file a motion to suppress was objectively unreasonable. The parties agree that the evidence seized in the search of the N. Ridgeway apartment was critical to the government's success in prosecuting Edmond. Thus the question is whether Edmond has shown a reasonable likelihood that a motion to suppress would have been successful had counsel filed it. *See Strickland*, 466 U.S. at 696; *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011). Edmond argues that the motion would have been successful because no probable cause existed to support the search warrant and the good faith exception does not apply. Def. Tralvis Edmond's Mem. of Law Demonstrating that He Suffered Prejudice As a Result of His Trial Counsel's Objectively Unreasonable Performance (Def.'s Mem. on Prejudice) at 6–13.

1. Probable cause

The search was conducted pursuant to a warrant issued by a Cook County judge upon submission of an application by Officer John Frano stating the following:

> The following facts are as follows: I, P.O. John Frano #11772 have been a Chicago police officer for the [sic] over 9 years and have made over

> 1000 narcotics related arrests. On the 18 may 2010 I had the opportunity to speak with a Registered Confidential Informant who R/O will refer to as RCI. R/O has known this RCI for the past 5 years during which time RCI has provided and been a reliable source of information concerning narcotics activities. On over 6 different occasions in the past two months R/O has acted upon the information provided by this RCI and on these occasions R/O has recovered illegal narcotics. From every occasion R/O made an arrest. Recovered narcotics from RCI information was submitted to the Illinois State Police crime lab for testing and analysis. On these occasions the crime lab found the presence of a controlled substance in items submitted.
>
> On 18 May 2010 RCI related to R/O that RCI was at the residence of 736 N Ridgeway and in the presence of Edmond, Tralvis E. in the basement apartment. RCI related to R/O that RCI was in the rear of the apartment in an area with a bed. RCI related to R/O that Edmond, Tralvis E. walked over to the bed, pushed the mattress away from the wall and pulled from under the bed a shoe box. RCI related to R/O that Edmond, Tralvis E. then opened the shoe box at which point RCI observed 20-30 golf ball sized clear plastic bags filled to the top of the shoe box. RCI related to R/O that each golf ball sized clear plastic bag had between 10 and 13 zip lock bags containing suspect heroin.

Def.'s Mem. on Prejudice, Ex. 1.

An affidavit "establishes probable cause to support a search warrant when it sets forth sufficient evidence to convince a reasonable person that a search will uncover evidence of the alleged crime." *United States v. Bell*, 585 F.3d 1045, 1049 (7th Cir. 2009). When an informant supplies the facts in the affidavit, the probable cause determination turns on the informant's credibility. *Id*. A court considers: (1) the extent to which police corroborated the informant's statements; (2) the degree to which the informant acquired knowledge through first-hand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and the officer's application for the search warrant. *Id*; *United States v. Johnson*, 655 F.3d 594, 600 (7th Cir. 2011). Also relevant is whether the informant personally appeared to testify before the judge issuing the warrant. *Bell*, 585 F.3d at 1049; *Johnson*, 655 F.3d at 600. "No one factor is dispositive, so a deficiency in some areas can be compensated by a stronger showing in others." *Bell*, 585 F.3d at 1049. A judge's decision to issue a warrant is given considerable weight and is overruled only when the supporting affidavit, "read as a whole in a realistic and common sense manner, fails to allege specific facts and circumstances to allow the judge to reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated." *United States v. Koerth*, 312 F.3d 862, 866–67 (7th Cir. 2002).

In arguing that the affidavit does not support a finding of probable cause, Edmond relies primarily on the fact that it does not indicate the date on which the confidential informant allegedly purchased drugs from Edmond at the N. Ridgeway apartment. Edmond

argues that without this information, one cannot reasonably conclude that the drugs would still have been located at the apartment at the time the search warrant was executed. The government argues in response that, when read in context, the affidavit makes it clear that the confidential informant purchased drugs from Edmond on May 18, 2010, the same date he spoke with Frano. The Court has already determined, however, that the affidavit does not specify when the informant went to N. Ridgeway. *Edmond*, 2016 WL 4179176, at *1. The government's argument to the contrary is unpersuasive.

Therefore the Court must determine whether the information in the affidavit supports a finding of probable despite the fact that it lacks details regarding when the informant met with Edmond. The Seventh Circuit has indicated that "'[s]taleness' is highly relevant to the legality of a search for a perishable or consumable object, like cocaine." *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012). This is because probable cause exists "only if it is established that certain identifiable objects are probably connected with certain criminal activity and are probably to be found *at the present time* in a certain identifiable place." *United States v. Mitten*, 592 F.3d 767, 775 (7th Cir. 2010) (emphasis added). It is not enough to establish that the location to be searched at one time contained evidence of a crime. *Id*. Without any temporal reference point, a judge is unable to determine whether the information in the affidavit reasonably suggests that evidence of a crime might *currently* be found in the location to be searched. *See United States v. Lamon*, 930 F.2d 1183, 1188–89 (7th Cir. 1991) ("Because the affidavit did not indicate when

the informant had observed Mr. Lamon dealing drugs from his automobile, that information standing alone would be insufficient to establish probable cause.") Thus Frano's failure to indicate when the informant visited Edmond at N. Ridgeway undermines a determination that probable cause existed to search the apartment.

Under some circumstances, the Seventh Circuit has excused an affidavit's failure to provide some indication of the age of the information, but typically only when other details in the affidavit provide evidence of ongoing criminal activity. In *Lamon*, the court concluded that probable cause existed to search defendant's car—despite the fact that the affidavit did not indicate when the informant had observed defendant dealing drugs from his car—because the informant had also observed defendant selling drugs out of his home within the past seventy-two hours and that together "these pieces of information suggested a pattern of drug trafficking" that supported probable cause to search the car. *Lamon*, 930 F.2d at 1189. The Seventh Circuit drew a similar conclusion in *Mitten*, where the affidavit failed to indicate when one confidential informant purchased drugs at the apartment to be searched and, regarding a different informant, stated only that he had purchased drugs sometime during the previous month. *Mitten*, 592 F.3d at 775. The court indicated that the information from multiple informants that they had purchased drugs at the apartment demonstrated ongoing criminal activity, which reduced the importance of the information's staleness in the probable cause inquiry. *See id.* (noting that "the passage of time is less critical when the

affidavit refers to facts that indicate ongoing continuous criminal activity").

The details in the affidavit for the search of the N. Ridgeway apartment do not provide evidence of ongoing criminal activity. According to the affidavit, the informant told Frano only that he purchased drugs at the apartment once, and there are no other informants with similar stories. The affidavit does not mention any belief that Edmond was known to deal drugs, *see United States v. Hicks*, 650 F.3d 1058, 1066 (7th Cir. 2011), nor does it discuss the frequency of an ongoing operation, *see United States v. Thompson*, 139 F. App'x 724, 729 (7th Cir. 2005). This case is similar to *United States v. Harris*, 464 F.3d 733 (7th Cir. 2006), in which the Seventh Circuit concluded that the affidavit's information that at some specified time an informant visited the home and observed drugs for sale failed to suggest ongoing criminal activity in the home. *Id*. at 739.

