No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Damon O'Neil,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

AO 245B (Rev. 09/08) Judgment in a Criminal Case
v1 Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
v.
Damon O'Neil

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:11-cr-00017-001

USM Number: 12744-030

John L. Lane
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. Count One of the Indictment filed February 16, 2011 (lesser included).

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(b)(1)(B), 841(b)(1)(A), 851, 846	Conspiracy to Distribute at Least 28 Grams of Cocaine Base	01/23/2011	One

☐ See additional count(s) on page 2

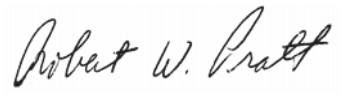
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 10, 2012
Date of Imposition of Judgment



Signature of Judge

Robert W. Pratt, United States District Judge
Name of Judge Title of Judge

May 10, 2012
Date

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Life imprisonment on Count One of the Indictment filed February 16, 2011.

☑ The court makes the following recommendations to the Bureau of Prisons:

That Defendant be placed in either FCI Oxford or FCI Pekin

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Ten years on Count One of the Indictment filed February 16, 2011.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation office;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcemnt agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, the defendant shall receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. The defendant shall not use alcohol and/or other intoxicants during the course of supervision.

The defendant shall submit to a search of his person, residence, adjacent structures, office or vehicle, conducted by a U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the residence or vehicle may be subject to searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

The defendant shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages.

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAMON O'NEIL,	*	
Movant,	*	4:16-cv-00126-RP
	*	3:11-cr-00017-RP-TJS-1
v.	*	
UNITED STATES OF AMERCA,	*	
	*	ORDER
Respondent.	*	

Damon O'Neil brings this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. He challenges his conviction and sentence in *United States v. O'Neil*, 3:11-cr-00017-RP (S. D. Iowa) (Crim. Case).

I. BACKGROUND

O'Neil was convicted by a jury of conspiracy to distribute twenty-eight grams or more, but less than 280 grams, of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. Crim. Case, ECF No. 69. The government filed two notices of enhancement under 21 U.S.C. § 851, identifying two prior felony drug convictions. Crim. Case, ECF No. 44. On May 10, 2012, the Court sentenced O'Neil to life in prison, finding by a preponderance of the evidence that he was responsible for 2.5 kilograms of crack cocaine, triggering a mandatory life sentence because of O'Neil's prior felony convictions under 21 U.S.C. §§ 841(b)(1)(A) and 851. Crim. Case, ECF No. 106. O'Neil appealed, and the Eighth Circuit initially affirmed. *See United States v. O'Neil*, 496 F. App'x 694 (8th Cir. 2013). O'Neil petitioned for a writ of certiorari, and the Supreme Court granted certiorari, vacated the Eighth Circuit's opinion, and remanded to the Eighth Circuit for further consideration following its decision in *Alleyne v.*

United States, 570 U.S. 99 (2013). In response, the Eighth Circuit vacated O'Neil's sentence and remanded to the district court for resentencing following the *Alleyne*, which prevented the Court from enhancing O'Neil's mandatory minimum sentence beyond that supported by the jury's verdict. *See United States v. O'Neil*, 549 F. App'x. 595 (8th Cir. 2014). On remand, the Court sentenced O'Neil to 180 months imprisonment and eight years of supervised release. This constituted a substantial downward variance from O'Neil's advisory Guidelines range, which was 360 months to life in prison. Crim. Case, ECF Nos. 145 and 146. O'Neil again appealed, and the Eighth Circuit affirmed. *United States v. O'Neil*, 595 F. App'x. 665 (8th Cir. 2015). O'Neil now brings this § 2255 motion.

II. STANDARD OF REVIEW

A federal inmate may file a motion under 28 U.S.C. § 2255 for release "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . ." 28 U.S.C. § 2255(a). That statute gives federal prisoners a remedy identical in scope to federal habeas corpus. *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011). The scope of remedy is limited; not all claimed errors in conviction and sentencing provide a basis for relief. *Id*. Beyond jurisdictional and constitutional errors, the permissible scope of a § 2255 collateral attack on a final conviction or sentence is "severely limited." *Id*. An error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice; claims regarding misapplication of the United States Sentencing Guidelines generally do not meet the standard for § 2255 relief. *Id.*

A movant "is entitled to an evidentiary hearing on a section 2255 motion unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985) (citing 28 U.S.C. § 2255); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) ("No hearing is required, however, where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.") (quoting *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008)). The files and record show that O'Neil is not entitled to § 2255 relief, and no hearing is needed.

To state a claim for ineffective assistance of counsel, the convicted defendant must show that his counsel's efforts fell below an objective standard of reasonableness at the time of the conduct, and prejudice such that "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

III. ANALYSIS

O'Neil raises seven claims alleging ineffective assistance of counsel. They are: (1) that counsel should have filed a motion to suppress the evidence of the search because the search warrant in this case contained statements made knowingly or with reckless disregard for their truth, in violation of *Franks v. Delaware*, 438 U.S. 154 (1978); (2) that counsel was ineffective in not filing a motion to suppress the search warrant as lacking probable cause; (3) that counsel was ineffective in not filing a motion to suppress the search of two cell phones; (4) that counsel was ineffective in not filing a motion to suppress statements made by O'Neil; (5) that counsel failed to investigate or call defense witnesses during trial; (6) that counsel failed, at sentencing, to challenge O'Neil's status as a career offender; and (7) that the Court failed to identify with

particularity the facts that supported an enhancement for obstruction of justice. The Court addresses each in turn.

First, O'Neil was not prejudiced by his counsel's failure to seek a *Franks* hearing and the suppression of evidence from the search warrant based on the *Franks* doctrine. To establish a *Franks* violation, the movant must show both that the search warrant affidavit "contain[ed] false or omitted statements made knowingly and intentionally or with reckless disregard for the truth" and "that the remaining content is insufficient to establish probable cause." *United States v. Reinholz*, 245 F.3d 765, 774 (8th Cir. 2001), *citing Franks*, 438 U.S. at 171. "[T]he affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *United States v. McIntyre*, 646 F.3d 107, 1114 (8th Cir. 2011). O'Neil argues, and the Government does not dispute, that the search warrant affidavit was false because it alleged that a confidential informant purchased crack cocaine from "Melissa Taylor," O'Neil's wife and the occupant of the apartment the police later searched where they arrested O'Neil. In fact, the woman the confidential informant purchased crack cocaine from was Aaren Verrett, *not* Melissa Taylor.[1] *See, e.g.*, ECF No. 28 Ex. 1.

Further, the record is clear that Detective Canas willfully misidentified the participant of the controlled buy as Taylor instead of Verrett in the affidavit,[2] despite "obvious reasons to doubt the accuracy of the information he reported." *McIntyre*, 646 F.3d at 1114. At trial, Detective Canas testified under oath that the confidential informant told him, before the controlled buy, that "Aaren" was the contact. Crim. Case, ECF No. 83 at 21, 23. Further, Detective Canas

[1] The trial record is also clear that Verrett was the woman who participated in the controlled buy.
[2] The record is less clear as to why Detective Canas did so. The search warrant, however, identified "Melissa Taylor" as the name on utility records for the apartment the police wanted to search. It seems highly probable that the change in the affidavit was in order to shore up the causal link between the controlled buy on the street and the apartment.

testified under oath that, after the controlled buy, the confidential informant told him that the other participant was "Ms. Verrett." *Id.* at 26. Detective Canas admitted he did not personally know whether the woman who participated in the controlled buy was Aaren Verrett or Melissa Taylor. *Id.* at 33. And Detective Canas testified that, despite being told it was Aaren Verrett at the controlled buy, he simply put in Melissa Taylor's name on the search warrant because he "thought possibly that people do not give their real names" but "use nicknames often." *Id.* at 32-33. Nonetheless, Detective Canas made no effort to clarify who, exactly, had participated in the controlled buy before applying for the search warrant. The record shows no reason to believe that Melissa Taylor used the name Aaren Verrett. This disregard for the truth is further evidenced by the fact that, *after* the search warrant was executed, officers checked the cell phone number they used to set up the earlier controlled buy and identified it as Verrett's, not Taylor's. *See* ECF No. 28 Exh. 1. The search warrant was obtained on January 16, 2011, a few days after the controlled buy, but the search was not conducted until a week later on January 23, 2011. Detective Canas thus had ample time to verify the identity of the participant in the controlled buy and the means to do so, but did not. To so cavalierly replace one name with another, in the absence of any reason to connect the two names, creates obvious reason for doubt rising to the level of reckless disregard for the truth in violation of the *Franks* doctrine.

Unfortunately for O'Neil, for a *Franks* violation to trigger the suppression of evidence from a search the moving party must also show that the warrant, absent the false statements, is void of probable cause. *Reinholz*, 245 F.3d at 774. That burden is not met here. The false information relates to the identity of the woman who participated in the controlled buy, not the fact of the controlled buy itself, and so the Court reviews the search warrant application for

probable cause as if it described a controlled buy with an unidentified woman. *See, e.g., id.* at 775 ("We remedy a *Franks* misrepresentation by deleting the false statements.").

