No.

in the

Supreme Court

of the

United States

Term,

DWAYNE SHECKLES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBORAH L. WILLIAMS
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

QUESTION PRESENTED

Search warrants are directed at places, not people. To obtain a warrant to enter a person's home, there must be probable cause that evidence of a crime will be found in the home. Does a person's status as a suspected drug dealer, alone, provide probable cause to allow for a warrant to be issued for that's person's residence?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

none

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The Petitioner, Dwayne Sheckles, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on April 30, 2021.

OPINION BELOW

The Sixth Circuit's opinion in this matter is published at 996 F.3d 330, and is attached hereto as Appendix 1. The district court's opinion is unpublished, and attached as Appendix 2. The magistrate judge's report and recommendation is also unpublished, and attached as Appendix 3.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on April 30, 2021. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to **be secure in their persons, houses**, papers, and effects, **against unreasonable searches and seizures**, shall not be violated, and no warrants shall issue, but **upon probable cause**, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In July of 2017, DEA Task Force officers in Louisville Kentucky determined that Petitioner Dwayne Sheckles was involved in drug trafficking. Through surveillance and other techniques, officers believed that Sheckles was utilizing a stash house apartment in a complex called Crescent Centre to both store and sell drugs. They also learned that Sheckles lived in a different apartment complex known as Terrace Creek. Other than knowing Sheckles lived at the Terrace Creek apartment, they had no information tying that location to drug trafficking. Yet a magistrate judge issued a warrant for a night time search of Sheckles' Terrace Creek apartment. The Sixth Circuit has held that such a warrant was supported by probable cause, as Sheckles was engaged in "continual and ongoing" drug operations.

For years, the DEA task force in Louisville, Kentucky pursued Julio and Freddy Rivas-Lopez, two Mexican nationals the DEA believed were involved in significant narcotics trafficking. Through a series of tips and investigation, the Task Force was led to Shawn Mosely, a purported local source of drugs. That in turn led them to Giovanni Salmiron. They set up surveillance of Salmiron's residence, and in November 2016, noticed a red pickup truck make a short stop at the residence. That pickup truck was later tied to Petitioner Sheckles.

As the investigation continued, the Task Force discovered that one of the Rivas brothers was planning to deliver 10 kilograms of cocaine to a location in Louisville. Through another warrant, officers had obtained access to Rivas's cell

phone. That cell phone communicated, on several occasions, with 480-740-7999. Officers believed this cell phone was being used by a drug trafficker to accept the 10 kilogram shipment; therefore, on July 6, 2017, officers sought and obtained a warrant to track the location of 480-740-7999. While they were tracking the phone, officers received credible evidence that the 10 kilogram delivery deal had fallen through, and would not be occurring.

Despite this, they continued to use the tracking warrant. As they tracked this phone, it "pinged" to a location in the Terrace Creek apartments in Louisville. They began surveillance on that location, and on July 7, 2017, noticed a white Ford Expedition, which investigation found was rented to Petitioner Dwayne Sheckles. Sheckles was renting an apartment at Terrace Creek. The phone was also tracked on another occasion to an apartment complex known as Crescent Centre apartments in Louisville.

On July 12, 2017, Detective Daniel Evans conversed with the apartment manager for Crescent Centre and told them they were investigating a resident for possible drug trafficking. That unnamed manager told Evans that an anonymous person had complained of potential drug trafficking in Apartment 234, an apartment rented by James Murphy. Evans reviewed video of the parking area of Crescent Centre, and found footage of Sheckles parking in the reserved space for apartment 234. Evans toured the apartments helped by the manager. Evans testified that as

he walked down the interior corridor which contained apartment 234, he could smell marijuana.