The government points to the quantity of drugs observed by the informant—20 to 30 golf-ball sized bags each containing 10 to 13 individual user quantities of heroin—in arguing that there was reason to believe heroin remained in the apartment. Govt.'s Resp. to Def.'s Mem. of Law on Prejudice (Govt.'s Resp.) at 5. But the government cites to no case indicating that this quantity of drugs is sufficient to demonstrate ongoing criminal activity irrespective of how much time had passed since the drugs were seen on the premises. Even with this quantity of drugs, there remains (for example) the possibility that Edmond moved or planned to move them to a different location or sold all

he had. This evidence is not enough to show ongoing criminal activity.

Because the affidavit failed to indicate when the informant purchased drugs from Edmond at N. Ridgeway—and lacks any details indicating ongoing criminal activity—the information in the affidavit does not support a finding of probable cause.

2. Good faith exception

Even in the absence of probable cause, a search made pursuant to a warrant can be saved by the good faith exception. *United States v. Prideaux-Wentz*, 543 F.3d 954, 959 (7th Cir. 2008). Under this exception, evidence obtained in violation of the Fourth Amendment is nonetheless admissible if the officer who conducted the search acted in good faith reliance on a search warrant. *United States v. Pappas*, 592 F.3d 799, 802 (7th Cir. 2010). The fact that an officer obtained a search warrant is prima facie evidence of good faith. *Id*. A defendant may rebut this evidence by demonstrating that

> (1) the issuing judge wholly abandoned his judicial role and failed to perform his neutral and detached function, serving merely as a rubber stamp for the police; (2) the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (3) the issuing judge was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.

Id (citing *United States v. Elst*, 579 F.3d 740, 744 (7th Cir. 2009)). Edmond argues that the good faith exception does not apply here, both because the affidavit was lacking in indicia of probable cause and because Frano acted in reckless disregard of the truth when preparing the application for the search warrant.

a. Indicia of probable cause

Edmond argues that Frano's complaint was so lacking in indicia of probable cause so as to make reliance on the search warrant unreasonable. In doing so, Edmond points to four alleged deficiencies: (1) the lack of reference to when the informant purchased the drugs; (2) Frano's failure to present the informant to the judge for questioning; (3) Frano's failure to corroborate the information; and (4) the lack of specific facts describing the apartment. Def.'s Mem. on Prejudice at 10.

The Court disagrees. First, the affidavit provided a number of details to suggest the existence of probable cause. The informant gave the precise address for the N. Ridgeway apartment and identified Edmond as the individual inside. Def.'s Mem. on Prejudice, Ex. 1. He described in detail the location of the drugs in a shoe box under the bed, as well as the packaging and approximate quantity of drugs. *Id*. The affidavit also provided information indicating how the informant knew that the substance was heroin—namely, that the informant used the substance after purchasing it and experienced the effects of heroin. *Id*; *see also United States v. Bell*, 585 F.3d 1045, 1050 (7th Cir. 2009) (emphasizing the importance of indicating how the informant was able to identify the substance as an illegal narcotic). The Seventh Circuit has indicated that

statements against an informant's penal interest—such as a statement that the informant purchased the drug—are "a weighty factor in establishing probable cause." *United States v. Lake*, 500 F.3d 629, 633 (7th Cir. 2007). Finally, the affidavit provided information regarding the informant's credibility, indicating that he had provided reliable information to Frano in the five years preceding the warrant and that in the preceding two months, his information had on six occasions led to the recovery of illegal narcotics and an arrest. Def.'s Mem. on Prejudice, Ex. 1. Thus the affidavit provided sufficient detail to permit an officer to reasonably rely on the warrant that was later issued. The fact that the affidavit did not include temporal information does not preclude application of the good faith exception. *See Prideaux-Wentz*, 543 F.3d at 959; *Mitten*, 592 F.3d at 775. In light of the details discussed above, this deficiency is insufficient to make reliance on the affidavit unreasonable.

In addition, Frano adequately corroborated the information that the informant provided. He showed the informant a picture of Edmond obtained from a police database, which the informant positively identified as the person who sold him the drugs. Def.'s Mem. on Prejudice, Ex. 1. Frano also drove the informant past the N. Ridgeway apartment, and he identified the building in which he purchased drugs from Edmond. *Id*. These steps are sufficient to corroborate the information in the affidavit. *See United States v. Sutton*, 742 F.3d 770, 773–74 (7th Cir. 2014).

Edmond's final argument is that the informant failed to appear before the issuing judge. But, as previously noted, no one factor is dispositive in the

determination of probable cause. *United States v. Taylor*, 471 F.3d 832, 840 (7th Cir. 2006). It is true that when the informant appears before the issuing judge, the judge has a better opportunity to ascertain the credibility of the informant. *Sutton*, 742 F.3d at 773. That issue is less of a concern here, however, where the affidavit indicated that the informant had proven reliable in the past and therefore was not an unknown, untested informant. *See United States v. Jones*, 376 F. App'x 627, 629 (7th Cir. 2010); *Taylor*, 471 F.3d at 840.

The Court therefore finds that the affidavit supporting the warrant was not so lacking in indicia of probable cause as to render reliance on it unreasonable.

b. Reckless disregard

Edmond next argues that the good faith exception does not apply because Frano acted in reckless disregard of the truth by omitting from the affidavit the following facts about the informant: (1) the informant had been convicted of at least four drug-related felonies before May 2010; (2) the informant faced a pending charge for possession of cocaine on May 19, 2010; (3) the informant forfeited his bail bond on May 6, 2010; and (4) an arrest warrant had been issued for the informant on May 6, 2010. Def.'s Mem. on Prejudice at 12. Edmond argues that this information was essential to the issuing judge's credibility determination and therefore that its omission defeats the good faith exception.

i. Officer Frano's testimony

At the evidentiary hearing on June 27, 2017, the Court heard testimony from Officer Frano regarding the application for the search warrant. Frano testified

that he provided the affidavit used to apply for the search warrant and that he has been the affiant in over 200 similar cases. He stated that the affidavit was based on information from a registered confidential informant (RCI). To become an RCI, an individual must be "signed up" with the police department, meaning he must have previously provided the department with reliable information. Frano testified that, at the time of the warrant application, he had no reason to believe the informant was unreliable, as the informant had never given him false information in the past. Frano knew at the time of the application that the informant had a criminal history involving drug charges and possibly theft or disorderly conduct. He also knew that the informant had a pending criminal case related to charges for trafficking and possession of cocaine on which he was arrested in 2008. Frano did not include any of this information in the affidavit for the search warrant because, at the time, the Chicago Police Department's standard practice did not require this information. The policy has since changed, and officers are now required to provide the judge to whom a warrant application is presented with an informant's criminal history. In May 2010, however, the Cook County state's attorney's office approved Frano's warrant application without requesting criminal history information for the informant.

Edmond presented at the hearing a copy of the informant's criminal history report, which indicated that a warrant for his arrest had been issued on May 6, 2010. Frano stated that—despite the fact that he spoke with the informant on May 18, 2010 and reviewed his criminal history information prior to doing so—he was unaware of the outstanding warrant. The copy of the

report presented at the hearing indicated, however, that it was generated on August 9, 2011, meaning it was not the same report that Frano had reviewed prior to speaking with the informant. Frano also stated that, at the time he submitted his affidavit, he was unaware that the informant had recently forfeited his bail.