With the false information about identity omitted, the warrant establishes the following facts: (1) law enforcement officers observed a controlled buy with a confidential informant on the 2000 block of W. 3rd Street; (2) surveillance observed an unidentified woman exit the rear of the apartment building; (3) the unidentified woman crossed the street and participated in a controlled buy with the confidential informant, where money was exchanged for crack cocaine; and (4) law enforcement officers observed the unidentified woman return to the front of the same apartment building, enter the front door, and then enter the right side apartment, number 1. Police then sought a search warrant for apartment number 1 based on this transaction. "Probable cause to issue a search warrant exists if, in light of the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Shockley*, 816 F.3d 1058, 1061 (8th Cir. 2016). Because, even without the false information, officers observed the participant of a controlled buy leave and then re-enter the apartment to be searched, there was a fair probability further evidence would be discovered and the warrant was not void of probable cause. *See United States v. Wells*, 347 F.3d 280, 286 (8th Cir. 2003) (upholding a search warrant where officers observed a controlled buy and had reason to connect the participant to the searched location).

The Court is concerned that a detective, in a sworn affidavit, would substitute the name provided by an informant for another based on unsubstantiated belief with no effort to clarify the actual identity of the person being referenced. Similarly, the better practice for the defense lawyer would have been to seek a *Franks* hearing in light of Detective Canas' trial testimony. Nonetheless, the warrant would have retained probable cause absent the false information, and so

a *Franks* hearing would have been ultimately unsuccessful. As such, and despite the Court's concerns, O'Neil's claim of ineffective assistance here must fail for lack of prejudice.

Second, O'Neil's additional challenges to the search warrant fail as well. O'Neil argues that because the magistrate judge did not complete the "endorsement" of the search warrant section stating the reliability of the informant, the warrant is invalid. *See* ECF No. 21, Ex. A at 7. But the magistrate judge signed the bottom of that endorsement page of the application and signed the search warrant itself. *Id.* at 7-10. O'Neil provides no reason to believe the magistrate judge was otherwise unduly influenced or abandoned his judicial role, and the technical and partial failure to complete one part of the form is insufficient to invalidate the warrant. *See United States v. Henderson*, 471 F.3d 935, 937 (8th Cir. 2006) (holding the warrant was not defective when the judge signed the warrant itself but failed to sign another section); *see also Groh v. Ramirez*, 540 U.S. 551, 558 (distinguishing an invalid warrant that "did not describe the items to be seized *at all"* as obviously deficient from one that contained a "technical mistake"). O'Neil also argues that the single controlled buy is insufficient to justify the subsequent search. As previously explained, that may be true for a search warrant with no connection to the controlled buy, but it is not true where officers observed the participant enter the apartment. The search warrant was not lacking probable cause, and the magistrate judge did not abandon the judicial role in signing it.

Third, counsel was not ineffective in failing to file a motion to suppress the search of O'Neil's cell phones. O'Neil relies on *Riley v. California*, 134 S. Ct. 2473 (2014), which is not retroactive and was issued three years after the search here. The Eighth Circuit has made clear in the context of *Riley* that counsel is not ineffective for failing to raise an argument, even a plausible one, that is not yet law under controlling authority of the circuit. *Basham v. United*

States, 811 F.3d 1026, 1029 (8th Cir. 2016). O'Neil contends *Basham* is distinguishable because that case involves a search incident to arrest, while O'Neil was searched pursuant to a search warrant. But the warrant authorized the seizure of phones, and O'Neil points to no evidence suggesting officers knew they were seizing a phone belonging to O'Neil, rather than Melissa Taylor, in an apartment under Taylor's name. Without such evidence, officers would not have known that phones seized inside the apartment were nonetheless outside the scope of the warrant, and the search was in good faith reliance on the warrant. *United States v. Leon*, 468 U.S. 897, 921-22 (1984). Nor is it clear how O'Neil was prejudiced. The trial transcript pages O'Neil points to are largely about cell phone records from the phone company, which law enforcement obtained through subpoena independent of the physical phones themselves. *See* Crim. Case ECF No. 83, pp. 46-53; Crim. Case ECF No. 84, pp. 188-99.

Fourth, counsel was not ineffective in failing to challenge O'Neil's in-custody statements. The record shows that O'Neil was twice mirandized, making trial counsel's determination that a motion to suppress was unlikely to succeed a reasonable one. More importantly, however, while O'Neil implicated himself in over two kilograms of crack cocaine in his statements the jury only returned a verdict form of between twenty-eight and 280 grams of crack cocaine. The jury clearly did not credit O'Neil's confession as to this quantity, a vindication of trial counsel's efforts to discredit the police testimony to that effect (based in part on the unrecorded nature of the alleged confessions). ECF No. 5 at 2. And there was ample independent evidence of a conspiracy to distribute crack cocaine from the testimony of other witnesses, including Aaren Verett and Melissa Taylor, such that the jury need not have credited O'Neil's confession to convict him of conspiracy. O'Neil has not shown how he was prejudiced in a way that would warrant relief, even if he could have prevailed.

Fifth, O'Neil alleges that his trial counsel was ineffective in not meeting with O'Neil more frequently and not investigating or calling additional witnesses at trial. O'Neil does not identify who these witnesses would be, what they would have testified to, or how they might have explained away the drugs found in the apartment or the testimony of other witnesses. Further, O'Neil's trial counsel's strategy was effective—the jury found O'Neil responsible for a greatly reduced crack cocaine amount that ultimately resulted in a much lower sentence. If the jury had found O'Neil responsible for more than 280 grams of crack cocaine, he would not have been entitled to relief under *Alleyne* and he would still be subject to his previously-imposed mandatory life sentence due to his prior drug-related felonies. *See* 21 U.S.C. §§ 841(b)(1)(A) and 851.

Sixth, O'Neil argues his counsel erred in not objecting to his career offender status at sentencing based on his prior Illinois conviction for criminal drug conspiracy. O'Neil contends that his offense of conviction, Illinois criminal drug conspiracy, is overbroad under the categorical approach and does not qualify as a controlled substance offense because it includes conspiracy to commit "an offense set forth in Section 401, Section 402, or Section 407" of the Illinois criminal code. 720 ILCS § 570/405.1(a); *see United States v. Robinson*, 639 F.3d 489, 495 (8th Cir. 2011) (applying the categorical approach to determine whether a prior conviction qualifies as a "controlled substance offense"). Section 402 criminalizes simple possession of a controlled substance, 720 ILCS § 570/402, while the career offender provision's definition of "controlled substance offense" does *not* include simple possession but only possession with intent to "manufacture, import, export, distribute, or dispense" illegal substances. U.S.S.G. § 4B1.2(b). O'Neil is therefore correct to argue that section 402, in covering simple possession, is

overbroad compared to the Guidelines. The Government simply ignores this reality by pointing to a different section of Illinois law in its brief.

O'Neil's argument, however, cannot carry him to the finish line. The teaching of *Mathis v. United States*, upon which O'Neil relies, is to ask whether an offense that can be completed in multiple ways lists "elements in the alternative" to "define multiple crimes" or whether a single element may be completed by "various factual means." 136 S. Ct. 2243, 2249 (2016). "[I]f the statutory alternatives carry different punishments, then under *Apprendi* they must be elements" and not means. *Id.* at 2256. Illinois law explains that the sentence for criminal drug conspiracy is "not less than the minimum nor more than the maximum provided for the offense which is the object of the conspiracy." 720 ILCS § 570/405.1(c). Criminal drug conspiracy thus provides three alternative *elements*, not means, to violate section 405.1; one for each of the different "objects" of the conspiracy. *See* 720 ILCS §§ 570/401 (manufacture or delivery), 402 (simple possession), 407 (enhanced penalties for distributing to minors). When a crime has different elements, the "modified categorical approach" assesses a defendant's career offender status based on the specific elements needed for the prior conviction, not based on all possible elements for different crimes. *Mathis*, 136 S. Ct. at 2256. O'Neil's conviction is therefore overbroad *only* if it was for criminal drug conspiracy to violate section 402. The record reveals that O'Neil was convicted of criminal drug conspiracy to manufacture or deliver a controlled substance, in violation of section 401, which is not overbroad. *See* Crim. Case, ECF No. 44 (identifying the object of O'Neil's criminal drug conspiracy conviction as 720 ILCS § 570/401); Crim. Case, ECF No. 53; Crim. Case ECF No. 146 ¶ 36. O'Neil was therefore properly classified as a career offender at sentencing.

Further, O'Neil was not prejudiced even if there had been error, as any objection to career offender status would have been, and remains, unimportant to his final sentence. At the time of his sentencing on remand, this Court re-affirmed its prior finding that O'Neil was responsible, for sentencing purposes, for 2.5 kilograms of crack cocaine resulting in a Sentencing Guidelines range of 360 months to life. Crim. Case, ECF No. 152 at 9, 12 ("The Court incorporates by reference the findings of the Court made at the initial sentencing" and "I meant to just incorporate my previous finding . . . and I did find 2.5 [kilograms of crack cocaine] at the time of sentencing."). That quantity results in a base offense level of 32, the same today as it was at O'Neil's sentencing. *See* ECF No. 145 at 7. O'Neil's final offense level, after a four-level enhancement for leadership and a two-level enhancement for obstruction of justice, was and is 38. *See id.*; ECF No. 146 ¶¶ 23-31. The Guidelines range for offense level 38 is 360 months to life whether O'Neil is criminal history category VI under the career offender provision, or category V if not, and so O'Neil was not prejudiced.