Based on this information, at 12:30am on July 13, 2017, officers applied for a search warrant for both the Crescent Centre and Terrace Creek apartments. However, before they ever applied for those warrants, they seized and arrested Sheckles, at 11:30pm on July 12. Officer Tom Schardein had been surveilling the Crescent Centre apartments that evening. He saw Petitioner Sheckles leave the area in the white Expedition, and was ordered to stop him. Sheckles was stopped, taken out of his vehicle, and handcuffed.

The warrants for the Crescent Centre and Terrace Creek searches were presented to the magistrate and issued after 12:30am. The affidavits supporting the warrants were identical. They outlined the history with the Rivas brothers, and the failed 10 kilogram deal. The affidavit set forth the conversation with the Crescent Centre apartment manager. The affidavit concludes "it is believed by your affiant that Dwayne SHECKLES is in contact with Alfredo RIVAS and is currently receiving large quantities of drugs from him. Per Internet data base checks and physical surveillance SHECKLES is currently residing at 13602 Terrace Creek Drive apartment 103. It is also believed SHECKLES is utilizing 644 South 3rd street (Crescent Centre) apartment 234 to store and sell drugs."

Officers executed both search warrants simultaneously. As to the Terrace Creek apartments, search of that residence led them to a search of a storage unit,

where they found large amount of cash. As to Crescent Centre, officers found "a large amount of heroin, crystal meth, multiple guns", and a quantity of marijuana.

Sheckles was indicted on August 1, 2017 in the Western District of Kentucky. After a series of superseding indictments, Petitioner Sheckles was charged as follows: one count of conspiracy to possess with the intent to distribute heroin, in violation of 21 U.S.C. § 846; two counts of possession with the intent to distribute heroin and methamphetamine, in violation of 21 U.S.C. § 841; one count of maintaining a premises for drug distribution, in violation of 21 U.S.C. § 856; one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); and one count of possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c).

Sheckles pursued several motions to suppress, each of which was denied by the district court after hearings. On September 23, 2019, Petitioner Sheckles entered into a conditional plea agreement, in which he plead guilty to all counts except the 18 U.S.C. § 924(c) count, which was dismissed. The plea also allowed Sheckles to appeal the district court's denial of suppression of evidence. On January 9, 2020, Sheckles was sentenced to 108 months incarceration, to be followed by 5 years supervised release.

On appeal to the Sixth Circuit, Sheckles (among other issues) argued that the affidavit supporting the Terrace Creek search warrant could not support a probable cause determination. The Sixth Circuit denied Sheckles' appeal in its entirety on

April 30, 2021. As to the claim that the Terrace Creek apartment warrant was not supported by probable cause, the Sixth Circuit admitted that the issue presented a "close call,", but determined that because Sheckles was engaged in "continual and ongoing" drug operations, this fact alone presented a sufficient nexus to his house to permit a search. (Appendix 1, p.11)

REASON FOR GRANTING THE WRIT

1. The fact that a defendant is accused of being a drug trafficker does not provide a nexus sufficient for probable cause to search their home

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The 'very core' of this guarantee is 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021). The Sixth Circuit has determined that Petitioner Sheckles' status as a drug dealer, in and of itself, provided probable cause for officers to obtain a warrant and search his residence. Sheckles submits the court's decision conflicts with the basic guarantee of the Fourth Amendment, and conflicts with every other circuit to address this issue. As such, certiorari should issue and the Sixth Circuit's decision should be reversed.

"'Freedom' in one's own 'dwelling is the archetype of the privacy protection secured by the Fourth Amendment'; conversely, 'physical entry of the home is the chief evil against which [it] is directed.'" *Lange v. California*, 141 S. Ct. 2011, 2018 (2021). "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Collins v. Virginia*, 138 S. Ct. 1663, 1670, 201 L. Ed. 2d 9 (2018). "[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal

activity." *Riley v. California*, 573 U.S. 373, 403, 134 S. Ct. 2473, 2494, 189 L. Ed. 2d 430 (2014).