Frano testified that he was not trying to hide anything from the judge by omitting the informant's criminal history from his affidavit. He further stated that he had no reason to believe that this information was particularly important to the warrant application, because he included information regarding the informant's track record of providing reliable information to the department. Frano stated that the informant was not under arrest at the time they spoke, nor did Frano later "get him off the hook" in relation to his pending drug charges, for which the informant was ultimately sentenced to one year in prison. He also testified that RCIs are typically paid for providing information and that it is possible the informant in this case was compensated for the information he provided against Edmond.

ii. Outstanding warrant and bail forfeiture

Edmond argues first that Frano acted with reckless disregard for the truth by omitting from the affidavit information regarding the informant's outstanding arrest warrant and forfeiture of his bail. To establish that Frano acted with reckless disregard for the truth, Edmond must show that Frano entertained serious doubts about the truth of his statements, had obvious reasons to doubt their accuracy, or he failed to disclose facts that he knew would negate probable cause. *Betker*

v. Gomez, 692 F.3d 854, 860 (7th Cir. 2012). Edmond has failed to do so regarding the arrest warrant and the bail forfeiture, because the evidence shows that Frano was unaware of either of these facts. Frano testified credibly that the criminal history report he reviewed prior to speaking with Edmond did not include the arrest warrant and bail forfeiture, which had happened only a matter of days earlier. And Frano cannot be said to have failed to disclose facts that he knew would negate probable cause when he was unaware of these facts in the first place. The Court therefore finds that Frano did not act with reckless disregard for the truth when he did not include in the affidavit information regarding the informant's outstanding warrant and forfeiture of bail.

iii. Prior criminal history

The next issue involves the omission of information regarding the informant's criminal history. The evidence presented at the hearing shows that Frano was aware of the informant's prior convictions and arrests at the time that the informant gave information regarding Edmond. But Frano testified credibly that he did not question the reliability of the informant's information regarding Edmond because the informant had never provided false information in the past. Thus Frano never entertained serious doubts regarding the accuracy of the information.

Edmond has also failed to show that the informant's criminal history should have caused Frano to doubt the informant's reliability or that Frano knew this information would negate probable cause. The Seventh Circuit has indicated that "an informant's criminality does not in itself establish unreliability." *Taylor*, 471

F.3d at 840. And there was sufficient reason in this case for Frano to trust the informant's information. The affidavit indicated that the informant had, on multiple prior occasions, provided reliable information which led to arrests and the recovery of illegal narcotics. And Frano testified that none of the informant's prior arrests or convictions related to crimes of untruthfulness. Thus the criminal history did not give Frano an obvious reason (beyond what the affidavit disclosed about drug use) to question the informant's statements regarding Edmond, particularly given that the informant was not under arrest at the time and Frano did not assist him on his pending charge. Further, there is no evidence that Frano's omission of this information was deliberately or recklessly deceptive. Frano testified credibly that he did not intend to mislead the judge regarding the informant's credibility. And his affidavit indicated that the informant purchased cocaine from Edmond and later used it. This statement "could easily be read as giving the impression that the police were not trying to hide the fact that [the informant] was currently in trouble with the law." *United States v. Williams*, 718 F.3d 644, 653 (7th Cir. 2013).

c. Summary

The Court concludes that Edmond has failed to show that the good faith exception does not apply to the search warrant in this case. The warrant was not so lacking in indicia of probable cause so as to render Frano's reliance on it unreasonable. And Frano did not act in reckless disregard of the truth in preparing the warrant application. For these reasons, the Court finds that Edmond has failed to show that he was prejudiced

by trial counsel's failure to move to suppress the fruits of the search, because the motion would not have been successful.

B. Motion to suppress statements

Edmond also claims that his trial counsel provided ineffective assistance when he failed to call Edmond to testify at a hearing on a motion to suppress statements he was claimed to have made while in custody. Edmond was arrested after being stopped for a traffic violation approximately one month after officers searched the apartment at N. Ridgeway. While he was detained, Frano interviewed him about the items recovered at N. Ridgeway during the search. In the police report summarizing the interview, Frano stated that he gave Edmond *Miranda* warnings and that Edmond proceeded to admit that he owned the drugs and guns found in the apartment. Def.'s Mem. on Prejudice, Ex. 6. Edmond denies both that he received the warnings and that he waived his rights.

During pre-trial proceedings, Edmond's trial counsel filed a motion to suppress the alleged statement on these grounds. Trial counsel submitted a sworn affidavit from Edmond stating that he never received Miranda warnings and did not he waive his rights. Judge Blanche Manning, to whom the case was then assigned, ordered a hearing on the motion. Frano testified at the hearing that he gave the warnings and that Edmond waived his rights. Trial counsel did not call Edmond to testify, choosing instead to rely on his cross-examination of Frano. Judge Manning credited Frano's testimony and denied the motion to suppress.

Edmond now argues that trial counsel's failure to call him to testify constitutes ineffective assistance of counsel. As stated previously, to prevail Edmond must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *McDowell v. Kingston*, 497 F.3d 757, 761 (7th Cir. 2007). A court considering an ineffective assistance claim is not required to consider these points in this sequence, and if it concludes that the defendant has not made a sufficient showing on one point, it need not consider the other. *Strickland*, 466 U.S. at 697; *see also Spiller v. United States*, 855 F.3d 751, 755 (7th Cir. 2017) ("When applying *Strickland* to the facts of a particular case, there is no reason for a court to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.") (internal quotation marks omitted). The Court considers only whether Edmond was prejudiced by counsel's failure to call him to testify and concludes that he was not.

To demonstrate prejudice, Edmond must show that, absent counsel's deficient performance, he would have won the motion to suppress. *Johnson v. Thurmer*, 624 F.3d 786, 792 (7th Cir. 2010). Edmond has failed to make this showing. Judge Manning heard Frano's testimony and concluded that it was credible. *See United States v. Edmond*, No. 11 CR 378, dkt. no. 33. There is little reason to believe that Edmond's testimony would have altered this conclusion. *See Bynum*, 560 F.3d at 685. If counsel had called Edmond to testify, he would have testified to the same facts in his affidavit: that he did not receive *Miranda* warnings, nor did he waive his rights. Mem. of Facts and Law in

Supp. of Pet'r's Mot. to Vacate or Set Aside or Correct a Sentence (Pet'r's § 2255 Motion) at 14. Although testifying would have given Judge Manning the opportunity to evaluate Edmond's credibility, there is no reason to believe that it would have changed her decision to credit Frano's testimony.

Edmond argues that, if he had testified, Judge Manning would not have credited Frano's testimony given that (1) Frano is the one who prepared the police report omitting mention of a waiver of his rights; (2) no third party witness was present; and (3) there was no audio or video recording of the interview. Def.'s Reply Br. Demonstrating that He Suffered Prejudice as a Result of His Trial Counsel's Objectively Unreasonable Performance (Def.'s Reply) at 15. But all of these points were already made, based on Frano's testimony alone. Edmond's testimony would have added nothing on these points.

Edmond's argument basically boils down to the proposition that it would have made a difference if he had taken the witness stand and simply denied being read his rights or having waived them; he does not suggest that there would have been anything to his testimony other than this. The Court concludes that Edmond has failed to show that his denial under oath of Frano's testimony would have altered Judge Manning's evaluation of Frano's credibility. Edmond has thus failed to show the requisite prejudice.