Seventh, O'Neil argues that the court erred in not removing certain references to intimidating a witness from the PSR after he objected. O'Neil's obstruction of justice enhancement was affirmed on appeal, and the district court cannot displace that ruling now, and the obstruction enhancement was also properly based on Defendant's own testimony at trial that he was not involved in the offense—testimony belied by his conviction. It is not error for a PSR to include disputed paragraphs if the Court does not consider the matter at sentencing. Fed. R. Crim. P. 32(i)(3)(B); *see also United States v. Vega-Martinez*, __ F. App'x. __, 2019 WL 413757 (8th Cir. 2019). The Court also notes that changing the PSR in ways that do not impact O'Neil's sentence appears to be outside the Court's limited authority under § 2255.

III. CONCLUSION

Based on its review, the Court concludes the files and records of this case demonstrate O'Neil is not entitled to a hearing or entitled to any relief on his claims. *See* 28 U.S.C. § 2255; *Franco*, 762 F.3d at 763. **The Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 is denied, and this case is dismissed.** O'Neil's motion for oral argument, ECF No. 22, motion for rehearing on motion for release, ECF No. 35, and motion for appointment of new counsel, ECF No. 36, are DENIED.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the movant. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A certificate of appealability may issue only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is one "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). O'Neil has made a substantial showing of the denial of a constitutional right on his claims. The Court grants a certificate of appealability as to claims one, two, three, four and seven, and denies a certificate of appealability as to claims five and six.

IT IS SO ORDERED.

Dated this 6th day of February, 2019.

Robert W. Pratt

ROBERT W. PRATT, Judge
U.S. DISTRICT COURT

United States Court of Appeals
For the Eighth Circuit

No. 19-1422

Damon O'Neil

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: January 16, 2020
Filed: July 20, 2020

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

SMITH, Chief Judge.

A jury convicted Damon O'Neil of conspiracy to distribute cocaine. *See* 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 846, 851. We affirmed that conviction.[1] In this

[1]The district court originally sentenced O'Neil to life imprisonment, and we affirmed his conviction and sentence. *See United States v. O'Neil*, 496 F. App'x 694,

appeal, he asks us to vacate, set aside, or correct his sentence because his counsel was ineffective. *See* 28 U.S.C. § 2255. We conclude his counsel was not ineffective and affirm the district court.[2]

I. *Background*

In January 2011, a confidential informant told law enforcement that he knew of a female named "Aaren" and a man known as "D" selling drugs out of a specific apartment. The apartment's utilities were registered to Melissa Taylor. The officers set up a controlled buy and had the confidential informant purchase drugs from Aaren. The officers observed a female come from behind the apartment building, make the transaction, and return to the specified apartment. The confidential informant confirmed that the seller was Aaren.

A detective then applied for a search warrant. In the application's affidavit, he substituted Taylor's name for Aaren's. The detective testified that he did so because he did not have a last name for Aaren and assumed Taylor was using a fake name for drug sales. In reality, the two names identified different women. As a result of the switch, the affidavit stated that the confidential informant told police that Taylor operated the distribution center at the apartment and that Taylor sold the drugs during the controlled buy.

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695 (8th Cir. 2013) (per curiam). The Supreme Court vacated O'Neil's conviction in light of *Alleyne v. United States*, 570 U.S. 99 (2013). *See O'Neil v. United States*, 571 U.S. 801 (2013). After remanding, we again affirmed his conviction and the new 180-month sentence. *See United States v. O'Neil*, 595 F. App'x 665, 666 (8th Cir. 2015) (per curiam).

[2]The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

A magistrate judge issued a search warrant for the apartment, which authorized the search of Taylor's phones. During its execution, officers searched two phones that actually belonged to O'Neil. Officers obtained these phones' numbers by calling dispatch, which has caller ID, and received the owner's name and cell phone records from the service provider. The officers also found cocaine base, cash, and a digital scale in the apartment.

O'Neil, who was in the apartment at the time of the search, was arrested and later questioned by police. An officer testified that O'Neil admitted he was a crack dealer and described his operation in detail. At trial, O'Neil testified that he never confessed. O'Neil now claims that he did not waive his *Miranda* rights and that the police questioned him after he asked for an attorney.

O'Neil was convicted of conspiracy to distribute cocaine. After his initial sentence was vacated in light of *Alleyne*, we affirmed the 180-month sentence he received on remand. *See O'Neil*, 595 F. App'x at 665–66. O'Neil then filed this § 2255 habeas petition. *See* 28 U.S.C. § 2255. He raised seven ineffective-assistance-of-counsel claims.

First, O'Neil asserted that his counsel should have requested a *Franks* hearing[3] because the affiant switched Aaren's name with Taylor's. The district court found that the switch constituted a recklessly made false statement. But even with the identifying information omitted, the court found that the remaining allegations—which described the participant of a controlled buy leaving the apartment area, making the purchase, and returning to the specified apartment—created probable cause that criminal evidence was in the apartment. Therefore, the court concluded that any request for a *Franks* hearing would have been meritless, and thus O'Neil's trial counsel was not ineffective.

[3] *See Franks v. Delaware*, 438 U.S. 154 (1978).

Second, O'Neil argued that his counsel erred by not contesting the validity of the search warrant. First, he pointed out the magistrate judge's failure to indicate why he found the informant reliable. The court determined that such technical errors could not render the warrant invalid. Alternatively, O'Neil claimed that the single controlled buy described in the affidavit was not enough to establish probable cause. The court disagreed. Because both arguments lacked merit, the court held that O'Neil's trial counsel was not ineffective for not challenging the warrant.

Third, O'Neil claimed that his counsel provided ineffective assistance by failing to file a motion to suppress evidence related to his cell phones. The district court disagreed because *Riley v. California*, 573 U.S. 373 (2014), which served as the basis of O'Neil's claim, did not apply retroactively to the 2011 search. It also noted that the warrant authorized the seizure of Taylor's cell phones, and the officers who seized O'Neil's phones could have reasonably believed they belonged to Taylor. Finally, the court found that O'Neil had not identified any prejudicial evidence obtained via the search. Therefore, that claim failed as well.

Fourth, O'Neil averred that his counsel was ineffective for not filing a motion to suppress his confession. The district court found that trial counsel's decision not to challenge that evidence was reasonable because the police read O'Neil his *Miranda* rights twice. It also noted that O'Neil did not show prejudice because other evidence, including co-conspirator testimony, established O'Neil's involvement in the conspiracy.

Fifth, O'Neil argued that his counsel was ineffective because he failed to: (1) meet with O'Neil frequently, (2) adequately investigate the case, and (3) call certain unidentified witnesses. The district court found that O'Neil's counsel's trial strategy was not ineffective. The court noted that counsel focused on challenging the drug quantity. The jury appeared to adopt those arguments, as it found that O'Neil was responsible for a lesser amount than the government advocated, which resulted in a

lower sentence. The court also rejected O'Neil's witness argument because he failed to provide the witnesses' names and the substance of their potential testimonies.

Sixth, O'Neil maintained that effective counsel would have challenged his career-offender status. O'Neil was previously convicted for an Illinois controlled-substance offense. *See* 720 Ill. Comp. Stat. § 570/405.1(a). The relevant Illinois statute applies to "offense[s] set forth in Section 401, Section 402, or Section 407." *Id.* The court agreed with O'Neil that Section 402 was likely overbroad. But applying the modified categorical approach, it found that O'Neil's conviction arose out of Section 401, which was not. Therefore, any objection would have been meritless. Further, the court noted that the Guidelines range would have been the same regardless of his career-offender status, so any error was not prejudicial.

Lastly, O'Neil asserted that his counsel was ineffective because he failed to request a specific fact finding at his resentencing. O'Neil received a two-level sentence enhancement because he obstructed justice. O'Neil's counsel objected to some facts in the presentence investigation report (PSR) that indicated he intimidated a witness. However, the allegation was also supported by unobjected-to facts. The sentencing court applied the enhancement without specifying the facts it was relying on. O'Neil claims he was prejudiced because the Bureau of Prisons (BOP) found that the sentencing court adopted the objected-to facts in the PSR and used those facts to deny him early release. The district court found that this argument was outside of the scope of its review: The enhancement was upheld on appeal and a ruling that O'Neil's counsel was ineffective would require displacing that holding. Further, other evidence supported the enhancement and consideration of the BOP decision was outside of the court's authority under 28 U.S.C. § 2255.