"[N]o Warrants shall issue, but upon probable cause." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534, 204 L. Ed. 2d 1040 (2019). Probable cause "requires 'some quantum of individualized suspicion' before a search or seizure may take place." *Carpenter v. United States*, 138 S. Ct. 2206, 2221, 201 L. Ed. 2d 507 (2018). Courts interpreting this "individualized suspicion," as it relates to a residence, require a nexus between the residence and the crime. "In the context of a warrant authorizing the search of a house, an affidavit must establish a substantial nexus between the crime and the place to be searched." *United States v. Cotto*, 995 F.3d 786, 796 (10th Cir. 2021). All circuits have held this to be a general proposition – except the Sixth Circuit with suspected drug traffickers.

Until recently, the Sixth Circuit had given inconsistent messaging as to whether officers had to show a nexus between a suspected drug trafficker's home and evidence of a crime to search that person's home. For instance, in *United States v. Brown*, 828 F.3d 375, 384 (6th Cir. 2016), the court determined "if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer." However, in *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020), the court espoused "an affidavit containing credible, verified allegations of drug

trafficking, verification that said defendant lives at a particular residence, combined with the affiant officer's experience that drug dealers keep evidence of dealing at their residence, can be sufficient to demonstrate a nexus between the criminal activity and the suspect residence to validate the warrant—even 'when there is absolutely no indication of any wrongdoing occurring at that residence.'"

In Petitioner Sheckles' case, the Sixth Circuit formally did away with the nexus requirement as to residences of suspected drug traffickers. Here, the court found that if an officer alleged that a suspected drug trafficker's business was "large" and "ongoing," this alone provides a connection between the drug trafficker's residence and a crime, such that a warrant may issue. Thus, the Sixth Circuit has done away with the need for particularized suspicion relating to the place to be searched, and replaced it with a rule that a citizen's status as a criminal provides a basis for the search of their residence.

To be clear, there was no tie to drug trafficking alleged as to Petitioner Sheckles' residence. The affidavit in support of the search warrant states: "it is believed by your affiant that Dwayne SHECKLES is in contact with Alfredo RIVAS and is currently receiving large quantities of drugs from him. Per Internet data base checks and physical surveillance SHECKLES is currently residing at 13602 Terrace Creek Drive apartment 103. It is also believed SHECKLES is utilizing 644 South 3rd street (Crescent Centre) apartment 234 to store and sell drugs." Thus, officers not only knew that Sheckles used a different residence to "store and sell drugs," but also

conceded that the only tie to Terrace Creek was that Sheckles resided there. In effect conceding the lack of nexus, the Sixth Circuit has determined that a suspected drug trafficker's status as a drug trafficker, alone, provides police entry into the home.

The Sixth Circuit's decision places it at odds with almost every other circuit, creating a circuit split. See *United States v. Roman*, 942 F.3d 43, 51 (1st Cir. 2019)("[W]e have rejected a per se rule automatically permitting the search of a defendant's home when he has engaged in drug activity."); *United States v. Abdul-Ganiu*, 480 F. App'x 128, 130 (3d Cir. 2012)("[A] magistrate judge may not infer probable cause to search a defendant's residence or property solely because there is evidence that he has committed a crime involving drugs."); *United States v. Lalor*, 996 F.2d 1578, 1583 (4th Cir. 1993)(mere fact that defendant had recent drug sales not enough to establish a nexus to his residence); *United States v. Brown*, 567 F. App'x 272, 283 (5th Cir. 2014)(bare bones affidavit in support of search warrant did not provide probable cause to search drug trafficker's home); *United States v. Wiley*, 475 F.3d 908, 916 (7th Cir. 2007)("[I]t would be inappropriate to adopt a categorical rule that would, in every case, uphold a finding of probable cause to search a particular location simply because a suspected drug trafficker resides there."); *United States v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009)(requiring "additional evidence," over and above a defendant's status as a drug dealer, that "must link a

defendant's home to the suspected criminal activity.") This Court should grant certiorari review to resolve this split.