Conclusion

For the foregoing reasons, the Court denies Edmond's motion to vacate his conviction and sentence under 28 U.S.C. § 2255 [dkt. no. 1]. The Clerk is

directed to ender judgment in favor of the United States.

/s/Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: July 14, 2017

APPENDIX C

ILND 450 (Rev. 10/13) Judgment in a Civil Action

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Case No. 15 C 3566
Judge Matthew F. Kennelly

[Filed July 14, 2017]

United States of America,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
Tralvis Edmond,	)
	)
Defendant(s).	)
	)

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☒ in favor of plaintiff(s) United States of America and against defendant(s) Tralvis Edmond in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

□ in favor of defendant(s) and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

□ other:

This action was *(check one)*:

□ tried by a jury with Judge presiding, and the jury has rendered a verdict.

□ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Matthew F. Kennelly on a motion the Court denies Edmond's motion to vacate his conviction and sentence under 28 U.S.C. § 2255 [dkt. no. 1].

Date: 7/14/2017 Thomas G. Bruton, Clerk of Court

/s/ Marsha E. Glenn , Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois –
CM/ECF LIVE, Ver 6.1.1.2
Eastern Division

Case No.: 1:15-cv-03566
Honorable Matthew F. Kennelly

[Filed July 14, 2017]

United States of America)
Plaintiff,)
)
v.)
)
Tralvis Edmond)
Defendant.)
)

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, July 14, 2017:

MINUTE entry before the Honorable Matthew F. Kennelly: The Court denies Edmond's motion to vacate his conviction and sentence under 28 U.S.C. § 2255 [dkt. no. [1]]. The Clerk is directed to enter judgment in favor of the United States. Enter Memorandum Opinion and Order. Enter Judgment. Civil case terminated. Mailed notice (meg,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 15 C 3566

[Filed August 7, 2016]

UNITED STATES OF AMERICA	)
	)
vs.	)
	)
TRALVIS EDMOND	)
	)

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Tralvis Edmond is serving a term of imprisonment following his conviction on drug and gun charges. He has moved under 28 U.S.C. § 2255 to set aside his conviction and sentence, alleging ineffective assistance of counsel. One of Edmond's claims is that his trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence seized via the execution of a search warrant at 736 N. Ridgeway in Chicago. The Court concluded that an evidentiary hearing was needed on this claim. By agreement of the parties and the Court, the hearing was initially limited to the question of whether counsel's failure to file a motion to suppress was objectively unreasonable. The issue of prejudice was reserved for later determination. The

hearing took place on June 16, 2016. This constitutes the Court's findings of fact and conclusions of law.

Facts

On May 20, 2015, Chicago police officers executed a warrant obtained by officer John Frano. Frano obtained the warrant based on information from a confidential informant. In the affidavit that he submitted to obtain the warrant, Frano said that on May 18, an informant told him that on an unspecified date, he was at Edmond's residence at 736 N. Ridgeway and observed him handling significant quantities of narcotics packaged for sale, some of which the informant purchased. Frano further stated in his affidavit that on May 18, he drove the informant past 736 N. Ridgeway, and the informant pointed out the basement apartment as the location where he had purchased the narcotics from Edmond. When officers executed the warrant on May 20, Edmond was not present, but his girlfriend Antonia Penister was. The officers recovered two loaded firearms and significant amounts of heroin and crack cocaine packaged for distribution. Penister told the officers that she and Edmond lived in the apartment together and that Edmond had recently purchased the firearms after being robbed.

Trial counsel did not file a motion to suppress the evidence seized pursuant to the warrant. Edmond contends that trial counsel should have moved to suppress on the ground that (perhaps among other things) the information used to obtain the warrant was stale. In response to Edmond's contention to this effect in his section 2255 motion, the government argued that counsel had a good strategic basis not to file a motion to suppress, specifically, that to support the motion,

Edmond would have had to testify, and his testimony could have provided leads that the government could have used at trial to buttress its contention that he possessed the firearms and narcotics found in the apartment. The Court rejected this argument as speculative, and as it turns out trial counsel did not take this point into consideration at all. *See* June 16, 2016 Tr. at 54-55. Rather, counsel determined not to file a motion based exclusively on his belief that Edmond lacked standing to challenge the search. Edmond argues that this counsel's decision was based on a misunderstanding of the law.

Both trial counsel and Edmond testified at the hearing regarding what Edmond told counsel about his connection with the apartment. There are some conflicts in their testimony. For present purposes, the Court will base its decision on trial counsel's testimony regarding the evidence that he had and what Edmond told him.

Trial counsel testified that Edmond told him that Penister—who Edmond described as his girlfriend—and their two children lived at the apartment but that he (Edmond) did not. June 16, 2016 Tr. at 13-14. Edmond also told counsel that at the time of the search, he and Penister were not seeing each other and "were kind of off and on at that time, their relationship." *Id.* at 14. When asked whether Edmond told him that he would stay at the apartment three nights a week, counsel said no, and that what Edmond said was that during the time period in question, he and Penister "were kind of – still on the outs, kind of, but that he would visit the home two to three days a

week" and that he also financially supported the children. *Id.* at 15.

Trial counsel also testified that he had talked to Penister regarding when and how often Edmond was at the apartment—and, during this testimony, he returned to what Edmond had told him about this:

> Q: And didn't she tell you Mr. Edmond would stay there?
>
> A: Yeah, that he would visit two days a week, two or three days a week.
>
> Q: *And he would spend the night?*
>
> A: *Some nights he spent the night. Sometimes he spent the night, sometimes he didn't. And if I might, Mr. Edmond said that as well; said sometimes he spent the night, sometimes he didn't.*

Id. at 16-17 (emphasis added).

On cross-examination by the prosecutor, trial counsel stated that Penister told him that at the time of the search, Edmond was not living at the apartment because they had had a dispute. *Id.* at 37-38. Counsel also testified that neither Edmond nor Penister had told him that he had a key to the apartment "at the time the search occurred." *Id.* at 38.

Counsel also obtained via discovery a police report relating that Penister told the police that Edmond had lived with her at the apartment for over two years. *Id.*

at 18.[1] Counsel said, however, that he did not find this persuasive, based on what he characterized as Edmond's "adamant" statements that "he didn't live at the apartment." *Id.* at 19.

Via discovery, counsel received from the government documents that included Edmond's checkbook, which was recovered at the 736 N. Ridgeway apartment during the search. *Id.* at 22. Also recovered during the search was a receipt dated April 19, 2010, bearing Edmond's name and listing 736 N. Ridgeway as his address. *Id.* at 23-24. The police also recovered from the apartment a receipt for Edmond's purchase of a vehicle from a third party and a certificate attesting that Edmond had completed a phase of the Cook County "impact incarceration" program. *Id.* at 24-26. The government relied on this evidence at trial as proof of Edmond's residence at the apartment.

> Counsel testified that he did not file a motion to suppress because I believed that he didn't live [at the apartment] based on what he told me. When we looked at the police reports in addition to the complaint, there was no evidence that he lived there. And he told us that at the time, he and Ms. Penister, Antonio Penister, were not seeing each other. They were kind of off and on at that time, the relationship.

Id. at 14. More specifically:

---

[1] Counsel later obtained via discovery a memorandum of a federal agent's interview with Penister in September 2012, in which she stated that Edmond "lived" in the apartment with her and her children approximately three or four days per week. *See* Def.'s Mem., Ex. F. at 1.