In sum, the district court found that O'Neil failed to show that his trial counsel was ineffective. The district court granted O'Neil a certificate of appealability on all of his claims except those regarding the trial-strategy and career-offender issues.[4]

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[4]On appeal, O'Neil again claims that his counsel was ineffective for failing to (1) meet with him, investigate the case, and call certain witnesses; and (2) object to his career-offender status. Because the district court's certificate of appealability does not cover those claims, we do not review those issues. *See Barajas v. United States*, 877 F.3d 378, 380 n.3 (8th Cir. 2017).

Further, the district court recently granted O'Neil's motion for compassionate release. *See United States v. O'Neil*, No. 3:11-CR-00017, 2020 WL 2892236, at *9 (S.D. Iowa June 2, 2020). Thus, his term of imprisonment is expired. Where a § 2255 motion challenges a "term of imprisonment, which has . . . expired," the challenge is moot. *Owen v. United States*, 930 F.3d 989, 990 (8th Cir. 2019). But where "a petitioner, though released from custody, faces sufficient repercussions from his allegedly unlawful punishment, the case is not moot." *Leonard v. Nix*, 55 F.3d 370, 372–73 (8th Cir. 1995). "Collateral consequences are presumed to stem from a criminal conviction even after release." *Id.* at 373; *see also Farris v. United States*, No. 4:15-CV-01728-JAR, 2019 WL 316567, at *2 (E.D. Mo. Jan. 24, 2019) ("To the extent Farris is challenging his sentence, even if the Court were to rule in his favor, such a holding would have no effect . . . . To the extent that Farris is challenging not just his sentence, but also his conviction, the completion of his sentence does not necessarily render his motion moot."). O'Neil's ineffective-assistance-of-counsel claims regarding the search warrant and motions to suppress turn on the validity of his conviction, not the validity of his sentence. Therefore, we presume that those claims bore collateral consequence and are not mooted by his release. But his claim regarding the obstruction-of-justice enhancement is a challenge to his "term of imprisonment" and is therefore moot. *Owen*, 930 F.3d at 990; *see also Blakeney v. Huetter*, 795 F. App'x 493, 494 (8th Cir. 2020) (per curiam) ("A ruling that [O'Neil's] early-release date was improperly [denied] would not affect his current term of supervised release . . . .").

II. *Discussion*

O'Neil reasserts all of his ineffective-assistance-of-counsel claims. "On appeal, we review the district court's factual findings for clear error and the legal question whether those findings amount to ineffective assistance de novo." *Long v. United States*, 875 F.3d 411, 413 (8th Cir. 2017) (cleaned up). Still, "[o]ur review is highly deferential, with a strong presumption that counsel's performance was reasonable." *Love v. United States*, 949 F.3d 406, 409 (8th Cir. 2020).

"The standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.E.2d 674 (1984), provides the framework for evaluating [O'Neil's] ineffective-assistance-of-counsel claim." *Anderson v. United States*, 762 F.3d 787, 792 (8th Cir. 2014). O'Neil "must show that his counsel's performance was deficient and that [he] suffered prejudice as a result" to prove a violation of his Sixth Amendment rights. *Id*.

"Deficient performance is that which falls below the range of competence demanded of attorneys in criminal cases." *Bass v. United States*, 655 F.3d 758, 760 (8th Cir. 2011) (internal quotation omitted). "*Strickland* sets a 'high bar' for unreasonable assistance." *Love*, 949 F.3d at 410 (quoting *Buck v. Davis*, 137 S. Ct. 759, 775 (2017)). Only a performance "outside the wide range of reasonable professional assistance" is constitutionally deficient. *Id.* (internal quotation omitted). "We make every effort to eliminate the distorting effects of hindsight and consider performance from counsel's perspective at the time." *Id.* (internal quotation omitted).

"Prejudice requires the movant to establish 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Bass*, 655 F.3d at 760 (quoting *Strickland*, 446 U.S. at 694). We now turn to O'Neil's claims.

A. Franks *and Probable Cause*

O'Neil argues that his counsel's failure to request a *Franks* hearing rendered his representation ineffective. Alternatively, he avers that his counsel should have argued that there was no probable cause justifying issuance of the warrant.

Under *Franks*, "[a] search warrant may be invalid if the issuing judge's probable cause determination was based on an affidavit containing false or omitted statements made knowingly and intentionally or with reckless disregard for the truth." *United States v. Reinholz*, 245 F.3d 765, 774 (8th Cir. 2001). "To prevail on a *Franks* claim the defendants must show: (1) that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit; and (2) that the affidavit's remaining content is insufficient to establish probable cause." *Id.*

In the search warrant affidavit, the affiant replaced Aaren's name with Taylor's when describing who the confidential informant said sold drugs out of the apartment and who was involved in the controlled buy.[5] The district court determined that the name switch constituted a recklessly made false statement. The government does not dispute that finding here. Instead, the parties focus on whether "the affidavit's remaining content[s] [are] insufficient to establish probable cause." *Reinholz*, 245 F.3d at 774.

[5]O'Neil also argues that the affidavit contained a material omission: It did not indicate that the confidential informant provided information for leniency in his own case. But under our precedent, that omission did not warrant a *Franks* hearing because the information was corroborated by the controlled buy. *See United States v. Carnahan*, 684 F.3d 732, 735 (8th Cir. 2012) ("Omitting that a confidential informant has a criminal record or is cooperating does not satisfy [the *Franks*] standard when the informant's information is partially corroborated . . . ."). Therefore, O'Neil's counsel was not ineffective for failing to request a *Franks* hearing on that issue.

"Probable cause is a fair probability that . . . evidence of a crime will be found in the location to be searched." *United States v. LaMorie*, 100 F.3d 547, 552 (8th Cir. 1996). In that inquiry, we give "substantial deference to the . . . issuing judge." *Id.* "When, as here, the issuing court relies solely on an affidavit to determine whether probable cause exi[s]ts, only the information found within the four corners of the affidavit may be considered." *United States v. Wells*, 347 F.3d 280, 286 (8th Cir. 2003) (internal quotation omitted).

Without Taylor's identity, the affidavit provides that the confidential informant informed officers that a woman and man were selling drugs out of the apartment. It also describes the controlled purchase, during which the police watched an unidentified woman walk from the back of the relevant apartment complex, make the sale, and then enter the identified apartment. The district court believed that was enough to indicate that evidence of the crime would be found in the apartment.

We agree. In *Wells*, we found that allegations in a warrant affidavit created a fair probability that evidence of crime would be in a home. 347 F.3d at 286. The affidavit described records that connected the defendant to the address and officers' observations of the defendant leaving the address prior to two controlled sells. *Id.*

O'Neil argues that *Wells* was a stronger case. That may be so. In that case, there were multiple controlled buys and documents connecting the seller to the address. *Id.* The evidence here consists of an initial observation of the seller near the apartment—she came from the back of the complex with the drugs—and a later observation of her entering the specified apartment after the sale. And unlike *Wells*, where documents tied the suspect to the home to be searched, here, utility records tied Taylor, who was not involved in the controlled buy, to the apartment. Nonetheless, the officers had information from the confidential informant that drugs were sold by a woman out of the identified apartment. That information was corroborated by the controlled buy because the seller returned to the identified apartment. That connected

the seller, her drug activity, and the relevant apartment. *See United States v. Archibald*, 685 F.3d 553, 557–58 (6th Cir. 2012) (finding a single controlled buy, which was executed under surveillance, was enough to establish probable cause for a search warrant of the apartment where the buy occurred). Further, although the seller was not seen coming from the identified apartment, it appears that the magistrate judge found that her entry into that apartment after the sale made it probable that evidence of criminal activity was within. Given the deference owed to the magistrate judge, we affirm that conclusion. *See LaMorie*, 100 F.3d at 552.

O'Neil also takes issue with the district court's analytical process. The district court switched the given identity in the affidavit—Taylor—to "an unidentified female" when conducting the probable cause analysis. O'Neil argues that the court should have (1) deleted the entire paragraphs that erroneously referred to Taylor,[6] or (2) replaced her name with Aaren's.

Franks mandates that "material that is the subject of the alleged falsity or reckless disregard [must be] set to one side." 438 U.S. at 171–72. Under that language, the district court did not err: O'Neil does not challenge that a woman sold the drugs. Instead, the faulty information here was the identity of the woman who sold the drugs. Under *Franks*, only that identity need be set aside; the affiant used the wrong name in affidavit, but the affidavit's description of the sale was otherwise correct.

O'Neil argues that our case law suggests otherwise. He cites to *Reinholz* and claims that we upheld the deletion of an entire paragraph that contained false information. 245 F.3d at 774–75. There, a pharmacist reported suspicious activity to

[6]The paragraphs that erroneously referenced Taylor made up most of the affidavit; they contained the informant's tip and an account of the controlled buy. *See* Appellant's Add. at 16. If we excised those paragraphs, the affidavit would only indicate that the affiant had drug-enforcement experience and Taylor held utilities for an apartment.

police. *Id.* at 770. He indicated that the defendant attempted to purchase iodine crystals, he knew of no legitimate use for iodine crystals, and the defendant drove a Camry. *Id.* The affiant altered some of the information in the warrant affidavit; the relevant paragraph indicated that "a confidential and reliable source" said that the defendant was "involved in the use of methamphetamine," "may . . . be involved in the distribution of methamphetamine," and drove a Camry. *Id.* at 771 (internal quotation omitted).