This Court has always eschewed a Fourth Amendment analysis that ties a search of a place to a citizen's status as a criminal. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 98 S. Ct. 1970, 1976–77, 56 L. Ed. 2d 525 (1978). The Sixth Circuit's decision upends this line of reasoning, and ties places to be searched solely to the status of person who resides therein. But the Fourth Amendment "protects all, those suspected or known to be offenders as well as the innocent." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 158, 75 L. Ed. 374 (1931). This Court should grant certiorari, and reverse the decision of the Sixth Circuit.

CONCLUSION

Sheckles requests this Court grant certiorari, reverse the Sixth Circuit's decision, and vacate the convictions.

Respectfully submitted,

DEBORAH L. WILLIAMS
Federal Public Defender

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

APPENDIX

1. COURT OF APPEALS ORDER April 30, 2021
2. DISTRICT COURT DECISION January 25, 2019
3. MAGISTRATE JUDGE REPORT November 20, 2018

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0098p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DWAYNE SHECKLES,

Defendant-Appellant.

No. 20-5096

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:17-cr-00104-1—Rebecca Grady Jennings, District Judge.

Argued: December 3, 2020

Decided and Filed: April 30, 2021

Before: ROGERS, NALBANDIAN, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. L. Jay Gilbert, UNITED STATES ATTORNEY'S OFFICE, Louisville, Kentucky, for Appellee. **ON BRIEF:** Kevin M. Schad, FEDERAL PUBLIC DEFENDER'S OFFICE, Cincinnati, Ohio, for Appellant. L. Jay Gilbert, UNITED STATES ATTORNEY'S OFFICE, Louisville, Kentucky, for Appellee.

OPINION

MURPHY, Circuit Judge. After a lengthy investigation, the federal government uncovered substantial evidence that Dwayne Sheckles was a Louisville distributor for a large drug-trafficking ring. Sheckles pleaded guilty but reserved the right to appeal the district court's

refusal to suppress much of this evidence. His appeal raises many Fourth Amendment questions. To name a few: What type of evidence creates probable cause to obtain a warrant for a phone's location data after *Carpenter v. United States*, 138 S. Ct. 2206 (2018)? Did a sufficient "nexus" exist between Sheckles's drug dealing and two apartments to justify search warrants for the apartments? Did officers lawfully stop Sheckles's vehicle after he left one of these apartments while they were in the process of seeking the warrants? And does a third party's lack of *apparent* authority to consent to a search make a difference if officers learn after the search that the party had *actual* authority to consent? Ultimately, we find no Fourth Amendment violations and thus affirm.

I

The case against Sheckles stems from an investigation of three other people occurring almost a decade before he arrived on the government's radar. In 2007, the Louisville office of the Drug Enforcement Administration (DEA) was monitoring a local drug dealer named Byron Mayes. Mayes had been receiving drugs from two brothers, Julio and Alfredo "Freddy" Rivas-Lopez. Living in Phoenix, Julio would ship cocaine from Mexico to Freddy in Louisville. Freddy would sell the drugs to dealers like Mayes. This investigation led to the seizure of many kilograms of cocaine and hundreds of thousands of dollars and the convictions of all three drug dealers.

In 2016, these individuals were out of prison. The Rivas-Lopez brothers were living in Mexico (Freddy had escaped from a federal prison), and Mayes was living in Louisville. Sheckles came to the DEA's attention during surveillance of a suspected drug "stash" house in Louisville. Officers believed that this house's "operator" had been receiving drugs from Julio Rivas-Lopez in Mexico and selling a portion to Mayes. After learning of Julio's suspected drug shipment in December 2016, officers observed the driver of a red truck visit the house. The license plate came back to a rental-car company that had leased the truck to Sheckles. Later that month, officers executed a search warrant at the house and seized a kilogram of heroin and about $200,000. The phone of the house's "operator" contained many texts from Julio.