> Q: And was the reason for that because you didn't believe Mr. Edmond had standing to challenge the search warrant?
>
> A: Based on what he told us, that's correct, we didn't believe – *we didn't believe he lived there, and he told us he didn't live there*.

Id. at 15 (emphasis added).

The Court asked counsel whether he had contemplated the possibility of establishing Edmond's standing by means other than his testimony, specifically, by relying on other evidence obtained in discovery. Counsel said that in his experience, "that would not have gotten us a hearing." *Id.* at 54.[2]

When asked by the Court whether he believed, aside from the standing issue, that there was a meritorious basis for suppression of the evidence obtained from the search, counsel stated the following:

> THE WITNESS: I don't think so, but to be frank, your Honor we – after our discussions with Mr. Edmond, I guess it's easier now to get past the standing issue. I view and always looked at the reports and the suppression, and my thinking about the suppression issue was always informed by what Mr. Edmond told us, and so we never believed we had standing.
>
> THE COURT: Okay. But put aside the standing issue. What would have been the issue in the

---

[2] The Court finds this questionable, but it need not address the point given its decision on the reasonableness of counsel's view of the merits of standing issue.

> motion to suppress if you had filed it? In other words, would it have been that there wasn't enough in there to show probable cause, or was there some reason to believe that there was false information given to the judge who issued the warrant, or what would it have been?
>
> THE WITNESS: Your Honor, I never –
>
> THE COURT: Didn't get to that point.
>
> THE WITNESS: I didn't get to that point.

Id. at 51-52.

Discussion

A defense attorney's failure to file a motion to suppress evidence constitutes ineffective assistance of counsel if the decision not to file the motion was objectively unreasonable and the attorney's client was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88, 693 (1984); *Gentry v. Sevier*, 597 F.3d 838, 851 (7th Cir. 2010). As indicated earlier, the June 16, 2016 evidentiary hearing was limited to the issue of objective unreasonableness. If counsel's decision not to file the motion was based on a misunderstanding of the law, then it was objectively unreasonable. *See Gardner v. United States*, 680 F.3d 1006, 1012 (7th Cir. 2012); *Johnson v. United States*, 604 F.3d 1016, 1019 (7th Cir. 2010).

Trial counsel testified that he determined not to file a motion to suppress based on Edmond's statements to him that he "did not live at" the apartment at the time of the search and other evidence to the same effect. The law, however, does not require a person to "live at" a

particular premises in order to have standing to challenge a search of it. That has been clear since at least 1990, when the Supreme Court decided *Minnesota v. Olson*, 495 U.S. 91 (1990). In that case, the Court debunked "the mistaken premise that a place must be one's 'home' in order for one to have a legitimate expectation of privacy there," *id.* at 96, and it concluded that the defendant's status "as an overnight guest is alone enough to show that he had an expectation of privacy in the home" that was reasonable and protected under the Fourth Amendment. *Id.* at 96-97. The court stated: "From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Id.* at 99. And there was nothing particularly new or novel about *Olson*. Thirty years earlier, in *Jones v. United States*, 362 U.S. 257 (1960), a defendant who had a key to a friend's apartment, had a change of clothes there, and was permitted to use it "as a friend" but had only slept there "maybe a night" was held to have standing to challenge a search of the apartment. *Id.* at 259, 267. In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court reaffirmed that *Jones* established "that a person can have a legally sufficient interest *in a place other than his own home* so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." *Id.* at 141-42.

To be sure, the fact that a person may have stayed in a home at some point is not always enough to give rise to a reasonable expectation of privacy protected by the Fourth Amendment. This is reflected in the cases on which the government relies in its post-hearing

memorandum. For example, in *United States v. Battle*, 637 F.3d 44 (1st Cir. 2011), the court concluded that the former boyfriend of an apartment dweller did not have a protectable expectation of privacy in the apartment after the apartment dweller had "told [him] to leave her house and not come back" after he confronted her with a gun. *Id.* at 46. The court said that "[a] defendant lacks a legitimate expectation of privacy in a place . . . when he does not have permission to be present," which was the case given that he had been told to leave and not return. *Id.* at 49. Similarly, in *United States v. Knutson*, No. 03-CR-181-8, 2004 WL 635571 (W.D. Wis. Mar. 4, 2004), the defendant lacked standing to challenge a search because "his tenure as [a] houseguest had ended weeks before the agents visited," when he was jailed. *Id.* at *2. Finally, in *United States v. Hernandez*, No. 05 CR 485-6, 2006 WL 200513 (N.D. Ill. Jan. 20, 2006), the defendant alleged only that he had, on occasion, stayed overnight at the apartment that was the subject of a search. This, the court concluded, was insufficient to give him a legitimate expectation of privacy. *Id.* at *3.

This case, however, is nothing like those cited by the government. There is no evidence that Penister had kicked Edmond out or barred him from the apartment. Indeed, the evidence is to the contrary. Defense counsel testified that Penister had told him that as of the date of the search, even though she and Edmond were "on the outs, kind of," he still came to the apartment two or three days per week, and "[s]ome nights he spent the night." June 16, 2016 Tr. at 15, 16-17. Defense counsel also testified that "Mr. Edmond said that as well; said sometimes he spent the night, sometimes he didn't." *Id.* at 17. In short, Edmond was still a regular guest at

Penister's apartment as of the time of the search, even though he was not staying there each and every night. Unlike the defendants in *Battle*, *Knutson*, and *Hernandez*, he had not stopped coming to and staying at the dwelling that was searched, and he most certainly had not been excluded by Penister. It is also noteworthy that Edmond still had belongings at the apartment, including a checkbook and important documents. In sum, the evidence that counsel had was more than sufficient to establish under *Olson* and its progeny that Edmond had standing to challenge the search. *See, e.g., United States v. Paradis*, 351 F.3d 21, 27 (1st Cir. 2003) (defendant stayed in girlfriend's apartment only when they were not fighting); *United States v. Owen*, 65 F. Supp. 3d 1273, 1281 (N.D. Okla. 2014) (defendant had stayed overnight in girlfriend's house only four times, regularly resided at mother's home, and did not contribute to girlfriend's household expenses); *United States v. Smith*, No. 3:06cr27RV, 2011 WL 4904404, at *7-8 (N.D. Fla. Sept. 23, 2011) (defendant was not living with girlfriend at time of search but had periodically stayed at her home while they were dating); *United States v. Watson*, No. 07-cr-238, 2010 WL 1924474, at *3 (E.D. Pa. May 6, 2010) (defendant was "occasional visitor" to girlfriend's home but paid the bills and had a key and was coming to stay over on the day of the search); *United States v. Romero-Leon*, No. 09-CR-902 WJ, 2010 WL 3613797, at *3 (D.N.M. Apr. 19, 2010) (defendant—like Edmond—had children living at apartment and regularly watched them while their mother was at work).

The government also contends that because Edmond was not physically present at the apartment at the time of the search, he lacked standing. This

argument is unsupported. The Court is unaware of any Supreme Court or Seventh Circuit case—and the government has cited none—suggesting that one's standing to challenge a search depends on physical presence at the time and place of the search. Is the government actually suggesting that if the houseguest in *Olson* had gone out to get coffee, the government could have swooped in and searched his room without a warrant or his consent, on the ground that he wasn't there *at that moment*? A rule to this effect would make no sense. A homeowner has standing to challenge the search of his home even if he does not happen to be there at the time of the search; a houseguest who has standing under *Olson* likewise can challenge a search even if he does not happen to be there at the time.