Because it contained misrepresentations, we found that the "district court properly deleted the [relevant] paragraph." *Id.* at 775. O'Neil latches onto this statement and argues that the district court should have deleted the entire paragraph here. O'Neil misreads *Reinholz*. *Reinholz* stated that "[w]e remedy a *Franks* misrepresentation by deleting the false statements." *Id.* We upheld the deletion of the entire fifth paragraph because "[t]he *entire* fifth paragraph . . . contain[ed] false information." *Id.* (emphasis added). In other words, deletion of the whole paragraph was warranted because the entire paragraph contained false information.

That is not the case here; the paragraphs O'Neil challenges contained uncontested allegations. The district court did not err by leaving that information undisturbed. Because the identifying information was false, the district court deleted it. That provided a proper remedy for the *Franks* violations. *See id.* Even with that deletion, the affidavit's contents were sufficient to indicate that there was likely evidence of an illicit drug sale within the home, as discussed above.[7] Thus, O'Neil has

[7]O'Neil argues that substituting an "unidentified woman" for Taylor was erroneous because the affiant knew that Aaren Verrett made the sales. Even if that was so and the names were switched, probable cause supported the search warrant; the confidential informant would have identified an individual who sold drugs out of the home, and that individual would have made a sale and returned to the home. As the district court concluded, there still would have been a probability that evidence of criminal activity was in the home under those circumstances.

not established that the results of his proceedings would have been different even if his counsel requested a *Franks* hearing or challenged the warrant on probable cause grounds. Therefore, trial counsel was not ineffective.

B. *Warrant Endorsement*

As described above, the search warrant relied on information obtained from a confidential informant. The issuing magistrate reviewed an "Informant's Attachment" accompanying the warrant affidavit, which listed law enforcement's reasons for finding the informant reliable. In relevant part, this document listed form statements, which provided reasons for considering the informant reliable. The detective affiant indicated that the informant was reliable because he or she: "[wa]s a mature individual"; "[wa]s a person of truthful reputation"; "[h]a[d] no motivation to falsify the information"; "[h]a[d] otherwise demonstrated truthfulness"; "[h]a[d] not given false information in the past"; and his or her information was "*corroborated by law enforcement personnel*." Appellant's Add. at 18 (emphasis added.)

O'Neil argues that the warrant should not have issued because the magistrate judge did not affirmatively find the confidential source credible since "he failed to sign the Endorsement." Appellant's Br. at 28. He contends the absence of the magistrate judge's signature indicates the magistrate judge acted merely as "a rubber stamp." *Id.*

O'Neil is correct that the magistrate judge did not select one of three available options on the "ENDORSEMENT ON SEARCH WARRANT APPLICATION" indicating that the informant was credible. Appellant's Add. at 19. The magistrate judge, however, did sign the Endorsement. *See id*. O'Neil provides no authority for the proposition that the absence of the magistrate judge's check mark next to one of the reasons supporting the source's reliability invalidates the warrant. The magistrate judge signed the endorsement and the warrant. O'Neil has not shown that the reasons supporting the confidential source's reliability stated in the warrant affidavit were false or misleading. The warrant affidavit specifically declared that the informant's

information was credible because it was corroborated by further investigation; law enforcement observed the confidential source's controlled buy with the presumed occupant of the apartment. *See United States v. Keys*, 721 F.3d 512, 518 (8th Cir. 2013) ("Information may be sufficiently reliable to support a probable cause finding if it is corroborated by independent evidence." (cleaned up)). Therefore, the alleged magistrate judge's error, even if it is error, did not affect the validity of the warrant. Thus, counsel's decision not to challenge the warrant on this ground did not affect the outcome of the case.

C. *Cell-Phone Evidence*

O'Neil also avers that his counsel should have moved to suppress evidence found on his cell phones. The search warrant for the apartment allowed officers to seize and search Taylor's phones. During its execution, the police found two phones. They obtained the phones' numbers by calling dispatch. It turned out that the phones actually belonged to O'Neil. Therefore, the warrant did not facially cover the search.

The Supreme Court has recently held "that officers must generally secure a warrant before conducting" a cell-phone search. *Riley*, 573 U.S. at 386. O'Neil claims that holding rendered (1) the search of his phone illegal and (2) evidence found through that search fruit of the poisonous tree. Therefore, he asserts that his counsel should have moved to suppress that evidence.

O'Neil's argument ignores legally vital dates. The Supreme Court's *Riley* holding became law more than two years after a jury convicted O'Neil. Considering this very argument, we have held that a "counsel's failure to raise a novel argument does not render his performance constitutionally ineffective." *Basham v. United States*, 811 F.3d 1026, 1029 (8th Cir. 2016) (cleaned up). Still, O'Neil argues that "the holding in *Riley* was clearly portended at the time of [his] conviction." *Id.* We rejected the same argument in *Basham*. *Id.* at 1030. Therefore, similarly, we hold that O'Neil's "counsel did not act constitutionally deficient in failing to file a motion to suppress." *Id*.

D. *O'Neil's Confession*

During his trial, the government offered testimony describing a confession O'Neil made to officers. O'Neil argues that (1) he did not waive his *Miranda* rights before the confession and (2) his confession was not made knowingly and voluntarily. He also claims that police questioning continued after he requested an attorney. On that basis, O'Neil asserts that his counsel should have objected to the introduction of the confession.

In response to this allegation, trial counsel submitted an affidavit for the district court's habeas review that indicated that "O'Neil had been Mirandized prior to any statements being made. In fact, I believe Mr. O'Neil was Mirandized twice before he [gave his confession]. Thus, *[trial] counsel was unaware of any grounds on which to base a motion to suppress*." Aff. of Att'y at 3, *O'Neil v. United States*, No. 4:16-cv-00126-RP (S.D. Iowa Nov. 3, 2016), ECF No. 8 (emphasis added).

O'Neil does not indicate that his counsel was ever aware that his statement was given without *Miranda* warnings, involuntarily, or after he requested an attorney. O'Neil "does not allege[] that this lack of knowledge was due to any neglect on trial counsel's part." *Bell v. Att'y Gen. of Iowa*, 474 F.3d 558, 561 (8th Cir. 2007) (finding that, because the defendant did not allege that his counsel failed to investigate, his attorney's failure to challenge a potential Fifth Amendment violation that he was unaware of until trial did not rise to the level of ineffective assistance). Given that trial counsel believed O'Neil received *Miranda* warnings and knew of no basis to move to suppress the confession, we cannot say that he acted outside of "the wide range of reasonable professional assistance." *Love*, 949 F.3d at 410 (internal quotation omitted).

III. *Conclusion*

In summary, O'Neil has not shown that any of his attorney's alleged errors both (1) were constitutionally deficient and (2) prejudiced him. *See Anderson*, 762 F.3d at 792. For those reasons, we affirm the district court's denial of his § 2255 motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	Criminal No. 3:11-cr-17
	)	
Plaintiff,	)	**INDICTMENT**
	)	T. 21 U.S.C. §846
v.	)	T. 21 U.S.C. §841(a)(1)
	)	T. 21 U.S.C. §841(b)(1)(A)
DAMON O'NEIL,	)	
	)	
Defendant.	)	

THE GRAND JURY CHARGES:

COUNT 1
(Conspiracy to Distribute Cocaine Base)

From a date unknown, but beginning during or about May 2010, and continuing to on or about January 23, 2011, in the Southern District of Iowa and elsewhere, the defendant, DAMON O'NEIL, did knowingly and intentionally conspire with persons known and unknown to the Grand Jury to knowingly distribute at least 280 grams of a mixture and substance containing cocaine base, also known as "crack," a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

This is a violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A).

A TRUE BILL.

/s/
FOREPERSON

Nicholas A. Klinefeldt
United States Attorney

By: /s/
Lisa C. Williams
Special Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

NOTICE OF APPEAL

Damon O'Neil	*	4:16-cv-00126
Plaintiff	*	District Court Docket Number
United States of America	*	Robert W. Pratt
Defendant	*	District Court Judge

Notice is hereby given that Damon O'Neil appeals to the United States Court of Appeals for the Eighth Circuit from the ☑ Judgment ☑ Order entered in this action on February 6, 2019.

Signature of Appellant/Cnsl	2910 Grand Avenue Street Address
February 28, 2019 Date	Des Moines, Iowa 50312 City State Zip
Andrew Dunn Typed/printed Name	515-284-5737 Telephone Number

Transcript Order Form: **(To be completed by attorney for appellant)**

Please prepare a transcript of: _____
(Specify)

I am not ordering a transcript because: No hearing was held.
(Specify)

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that copies of this notice of appeal/transcript order form have been filed/served upon the US District Court, court reporter, and all counsel of record and that satisfactory arrangement for payment of cost of transcripts ordered have been made with the court reporter (FRAP 10(b))

Attorney's Signature A-t-D-u-n Date: 2/28/19

NOTE: COMPLETE APPROPRIATE APPEAL SUPPLEMENT FORM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. DAMON O'NEIL, Defendant.	*	3:11-cr-017 VERDICT FORM

VERDICT FORM

COUNT ONE

With regard to the crime of conspiracy to distribute cocaine base, as charged in Count One of the Indictment, we, the jury, unanimously find the Defendant, DAMON O'NEIL:

_____ NOT GUILTY X GUILTY

If you find the Defendant guilty of Count One, answer the following questions about the offense charged in Count One (Do not answer this question if you find the Defendant not guilty on Count One):

We the jury unanimously find, beyond a reasonable doubt, that the amount of crack cocaine Defendant conspired to distribute is: (choose only one)

_____ Two hundred and eighty (280) grams or more.

X Twenty eight (28) grams or more, but less than two hundred and eighty (280) grams.