Officers continued to monitor the Rivas-Lopez family in Mexico. In early 2017, they learned that Julio had been murdered. In June, they learned from an undercover DEA agent that Freddy had taken over his brother's business and planned to send ten kilograms of cocaine to his "Louisville distributor." Officers had obtained a pen register for Freddy's phone. Using his phone records, they identified the likely phone number of this Louisville distributor. In July, a state judge issued a warrant to obtain location data from AT&T for the distributor's phone.

The officers suspected that the phone belonged to Mayes. But their "pinging" of it led to Sheckles. On July 7, the phone pinged at the Terrace Creek Apartments. Officers saw a Ford Expedition rented by Sheckles at this location and confirmed that he had an address there.

Three days later, officers learned from the undercover DEA agent that Freddy's deal with his Louisville distributor (Sheckles) had fallen through because this distributor had invested in other drugs. The officers decided to ping the phone again on July 11. This ping took them to the Crescent Centre Apartments. They saw Sheckles's Expedition parked in a spot assigned to Apartment 234.

The next day, an employee at the apartment building noted that someone had just made an anonymous complaint about drug dealing from this apartment. The apartment was leased to a "John Murphy," but Murphy had illegally subleased the apartment to two men nicknamed "D" and "Boy" for their drug dealing. A maintenance person had also smelled marijuana in the apartment, and an officer smelled marijuana as he walked by it. The officer knew that Sheckles was at the apartment at this time but that his pinged phone remained at the Terrace Creek apartment.

After learning this information, officers sought search warrants for both apartments late on July 12. While one officer obtained the warrants, others observed Sheckles leave the Crescent Centre apartments at about 11:30 p.m. They stopped his vehicle and smelled marijuana. The officers detained Sheckles until a drug dog could arrive. The dog positively alerted to the presence of contraband. The officers searched the vehicle and found a handgun. Sheckles could not possess firearms because of a prior felony drug conviction, so the officers arrested him.

A little under an hour after the officers initiated this stop, a state judge approved the search warrants for the two apartments. The officers first searched the Crescent Centre apartment. They seized about 1.5 kilograms of heroin and 144 grams of crystal methamphetamine. They also recovered two handguns and an AR-15 rifle.

While the Crescent Centre search progressed, others executed the warrant at the Terrace Creek apartment. It was the middle of the night. Sheckles's girlfriend, Cristal Flores, was sleeping in the apartment with her young daughter. About nine to ten officers entered with guns drawn. They ordered Flores to the ground. When she explained that she was pregnant, they told her to get up, holstered their weapons, and turned the lights on. Officers proceeded with the search. They found the pinged phone, a firearm magazine, documents containing the name "John Murphy" as the lessee of the Crescent Centre apartment, and paperwork for a storage unit at a self-storage facility.

The officers asked Flores about the storage unit. The parties dispute what was said. According to the officers, Flores calmly acknowledged that she had been to the storage unit and kept clothes and many one-dollar bills for her daughter there. She also allegedly stated her belief that Sheckles had retrieved around $40,000 from the unit a short time ago to buy the heroin found at the other apartment. During a suppression hearing, Flores did not recall these statements. She testified that she had no authority over the storage unit, was scared, and just wanted the officers to leave. At 3:20 a.m., roughly two hours after the officers' entry, Flores signed a form consenting to a search of the storage unit. The search revealed a substantial amount of money, along with separate bags of clothes and one-dollar bills.

Sheckles was indicted on several counts. He moved to suppress the evidence against him, arguing that the government violated the Fourth Amendment when it tracked his phone, stopped his car, and searched his apartments and storage unit. After an evidentiary hearing, a magistrate judge recommended that the district court reject these arguments. *United States v. Sheckles*, 2018 WL 7297867, at *1–8 (W.D. Ky. Nov. 20, 2018). The district court agreed. *United States v. Sheckles*, 2019 WL 325637, at *1–6 (W.D. Ky. Jan. 25, 2019).