The record contains no evidence that defense counsel did legal research regarding the standing issue and determined, after analyzing the case law, that Edmond could not establish standing. Indeed, there is no evidence that he did any legal research on the issue at all. Rather, counsel's testimony is that he made his decision not to file a motion to suppress based exclusively on his understanding that Edmond did not "live at" his girlfriend's apartment at the time of the search. That, as the Court has stated, is not the applicable legal standard. Based on the evidence in the record, counsel's decision not to file a motion to suppress was premised on a misunderstanding of the law. The Court finds that counsel's failure to file the motion was objectively unreasonable.[3]

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[3] Defense counsel never considered the merits of a motion to suppress (aside from the threshold standing question), and the government did not argue at the hearing that a motion would have

As indicated earlier, the issue of prejudice under *Strickland* remains for determination. The Court sets the case for a status hearing on August 11, 2016 at 9:30 a.m. Counsel are to be prepared to discuss at that time what evidence will be offered on the issue of prejudice and whether an evidentiary hearing will be necessary, and if so to set a prompt date for the hearing.

Date: August 7, 2016

/s/Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

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otherwise lacked merit, so the Court sees no need or basis to address that issue. Of course, if a motion to suppress would have lacked merit aside from the standing issue, the government may argue that point on the prejudice issue under *Strickland*.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 15 C 3566

[Filed November 9, 2015]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
TRALVIS EDMOND,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Tralvis Edmond is serving an 84 month prison sentence after his conviction on drug and gun charges. Edmond has moved to set aside his conviction and sentence pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel. He also seeks to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 782 to the Sentencing Guidelines. The Court orders further proceedings on Edmond's ineffective assistance of counsel claims but denies his request to modify the sentence.

Background

On May 18, 2010, a confidential informant met with Chicago police officer John Frano and reported that he had purchased heroin from Edmond in a basement apartment at 736 N. Ridgeway in Chicago. The record does not identify the date the informant purchased the heroin from Edmond. Officer Frano applied for and obtained a search warrant for the apartment based on the information from the informant. On May 20, officers of the Chicago Police Department executed the warrant. They recovered two loaded firearms and significant amounts of heroin and crack cocaine packaged for distribution. Edmond was not present for the search, but his girlfriend was. She told officers that she and Edmond lived in the Ridgeway apartment together. She told officers that Edmond had recently purchased the firearms after being robbed.

Officers issued an investigative alert for Edmond in connection with the search of his home. He was eventually arrested after officers identified him during a traffic stop. Officers testified that Edmond made several incriminating statements to them after his arrest. Specifically, he confirmed that he had purchased the guns for protection. Officers also testified that Edmond admitted that he stored the drugs in his home, although he stopped short of admitting he intended to sell them. The government maintains that the officers advised Edmond of his rights under *Miranda v. Arizona* and that he waived them before making the incriminating statements.

Edmond was charged with one count of possessing a firearm after previously having been convicted of a felony, in violation of 18 U.S.C. § 922(g); one count of

possessing heroin with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1); and one count of possessing crack cocaine with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). Before trial, Edmond moved to suppress his post-arrest statements. He submitted an affidavit in which he denied that he made the incriminating statements, denied that the police read him his rights, and denied that he waived his rights. During the suppression hearing, officer Frano testified, and defense counsel cross-examined him. Edmond did not testify, for reasons undisclosed by the record. Judge Blanche Manning, to whom the case was then assigned, found officer Frano's testimony credible and denied Edmond's motion to suppress based on that testimony.

At trial before the undersigned judge, the government called as witnesses the officers who carried out the search of the apartment, officer Frano, a chemist, and a drug expert. Edmond exercised his right not to testify. The jury convicted Edmond on the felon-in-possession and heroin charges and acquitted him on the crack cocaine charge. At sentencing, the Court imposed an obstruction of justice enhancement based on a finding that Edmond had knowingly made false statements in the affidavit he filed to obtain a hearing on his motion to suppress, reasoning that if officer Frano's testimony that he gave *Miranda* warnings and Edmond had waived them was credible as Judge Manning had found, then the corresponding assertions in Edmond's affidavit had to be false, and knowingly so. The Court departed from Edmond's applicable Sentencing Guideline range after finding that a sentence within the range specified by the career offender guidelines would be unjustly excessive due the

nature of Edmond's prior offenses and the relatively light sentences he had received for them. The Court ultimately imposed an 84 month prison sentence. Edmond appealed his conviction, but his appeal was unsuccessful. *See United States v. Edmond*, 560 F. App'x 580 (7th Cir. 2014).

Discussion

Edmond asks the Court to vacate his conviction and sentence based on ineffective assistance of counsel and alternatively to modify the sentence based on a later, retroactively-applicable amendment to the Sentencing Guidelines. The Court will address the ineffective assistance claims first. To sustain a claim of ineffective assistance of counsel, a defendant must establish that his attorney's performance fell below an objective level of reasonableness and he was prejudiced by the attorney's error. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Edmond bases his ineffective assistance claims on counsel's failure to challenge the May 2010 search warrant and counsel's failure to call him to testify at the hearing on the motion to suppress the post-arrest statement. Because Edmond is a *pro se* litigant, the Court construes his motion liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

1. Search warrant

Edmond argues that counsel's decision not to challenge the search warrant for lack of probable cause amounted to ineffective assistance. The affidavit submitted to obtain the warrant said (among other things) that the applicant, officer Frano, had met with the informant on May 18, 2010. The affidavit stated that on that date, the informant told Frano that at

some prior but unspecified date, he was at Edmond's residence at 736 N. Ridgeway and observed him handling significant quantities of narcotics packaged for sale, some of which the informant purchased. The affidavit further stated that on May 18, Frano drove the informant past 736 N. Ridgeway, and the informant pointed out the basement apartment as the location where he had purchased the narcotics from Edmond. *See* Def.'s Mot., Ex. 1. Edmond argues that given the absence of a date when the informant claimed to have seen this activity, the warrant was subject to challenge on the ground that the information was stale and thus did not establish probable cause.

A defendant asserting a Fourth Amendment violation as the basis for an ineffective assistance of counsel claim must establish "that his Fourth Amendment argument is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence . . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Edmonds contends that a successful challenge would have resulted in suppression of evidence that was crucial to his conviction on the gun and heroin charges.

In assessing a claim of ineffective assistance, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In particular, an attorney is not required to "pursue arguments that are clearly destined to prove unsuccessful." *United States v. Lawson*, 947 F.2d 849, 853 (7th Cir. 1991).

The government argues that a challenge to the warrant would have had no reasonable chance of

success. The Court does not agree, at least on the record as it now stands. The government seeks to draw an inference, based on the frequency with which officer Frano met with the informant and the date of the meeting in question, regarding when the informant likely had seen the activity cited in application. This argument is speculative, to say the least. Based on the warrant application alone, no decent inference may be drawn regarding when the informant had been in the 736 N. Ridgeway apartment. For this reason, the Court is unable to say at this juncture that a staleness challenge would have lacked merit.