_____ Less than twenty eight (28) grams.

Jan. 6, 2012
DATE

FOREPERSON

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
v1 Sheet 1

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

V.

Damon O'Neil

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 3:11-cr-00017-001

USM Number: 12744-030

John L. Lane

Defendant's Attorney

Date of Original Judgment: 5/10/2012
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☑ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☑ was found guilty on count(s) Count One of the Indictment filed February 16, 2011 (lesser included). after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(b)(1)(B), 851	Conspiracy to Distribute at Least 28 Grams of Cocaine Base	01/23/2011	One

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 20, 2014
Date of Imposition of Judgment

Robert W. Pratt
Signature of Judge

Robert W. Pratt, Senior United States District Judge
Name of Judge Title of Judge

August 20, 2014
Date

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

180 months on Count One of the Indictment filed February 16, 2011*

☑ The court makes the following recommendations to the Bureau of Prisons:

That Defendant be designated to either FCI Oxford, WI or FCI Milan, MI.*

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Eight years on Count One of the Indictment filed February 16, 2011*

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation office;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcemnt agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, the defendant shall receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. The defendant shall not use alcohol and/or other intoxicants during the course of supervision.

The defendant shall submit to a search of his person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.*

The defendant shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages.

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
v1 Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case

v1 Sheet 6 — Schedule of Payments

DEFENDANT: Damon O'Neil
CASE NUMBER: 3:11-cr-00017-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

DAMON O'NEIL, **Movant,** **vs.** **UNITED STATES OF AMERICA,** **Respondent.**	**No. 4:16-cv-00126-RP** **AMENDED AND SUBSTITUTED 28 U.S.C. § 2255 MOTION (Pursuant to Court Order, ECF 10, p. 3)**

COMES NOW the Movant, Damon O'Neil, through counsel, and files the Amended and Supplemented 28 U.S.C. § 2255 Motion:

AMENDED MOTION

1. Movant, pro se, has filed three motions challenging his sentence under 28 U.S.C. §2255. (ECF 1 (4:16-cv-00312), 2 (4:16-cv-00312), and 9 (4:16-cv-00126).)

2. The Court ordered that counsel "file an amended and substituted § 2255 motion or report why no motion will be filed." (ECF 10, p. 3 (4:16-cv-00126.)

3. Pursuant to the Court's order, the Movant amends and substitutes the fourteen grounds raised in ECF 1 (4:16-cv-00312), 2 (4:16-cv-00312), and 9 (4:16-cv-00126),[1] with the following seven grounds:

I. Amended/Supplemented Ground One.

Mr. O'Neil's trial counsel was ineffective and unfair prejudice resulted when counsel failed to effectively investigate the case, interview defense witnesses provided

[1] Counsel has conferred with Mr. O'Neil through correspondence and a conference call regarding the amended and substituted § 2255 claims.

by Mr. O'Neil, and call these witnesses during trial. This failure violated O'Neil's Sixth Amendment rights.

In trial counsel's Affidavit, he did not respond to this Ground. (ECF 8 (4:16-cv-00126).)

There is a reasonable probability that had trial counsel investigated, interviewed, and called witnesses during trial, O'Neil would have been acquitted.

Supporting Facts: Counsel did not to properly investigate the case, interview defense witnesses provided by Mr. O'Neil, and call exculpatory witnesses during trial. O'Neil brought this to the attention of the trial court during trial. (Trial Tr. 227-33.)

Additional supporting facts are found in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) Attachment Ground I, pp. 14-22, and Ground VII, p. 82.

II. Amended/Supplemented Ground Two.

Mr. O'Neil's trial counsel was ineffective and unfair prejudice resulted when counsel failed to file a motion to suppress the Application for Search Warrant and Search Warrant for 2023 W. 3rd Street Apartment #1, Davenport, Iowa. The affidavit supporting the search warrant application lacked probable cause, there was no exception to the warrant requirement to allow the search, and the *Leon* good faith exception does not apply. This failure to file a motion suppress was ineffective assistance of counsel and violated O'Neil's Fourth and Sixth Amendment rights. There is a reasonable probability had counsel filed a motion to suppress the unconstitutional warrant, the motion would have been granted, the evidence would not have been admitted, and O'Neil acquitted.

Supporting Facts: The search warrant affidavit lacked probable cause to support a reasonable belief that evidence of a crime would be found in 2023 W. 3rd Street

Apartment #1, Davenport, Iowa. The one controlled buy out in the street did not have a sufficient nexus to the apartment to be searched. The magistrate judge failed to complete the Endorsement on Search Warrant Application, therefore the magistrate did not rely on the Confidential Informant when issuing the Search Warrant for the apartment, and this further shows there was no probable cause to issue the Search Warrant for the apartment. The magistrate judge merely acted as a rubber stamp for police and failed to exercise neutral and detached discretion when reviewing and granting the search warrant. The fruits of the search -- controlled substances, paraphernalia, pictures, cell phone evidence, and law enforcement testimony (Trial Tr. 30, 45-46, 62-72, 191-95, 214-21; Gov't Trial Exhibit's 1-20, 32-37, 46) -- were introduced at trial, and contributed to the verdict.

Additional supporting facts are found in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) Attachment Ground II, pp. 22-23; Ground VI, p. 82; and, Ground X, pp. 89-90.

III. Amended/Supplemented Ground Three.

Mr. O'Neil's trial counsel was ineffective and unfair prejudice resulted when counsel failed to file a motion to suppress the Application for Search Warrant and Search Warrant for 2023 W. 3rd Street Apartment #1, Davenport, Iowa, because the affidavit contained statements that were false and/or made with a reckless disregard for the truth. This was in violation of *Franks v. Delaware,* 438 U.S. 154 (1978). This failure to file a motion suppress was ineffective assistance of counsel and violated O'Neil's Fourth and Sixth Amendment rights. There is a reasonable probability had trial counsel filed a motion to suppress the unconstitutional warrant, the motion would have been granted, the evidence would not have been admitted, and O'Neil acquitted.

Supporting Facts: The search warrant affiant averred the confidential informant was "a person of truthful reputation," and "ha[d] no motivation to falsify information." The affiant should have disclosed to the magistrate judge the informant's criminal history and why he was assisting law enforcement. With the affidavit's false material set to one side and the information from the confidential informant discarded, the affidavit's remaining content is insufficient to establish probable cause. The search warrant must be voided and the fruits of the search excluded. The fruits of the search warrant -- controlled substances, paraphernalia, pictures, cell phone evidence, and law enforcement testimony (Trial Tr. 30, 45-46, 62-72, 191-95, 214-21; Gov't Trial Exhibit's 1-20, 32-37, 46) -- were introduced at trial, and contributed to the verdict.

Additional supporting facts are found in Supplementary Brief 2255 Motion, ECF 2 (4:16-cv-00312).

IV. Amended/Supplemented Ground Four.

Mr. O'Neil's trial counsel was ineffective and unfair prejudice resulted when counsel failed to file a motion to suppress the warrantless search of Mr. O'Neil's two cell phones. Warrantless searches and seizures are per se unreasonable. There was no exception to the warrant requirement to allow the search into the cell phones, and the *Leon* good faith exception does not apply. This failure to file a motion suppress was ineffective assistance of counsel and violated O'Neil's Fourth and Sixth Amendment rights. There is a reasonable probability had counsel filed a motion to suppress the warrantless search and seizure, the motion would have been granted, the evidence would not have been admitted, and O'Neil acquitted.

Supporting Facts: Without a warrant, law enforcement downloaded information from Mr. O'Neil's two cell phones and introduced the evidence during trial. (Trial Tr. 46-52, 189-99; Gov't Trial Exhibit's 18, 19, 22, 46.) The government produced expert testimony during trial to interpret and explain the evidence downloaded from the cell phones to describe the practices of drug traffickers, and the number of text messages. This evidence clearly contributed to the verdict.

Additional supporting facts are found in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) Attachment Ground III, pp. 23-51; Ground VI, p. 82; and Ground X, pp. 89-90.

V. Amended Ground Five.

Mr. O'Neil's trial counsel was ineffective and unfair prejudice resulted when counsel failed to file a motion to suppress the in-custody statement of Mr. O'Neil. This failure to file a motion suppress was ineffective assistance of counsel and violated O'Neil's Fifth and Sixth Amendment rights. There is a reasonable probability that had trial counsel filed a motion to suppress the in-custody, involuntary statements of O'Neil, the motion would have been granted, and the evidence regarding his alleged admissions to law enforcement would not have been admitted, and O'Neil acquitted.

Supporting Facts: During trial, law enforcement officer Brandon Koepke testified Mr. O'Neil confessed the crime to him. (Trial Tr. 72-79.) Mr. O'Neil denied he confessed the crime to Koepke. (Trial Tr. 255-56.) Mr. O'Neil did not waive his Miranda rights, and did not provide a knowing and voluntary statement to Officer Koepke. Since, O'Neil's statements were admitted at trial and contributed to the verdict, he must be given a new trial.

Additional supporting facts are found in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) Attachment Ground IV, pp. 51-63, and Ground VI, p. 82.

VI. Amended Ground Six.

Mr. O'Neil's sentencing counsel was ineffective and unfair prejudice resulted when counsel failed to object to the presentence investigation report's designation of Mr. O'Neil as a career offender under U.S.S.G. § 4B1.1.

Supporting Facts: Mr. O'Neil was not a career offender under U.S.S.G. § 4B1.1 because his criminal drug conspiracy conviction described in the presentence investigation report (PSR ¶ 36 (3:11-cr-00017, ECF 146)) was not a "controlled substance offense" as described under U.S.S.G. § 4B1.2(b).

Mr. O'Neil was convicted of a criminal drug conspiracy offense under Ill. Comp. Stat 720 § 570/405.1 (1995). The Illinois criminal drug conspiracy statute provides elements for the offense that are not included in the "controlled substance offense" as defined under U.S.S.G. § 4B1.2(b). The statute provides:

> (a) Elements of the offense. A person commits criminal drug conspiracy when, with the intent that an offense set forth in Section 401, Section 402, or Section 407 of this Act be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit such an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.
>
> (b) Co-conspirators. It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:
>
> (1) Has not been prosecuted or convicted, or
>
> (2) Has been convicted of a different offense, or
>
> (3) Is not amenable to justice, or

> (4) Has been acquitted, or
>
> (5) Lacked the capacity to commit an offense.
>
> (c) Sentence. A person convicted of criminal drug conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy.

Ill. Comp. Stat 720 § 570/405.1 (emphasis added).

The underlined language -- "with the intent that an offense set forth in Section 401, Section 402, or Section 407 of this Act be committed, . . ." – provides alternate elements to an Illinois criminal drug conspiracy, one of which -- Section 402 -- does not fall within the definition of a "controlled substance offense" as defined under U.S.S.G. § 4B1.2(b).

Section 402 of the Illinois Controlled Substances Act, titled "Possession unauthorized by this Act; penalty," provides in relevant part, "Except as otherwise authorized by this Act, it is unlawful for any person knowingly to possess a controlled or counterfeit substance or controlled substance analog. . ." Ill. Comp. Stat. 720 § 570/402.

Since Ill. Comp. Stat 720 § 570/405.1 provides alternative elements to an Illinois criminal drug conspiracy, one of which does not fall under the definition of a "controlled substance offense" as defined under U.S.S.G. § 4B1.2(b), O'Neil's prior criminal drug conspiracy cannot be used to find him a career criminal under U.S.S.G. § 4B1.1. He must be resentenced without the career offender designation.

VII. Amended Ground Seven.

Mr. O'Neil's sentencing counsel was ineffective and unfair prejudice resulted when counsel failed to have the court rule on the specific facts it was relying on to impose an obstruction of justice enhancement. This has prejudiced O'Neil's release status with the BOP.

Supporting Facts: The PSR requested a two-point enhancement based on the hearsay allegation from Perrie Green that "[o]n January 5, 2012, Green contacted LEO and stated that O'Neil told Green 'you snitched on me. I'm going to kill you, boy.' Green indicated that he was concerned about the threat and did not believe the statement was an idle threat." PSR ¶¶ 15, 24 (3:11-cr-00017, ECF 146).

The PSR also requested a two-point obstruction of justice enhancement because "[t]he defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice when the defendant testified at trial that he was not involved in distributing cocaine base. The jury's findings were inconsistent with the defendant's testimony. Additionally, on January 5, 2012, the defendant threatened to kill Perrie Green because Green testified against him at trial. Pursuant to USSG §3C1.1, comment. (n.7), a two-level enhancement will be applied under USSG §2D1.1(b)(14)(D)." PSR ¶¶ 19, 24 (3:11-cr-00017, ECF 146).

In Defendant's Objections to Presentence Investigation Report, counsel objected to the allegation that Mr. O'Neil threatened Green. PSR p. 35 (3:11-cr-00017, ECF 146).

No evidence was presented at either of Mr. O'Neil's sentencing hearings to support the hearsay allegation from Perrie Green that Mr. O'Neil threatened him. It was the government's burden of proof to establish this aggravating factor, and since Mr. O'Neil filed his objection, this allegation was a disputed portion of the PSR and can't be relied on at sentencing absent evidentiary support.

The law is clear. The sentencing court may accept any undisputed portion of the PSR as a finding of fact during sentencing. *See* Fed. R. Crim. P. 32(i)(3)(A); *United States v. Jenners*, 473 F.3d 894, 897 (8th Cir. 2007) (sentencing court may accept the facts in a

presentence report as true unless the defendant objects to the specific factual allegations). If the defendant does object to any of the factual allegations on an issue on which the government has the burden of proof, the government must present evidence at the sentencing hearing to prove the existence of the disputed facts. *Id*. at 897-98. Unless the disputed facts have been proven by a preponderance of the evidence, the district court cannot rely on them at sentencing. *Id*. at 898. *See also United States v. Flores*, 9 F.3d 54, 55 (8th Cir. 1993) (presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact).

Here, there can be no finding that Mr. O'Neil threatened Green. O'Neil is prejudiced by the inference that he threatened Green because he is being denied early release under 18 U.S.C. § 3621(e) based on Section 4.b. of Policy Statement 5162.05 (March 16, 2009) and Policy Statement 5331.02 (May 26, 2016), from the Bureau of Prisons.

5. The following grounds relating to the ineffective assistance of sentencing counsel will not be pursued by counsel.

A. Attachment Ground V in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) pp. 63-82, relating to leadership role;

B. Attachment Ground IX in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) pp. 83-89, relating to the 1:1 ratio of crack cocaine to cocaine ratio;

C. Attachment Ground XI in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) pp. 90-91, regarding individual drug findings; and,

D. Attachment Ground XII in Movant's Motion Under 28 U.S.C. § 2255, ECF 1 (4:16-cv-00312) pp. 91-92, the *Holloway* Doctrine.

6. Based on the above, the Court should grant the Movant a new trial, and any further relief that is just under the circumstances.

7. Following the filing of this amended and supplemented motion and the Government's response, the undersigned requests that the Court set a briefing schedule for the parties to file supporting briefs supporting and reasons for an evidentiary hearing.

WHEREFORE, the Movant, Damon O'Neil, through counsel, and files this Amended and Supplemented 28 U.S.C. § 2255 Motion.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE
GENTRY BROWN & BERGMANN L.L.P.

BY: /s/ Andrew Dunn

Andrew Dunn AT0002202
2910 Grand Avenue
Des Moines, Iowa 50312
(515) 284-5737
(515) 284-1704 (Fax)
adunn@parrishlaw.com
ATTORNEY FOR MOVANT

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by:

( )	personal service	(X)	first class mail
( )	certified mail, return receipt requested	( )	facsimile
( )	Airborne Express (overnight)	(X)	electronic filing
		( )	e-mail

on the 3rd day of February, 2017.
I declare that the statements above are true to the best of my information, knowledge and belief.

/s/ Lori Yardley

Mary C. Luxa
United States Attorney's Office
110 East Court Avenue
Suite 286
Des Moines, Iowa 50309
(515) 473-9300
Fax: (515) 473-9292
Mary.Luxa@USDOJ.GOV
ATTORNEY FOR RESPONDENT

Damon O'Neil
MOVANT

11-1407

1

Case Number _____

State of Iowa, County of Scott

APPLICATION FOR SEARCH WARRANT

Being duly sworn, I, the undersigned, say that at the place (and on the person(s) and in the vehicle(s) described as follows:

This premises is located at 2023 W. 3rd St apartment #1 in Davenport, Iowa. This is a white in color multi-plex apartment building located on the South side of 3rd St. Apartment number 1 is located on the 1st floor of the building as you come into the building from the North door.

This is also to include any vehicles belonging to Melissa M. Taylor.

This is also to include the person of Melissa M. Taylor DOB [redacted]

This is also to include the cell phone(s) of Melissa M. Taylor. To include text messages, pictures, voice mail, phone numbers and other information contained within the cell phone. Cell phones are often used to arrange narcotics transactions.

This is to include any and all storage areas under the control or accessible to the occupants therein. Also to include any and all out buildings, storage sheds, garages, or similar structures that are under the control or accessible to the occupants. To include all open grounds, yards, easements, parking areas or other open area associated with the defined location. Also any rented storage areas not on the premises but documented as being under the control of the occupants.

in Scott County, there is now certain property, namely:

Controlled Substances, including but not limited to cocaine, cocaine base (crack), LSD, Marijuana or Hashish, Amphetamine or Methamphetamine.