Turning to the reasonableness aspect of the *Strickland* analysis, the government argues that counsel could have had good reason not to pursue a challenge to the warrant. Edmond's defense at trial was that he was only rarely at the apartment and that the evidence did not establish beyond a reasonable doubt that he possessed the firearm or narcotics (a quantity of heroin and a quantity of crack cocaine). The government argues that to establish his standing to challenge the search of the Ridgeway apartment, Edmond would have had to offer evidence connecting him with the apartment. Such evidence, the government says, could have been used to strengthen the government's contention at trial regarding possession of the firearm and narcotics.

The government's focus on the issue of Edmond's standing has a basis in the record. Edmond states in his section 2255 motion that counsel told him he lacked standing to challenge the warrant given his contention that the firearms and narcotics did not belong to him and the fact that he was not present during the search.

See Def.'s Mot. at 4 & Ex. 2 (Edmond Affid.) ¶ 1. In challenging counsel's advice, Edmond says that he told counsel he had a key to the apartment, gave the owner a deposit for the apartment, and shared the rent and bills for the apartment. *Id.* at 6 & Ex. 2 ¶ 4. He says that this evidence would have provided a basis for standing and that counsel misunderstood the law.

The government acknowledges that any testimony Edmond offered in support of a motion to suppress could not have been used against him at trial. *See Simmons v. United States*, 390 U.S. 377, 394 (1968). It contends, however, that the evidence Edmond cites would have provided leads that the government could have used at trial to buttress its contention that he possessed the firearms and narcotics found in the apartment. In the abstract, this might supply a reasonable strategic basis for defense counsel to forego a challenge to the warrant. But for all the Court knows, the government already had this evidence prior to trial, and if so the facts Edmond cites would not have been new leads. The government does not attempt to show otherwise. And the Court cannot rule out the possibility that the government had such evidence from a source other than Edmond, namely his girlfriend Antonia Penister, who lived full time at the apartment. It is likely that the government interviewed Penister at some point, seeing as how it represented at trial that it might call her as a rebuttal witness. If the information the government cites was already in its possession via Penister or some other witness, and if defense counsel was aware of this via discovery, than the strategic basis the government hypothesizes for not challenging the warrant disappears.

In sum, on the present record, the Court cannot say that Edmond's ineffective assistance claim regarding the failure to challenge the search warrant is legally or factually infirm. Further development of the record, possibly including an evidentiary hearing, is required.

2. Suppression hearing

Edmond's second ineffective assistance of counsel claim concerns the hearing on the motion to suppress the post-arrest statements. Edmond argues that counsel's decision not to call him to testify during the hearing was unreasonable and prejudicial. Edmond continues to maintain that the police failed to give him *Miranda* warnings, he did not waive his rights, and he did not make incriminating statements. Edmond argues that trial counsel's decision to rely exclusively on his cross-examination of the testifying police officer was doomed to fail and that the only chance of success on the motion to suppress was to call Edmond to testify.

In response, the government argues that defense counsel acted reasonably because calling Edmond would have been risky. Specifically, the government says that

> [t]he defendant—who had a strong motive to lie and prior convictions with which he could have been impeached—might have weakened his case through his testimony. Cross-examination might have revealed inconsistencies in defendant's account of what happened, or defendant might have made admissions helpful to the government's evidence that he knowingly waived his *Miranda* rights. Putting defendant on the

> stand would have put defendant's credibility front-and-center at a hearing where the government had the burden of proof and the defense attorney had other avenues available to attack that proof.

Gov't's Resp. at 22. On the present record, however, the government's argument about what might have happened if Edmond had testified at the hearing is entirely speculative, as is the proposition that this is why counsel did not call Edmond to testify at the hearing.

The government also argues that counsel's decision not to call Edmond to testify was not prejudicial because Edmond cannot show that his testimony would have made a difference in the outcome of the motion to suppress. The government's argument is premised on Judge Manning's finding that officer Frano was credible: it contends that if Edmond's affidavit was not persuasive in refuting Frano, there is no reason to believe that Edmond's testimony would have been persuasive. *See* Gov't's Resp. at 24. This argument does not hold water. Judge Manning's order does not suggest that she considered Edmond's affidavit in the course of determining that officer Frano was credible. *See* Case No. 11 CR 378, dkt. no. 33, Order of Jan. 9, 2012. Nor could the judge have done so, in view of the fact that there was an evidentiary hearing at which only Frano testified, a point the judge made in her ruling. *See id.* at 1. The ruling referenced Edmond's affidavit, but it did so only in identifying the issues raised in the motion, *see id.*—the only way that Judge Manning appropriately could have considered the affidavit.

Because Edmond did not testify, the government's contention that his testimony would not have swayed things is speculative. The government ultimately might prevail on this point, but the Court does not believe that the issue can be determined without a hearing.

3. Sentencing

Edmond also argues that the Court should reduce his sentence under 18 U.S.C. § 3582(c)(2) based on Amendment 782 to the Sentencing Guidelines, which retroactively lowered the base offense level for most drug crimes. As the government argues, a section 2255 motion is not the appropriate mechanism to bring this type of claim, because a later change in the offense level does not render Edmond's sentence illegal. But because Edmond is acting *pro se*, the Court will address the merits of his request.

The short answer to Edmond's argument about the effect of Amendment 782 is that it does not affect the offense level in his case. The reason is that at sentencing, the Court determined Edmond's offense level based on the career offender guideline, not the drug quantity guideline. *See* Case No. 11 CR 378, dkt. no. 105, Mar. 15, 2013 Tr. 8 (expressly finding Edmond's criminal history category to be VI and his offense level to be 32 based on the career offender guideline). Later in the sentencing hearing, when discussing the factors under 18 U.S.C. § 3553(a), the Court determined that a sentence within the range called for by the career offender guideline would have been far greater than necessary and that the guideline did not fit Edmond's situation given the light sentences on his prior crimes. *See* Mar. 15, 2013 Tr. 26-27. But this does not change the fact that Edmond's offense

level was determined based on his career offender status. Edmond argues that he was not sentenced under the career offender guideline, but the record reflects that he, quite simply, is wrong about this.

Edmond spends considerable time in the third section of his motion discussing the applicability of *United States v. Guyton*, 636 F.3d 316 (7th Cir. 2011). *See* Def.'s Mot. 20-21. In *Guyton*, the Seventh Circuit left open the question of whether a defendant's applicable guideline range for purposes of a motion for sentence reduction is considered to have been determined before or after a downward departure under Guideline 4A1.3 for an overstatement of criminal history. *See Guyton*, 636 F.3d at 319. This, however, is beside the point, because the Court did not rely on Guideline 4A1.3 in giving Edmond a below-range sentence. Rather, the Court relied on 18 U.S.C. § 3553(a), concluding that a sentence within the advisory range under the career offender guideline would be unjust and unduly excessive given the nature of Edmond's prior offenses and the types of sentences imposed for those offenses.

For these reasons, Amendment 782 does not entitle Edmond to a sentence reduction, because it does not reduce his Guidelines offense level. *See United States v. Forman*, 553 F.3d 585, 589-90 (7th Cir. 2009).

Conclusion

For the foregoing reasons, the Court denies defendant's request to modify his sentence but declines to dismiss his section 2255 motion. The Court will appoint counsel to represent Edmond on the motion. A status hearing is set for December 10, 2015 at 9:30 a.m.

/s/Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: November 9, 2015

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 17 2734

[Filed October 4, 2018]

TRALVIS EDMOND, *Petitioner Appellant*,	)
v.	)
UNITED STATES OF AMERICA, *Respondent Appellee*.	)

Before

KENNETH F. RIPPLE, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:15 cv 03566

Matthew F. Kennelly, *Judge*.

O R D E R

Upon consideration of Petitioner-Appellant's petition for rehearing with suggestion of rehearing en banc, filed on September 17, 2018, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition.[*]

IT IS ORDERED that the petition for rehearing with suggestion of rehearing en banc is hereby **DENIED**.

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[*] Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

APPENDIX H

COURT BRANCH COURT DATE

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
(3-81) CCMC-1-219

STATE OF ILLINOIS	**THE CIRCUIT COURT**
COUNTY OF COOK	**OF COOK COUNTY**

COMPLAINT FOR SEARCH WARRANT

I, P.O. JOHN FRANO #11772, Chicago Police Department, Area 5 Gun Team, Complainant, now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search:

Edmond, Tralvis E. a male black, DOB: [redacted]1988, 6'02", 200 lbs, IR # 1705446.

and the premises:

736 N Ridgeway basement apartment of a two unit building located in Chicago, Cook County, Illinois

and seize the following instruments, articles and things:

Heroin, any documents showing proof of residency, any paraphernalia used in the weighing, cutting or mixing, of illegal drugs, any money, any records detailing illegal drug transactions

which have been used in the commission of, or which constitute evidence of the offense of:

720 ILCS 570/402, Unlawful Possession of a Controlled Substance.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and premises set forth above:

The following facts are as follows: I, P.O. John Frano # 11772 have been a Chicago police officer for the over 9 years and have made over 1000 narcotics related arrests. On the 18 may 2010 I had the opportunity to speak with a Registered Confidential Informant who R/O will refer to as RCI. R/O has known this RCI for the past 5 years during which time RCI has provided and been a reliable source of information concerning narcotics activities. On over to different occasions in the past two months R/O has acted upon the information provided by this RCI and on these occasions R/O has recovered illegal narcotics. From every occasion R/O made an arrest. Recovered narcotics from RCI information was submitted to the Illinois State Police crime lab for testing and analysis. On these occasions the crime lab found the presence of a controlled substance in items submitted.

On 18 May 2010 RCI related to R/O that RCI was at the residence of 736 N Ridgeway and in the presence of Edmond, Tralvis E. in the basement apartment. RCI related to R/O that RCI was in the rear of the apartment in an area with a bed. RCI related to R/O that Edmond, Tralvis E. walked over to the bed, pushed the mattress away from the wall and pulled

from under the bed a shoe box. RCI related to R/O that Edmond, Tralvis E. then opened the shoe box at which point RCI observed 20-30 golf ball sized clear plastic bags filled to the top of the shoe box. RCI related to R/O that each golf ball sized clear plastic bag had between 10 and 13 zip lock bags containing suspect herein.

Edmond, Tralvis E. then took one of the golf ball sized plastic bags and retrieved a zip lock bag of suspect heroin. Edmond, Tralvis E. then sold an amount of heroin to RCI for an amount of money. RCI related to R/O that Edmond, Tralvis E. then placed the golf ball sized plastic bag back into the shoe box and placed the shoe box back under the bed and pushed the bed back up against the wall. RCI moments later then left the residence alone and ingested the heroin RCI bought from Edmond, Tralvis E. RCI received the same euphoric high RCI has received in the past from ingesting heroin.

R/O performed a search of Edmond, Tralvis E. on the Chicago Police Departments Data Warehouse and was able to locate a picture of Edmond, Tralvis E. from a prior arrest. RCI positively identified the picture of Edmond, Tralvis E. as the same individual who sold RCI an amount of heroin in the basement apartment of 736 N Ridgeway located in Chicago Cook County IL.

On 19 May 2010, I, P.O. John Frano #11772, drove RCI past the residence of 736 N Ridgeway, Chicago, Cook County, IL. RCI then identified and pointed to the two unit building with the numbers 736 on the front as the building where RCI was with Edmond, Tralvis E. in the basement apartment when Edmond, Tralvis E. sold RCI an amount of heroin for an amount of money.

I, P.O. John Frano #11772, based on the above information, believes that probable cause exists to search 736 N Ridgeway basement apartment of a two unit building located in Chicago, Cook County, Illinois and Edmond, Tralvis E a male black, DOB: [redacted] 1988, 6'02", 200 lbs, IR #1705446.

COMPLAINANT

Subscribed and sworn to before me on 5-19, 2010.

/s/ 1939
JUDGE Judge's No.

[Decertification #85218 / Approved ASA Peter O'Mara 10SW7111 5/19/10 20:55hrs. /s/ #309]

APPENDIX I

(3-81) CCMC-1-220

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois to all peace officers of the state

SEARCH WARRANT

On this day, P.O. John Frano # 11772, Chicago Police Department, Area 5 Gun Team, complainant, has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search:

Edmond, Tralvis E. a male black, DOB: [redacted] 1988, 6'02", 200 lbs, IR # 1705446.

and the premises:

736 N Ridgeway basement apartment of a two unit building located in Chicago, Cook County, Illinois

and seize the following instruments, articles and things:

Heroin, any documents showing proof of residency, any paraphernalia used in the weighing, cutting or mixing, of illegal drugs, any money, any records detailing illegal drug transactions

which have been used in the commission of, or which constitute evidence of the offense of:

720 ILCS 570/402 Unlawful Possession of a Controlled Substance

I further command that a return of anything so seized shall be made without necessary delay before me or before:

Judge or before any court of competent jurisdiction

/s/ 1939
JUDGE Judge's No.

5-19-10 9:46 PM

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 15 C 3566

Hon. Matthew F. Kennelly

[Filed March 24, 2016]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
TRALVIS EDMOND	)
	)

Government's Response to
Defendant Tralvis Edmond's
First Set of Requests for Admissions

The United States of America, by its attorney, Zachary T. Fardon, United States Attorney for the Northern District of Illinois, responds to Defendant's first set of requests for admissions as follows:

1. Admit that Officer Frano did not present the Judge with any evidence other than the Complaint for Search Warrant when Officer Frano applied for the Search Warrant.

Answer: Admit.

2. Admit that Officer Frano did not present the Confidential Informant to the Judge for questioning prior to obtaining the Search Warrant.

Answer: Admit.

3. Admit that prior to applying for the Search Warrant, Officer Frano did not corroborate the Confidential Informant's statements that narcotics were present in Ridgeway.

Answer: Deny. The Complaint for Search Warrant sets forth efforts by Officer Frano to corroborate the Confidential Informant's statements.

4. Admit that prior to applying for the Search Warrant, Officer Frano did not attempt to perform a controlled purchase of narcotics from the Defendant.

Answer: Admit.

5. Admit that the Complaint for Search Warrant does not disclose the date when the Confidential Informant allegedly purchased narcotics from the Defendant.

Answer: Deny. The Complaint for Search Warrant speaks for itself.

Respectfully submitted,
ZACHARY T. FARDON
United States Attorney

By: *s/Rajnath Laud*
RAJNATH LAUD
Assistant United States Attorney
219 South Dearborn Street

Chicago, Illinois 60604
(312) 469-6306

Dated: March 24, 2016