Paraphernalia for packaging, manicuring, weighing and distributing Controlled Substances as set forth above, including, but not limited to scales, baggies, grinders, dilutents, wrappings, boxes, tape, and plastic wrap.

United States Currency, precious metals, jewelry, and financial instruments, including stocks and bonds.

Firearms and ammunition, including but not limited to, handguns, pistols, revolvers, rifles, shotguns, and other weapons, and any records or receipts pertaining to firearms and ammunition.

Books, records, receipts, notes, ledgers, photos, video tape, and other papers relating to the transportation, ordering, possession, sale, transfer and importation of Controlled Substances as set forth above.

Books, records, receipts, invoices, records of real estate transactions, records reflecting ownership of motor vehicles, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, and cashier's checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money.

Address and/or telephone books, rolodex indices and any papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers, and/or telex numbers of co-conspirators, sources of supply, customers, financial institutions, and other individuals or businesses with whom a financial relationship exists.

Indicia of occupancy, residency, rental and/or ownership of the premises described herein, including, but not limited to, utility and telephone bills, cancelled envelopes, rental, purchase or lease agreements, and keys.

which is:

☒ Property that has been obtained in violation of law.

☒ Property, the possession of which is illegal.

☒ Property used or possessed with the intent to be used as the means of committing a public offense or concealed to prevent an offense from being discovered.

☒ Property relevant and material as evidence in a criminal prosecution.

The facts establishing the foregoing ground(s) for an issuance of a search warrant are as set forth in the attachments which are made part of this Affidavit.

E. Canas 731

Det. Epigmenio Canas 0731, Affiant

Subscribed and sworn to before me on January 16th, 2011.

Magistrate/Judge
Seventh Judicial District
Scott County, Iowa

WHEREFORE, the undersigned asks that a Search Warrant be issued.

Michael Walton
Scott County Attorney

By: _____
Assistant Scott County Attorney

Case Number 4

ATTACHMENT A

Affiant's Name: Det. Epigmenio Canas 0731

Occupation: Law Enforcement Officer Number of Years: 7 years
Assignment: Tactical Operations Number of Years: 3 years

1. Your Affiant is a Police Officer assigned to the Davenport Police Department as a narcotics investigator. Your Affiant has been involved in the investigation of controlled substance offenses for 3 years. Your Affiant has attended schools that pertain to the investigation of controlled substance offenses.

2. It has been the experience of Your Affiant that person(s) who possess and sell controlled substances frequently maintain records, controlled substances, proceeds derived from the sale of controlled substances in their residences, on their person(s), and in their vehicles. Furthermore, it has been the experience of Your Affiant that person(s) who sell controlled substances or possess large amounts normally have controlled substances available for their customers.

3. In January 2011 the Davenport Police Tactical Operations Bureau received information from a CS reference a male black known as "D" and a F/B known as Melissa Taylor were selling various amounts of crack cocaine from 2023 W. 3rd St apartment #1. With this information an investigation was started.

4. Within the past 72 hours a controlled purchase was made from Melissa Taylor in the 2000 block of W. 3rd St using the same C/S. Prior to the purchase the C/S was searched for any drugs, money or contraband and was supplied with Official Buy Fund Money to be used for the purchase. Prior to the purchase surveillance was established at the residence 2023 W. 3rd St. I dropped the C/S off in the area and surveillance observed the C/S standing across the street near the front of the residence. A short time later surveillance observed a F/B later identified as Melissa Taylor exit the rear of the apartment complex and cross the street to meet with the C/S. Surveillance observed Taylor meet with the C/S for a short period of time and the C/S returned to my vehicle. Surveillance observed Taylor enter the front door of the building and enter the apartment on the east side of the building. The C/S advised Taylor walked across the street to meet the C/S and she handed the C/S the purported crack cocaine. The C/S advised the C/S gave Taylor the money and they had a short conversation. The C/S advised the C/S returned to my vehicle and turned over the purported crack cocaine. The purported crack cocaine was field tested using the Valtox test kit with positive results. The C/S was researched for drugs, money or contraband with nothing found.

5. In checking utility records it[5] shows Melissa M. Taylor as the utility holder as of September 2010.

Case Number _____

INFORMANT'S ATTACHMENT

Peace Officer Det. Epigmenio Canas 0731 has been informed of the following: That a Confidential Source whose name is: "John Doe" It is confidential because disclosure of the informants identity would:

- ☒ Endanger the informant's safety.
- ☒ Impair the informant's future usefulness to law enforcement

The informant is reliable for the following reason(s):

- ☒ Is a mature individual.
- Is regularly employed.
- ☒ Is a person of truthful reputation.
- ☒ Has no motivation to falsify the information.
- ☒ Has otherwise demonstrated truthfulness (state in the narrative the facts that led to this conclusion.)
- ☒ The informant has not given false information in the past.
- ☐ The informant has supplied information 0 or more times.
- The informant's information has led to the making of 0 arrests.
- x The informant's past information has helped supply the basis for 0 search warrants.
- Past information from the informant has led to the discovery and seizure of drugs.
- Past information from the informant has led to filing of the following charges:
- ☒ The information supplied by the informant in this investigation has been corroborated by law enforcement personnel. (Indicate in the narrative the corroborated information and how it was corroborated.)

The information provided by the informant is as follows:

The C/S provided information that a F/B known as Melissa Taylor was selling various amounts of crack cocaine from 2023 W. 3rd St apartment number 1. The C/S was able to make a controlled purchase of crack cocaine from Taylor. This is the basis for the search warrant.

7

Case Number_____

ENDORSEMENT ON SEARCH WARRANT APPLICATION

1. In issuing the search warrant, the undersigned relied upon the sworn testimony of the following person(s) in addition to the statements and information contained in the Application and any Attachments thereto:

Name	Address
Det. Epigmenio Canas 0731	416 Harrison, Davenport, Iowa

2. Abstract of Testimony (Information received in addition to that set forth in the Application and the Attachments thereto.)

3. The undersigned as relied, at least in part, on information supplied by a confidential informant to the Peace Officer(s) shown on Attachment(s)

_____

The informant's information appears to be credible because:

_____ Sworn testimony indicates that the informant has given reliable information on previous occasions.

_____ The informant or the informant's information appears credible for the reasons indicated on the attachment.

_____ The informant or the informant's information appears to be credible for the following reasons:

_____
Magistrate/Judge

Case Number _____

State of Iowa, County of Scott

SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE

Based on sworn application made to the Court, I have found that probable cause exists to believe at the place (and on or otherwise in the possession of the person(s) and in the vehicle(s)) described as follows:

This premises is located at 2023 W. 3rd St apartment #1 in Davenport, Iowa This is a white in color multi-plex apartment building located on the South side of 3Rd St. Apartment number 1 is located on the 1st floor of the building a you come into the building from the North door.

This is also to include any vehicles belonging to Melissa M. Taylor.

This is also to include the person of Melissa M. Taylor DOB [redacted]

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in Scott County, there is now certain property, namely:

Controlled Substances, including but not limited to cocaine, cocaine base (crack), LSD, Marijuana or Hashish, Amphetamine or Methamphetamine.

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United States Currency, precious metals, jewelry, and financial instruments, including stocks and bonds.

Firearms and ammunition, including but not limited to, handguns, pistols, revolvers, rifles, shotguns, and other weapons, and any records or receipts pertaining to firearms and ammunition.

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Books, records, receipts, invoices, records of real estate transactions, records reflecting ownership of motor vehicles, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, and cashier's checks, bank checks, safe deposit box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, concealment, and/or expenditure of money.

Address and/or telephone books, rolodex indices and any papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers, and/or telex numbers of co-conspirators, sources of supply, customers, financial institutions, and other individuals or businesses with whom a financial relationship exists.

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which is:

☒ Property that has been obtained in violation of law.

☒ Property, the possession of which is illegal.

☒ Property used or possessed with the intent to be used as the means of committing a public offense or concealed to prevent an offense from being discovered.

☒ Property relevant and material as evidence in a criminal prosecution.

THEREFORE, you are hereby commanded to make immediate search of the described place (and person(s) and vehicle(s)) for the specified property; to seize the specified property of found, leaving a receipt for the seized property at the place of the search; to prepare a written inventory of the property seized, to return this warrant together with the written inventory; and to bring the seized property before me.

Dated this 16 day of January at 9:50 o'clock P M.

Magistrate/Judge
Seventh Judicial District
Scott County, Iowa

Case Number _____

State of Iowa, County of Scott

RETURN TO SEARCH WARRANT

Being duly sworn, I, the undersigned, say that I have executed the attached search warrant and the following, to the best of my knowledge, is a complete inventory of the property seized pursuant to the warrant:
(____ see attached list.)

E. Carey 731
Peace Officer Subscribed and sworn to before me this 24 day of January, 2011.

CO. SO. 635
Title: _____

KEVIN D SMULL
Commission Number 712978
My Commission Expires
October 10, 2013
IOWA