Sheckles entered into a conditional plea agreement. He pleaded guilty to five counts involving drug or firearm offenses. 21 U.S.C. §§ 841(a)(1), 846, 856(a)(1); 18 U.S.C. § 922(g)(1). The district court sentenced him to 108 months' imprisonment.

Sheckles reserved the right to appeal the district court's denial of his motion to suppress. He now invokes this right. When considering a denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Hines*, 885 F.3d 919, 924 (6th Cir. 2018).

II

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Sheckles alleges three violations of this text. He argues that: (1) the officers did not have "probable cause" for the warrants to track his phone and search his apartments; (2) they engaged in an "unreasonable" "seizure" when they stopped his car and detained him; and (3) they engaged in an "unreasonable" "search" when they looked through his storage unit.

A. Probable Cause for the Warrants

Sheckles claims that all three search warrants in this case lacked probable cause. This claim triggers well-established substantive and procedural ground rules. First the substance: Probable cause "is not a high bar." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (citation omitted). It demands only a "fair probability" of criminal activity. *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). When deciding whether this fair probability exists, courts must view the totality of the circumstances through the common-sense lens of ordinary people, not the technical lens of trained lawyers. *See United States v. Christian*, 925 F.3d 305, 309–311 (6th Cir. 2019) (en banc).

Next the procedure: We review de novo the district court's after-the-fact conclusion that probable cause existed. *See Hines*, 885 F.3d at 924. But we give "great deference" to the state judge's initial probable-cause conclusion when issuing the warrant, *id.* (citation omitted), asking merely whether the judge had a "substantial basis" for that conclusion, *United States v. Allen*, 211 F.3d 970, 973 (6th Cir. 2000) (en banc) (citation omitted). When answering this question, however, we may consider only the sworn information provided to the state judge. *See United States v. Davis*, 970 F.3d 650, 666 (6th Cir. 2020). In this case, that means we may consider only the affidavits that the officers submitted to obtain the warrants.

1. Phone-Tracking Warrant

Sheckles first challenges the warrant to obtain his phone's location data. This tracking warrant requires two disclaimers about what we need not decide. Disclaimer One: In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court reserved whether the acquisition of a phone's "real-time" location data (as compared to its historical location data) is a Fourth Amendment "search" necessitating a warrant. *Id.* at 2220. The record here leaves unclear whether AT&T produced more than real-time data from Sheckles's phone. Yet we can leave this "search" question for another day because the government conceded that the phone pinging required a warrant backed by probable cause. *Compare State v. Brown*, 202 A.3d 1003, 1018 (Conn. 2019), *with United States v. Hammond*, __ F.3d __, 2021 WL 1608789, at *7–13 (7th Cir. Apr. 26, 2021).

Disclaimer Two: The Fourth Amendment says that "no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend IV. Yet probable cause *of what*? When the police seek a warrant to search a home for physical items, the caselaw has long answered this question: The police need a probable-cause "nexus" showing a fair probability that the home to be searched will contain the things to be seized. *See United States v. Reed*, __ F.3d __, 2021 WL 1217871, at *3 (6th Cir. Apr. 1, 2021) (citation omitted); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Here, however, the officers sought to locate a phone to identify the person using it and investigate the person's crimes, not to seize anything. What type of "nexus between . . . cellphone location data and drug trafficking" justifies this different kind of warrant? *United States v. Thornton*, 822 F. App'x 397, 402 (6th Cir. 2020). Must the affidavit show only

a fair probability that the phone's data "will aid in a particular" investigation and disclose evidence of criminal activity? *United States v. Christian*, 2017 WL 2274328, at *9 (E.D. Va. May 24, 2017) (quoting *Andresen v. Maryland*, 427 U.S. 463, 483 (1976)); *see Warden v. Hayden*, 387 U.S. 294, 307 (1967). Or must it show, say, a fair probability that the phone itself is being used "in connection with criminal activity"? *See United States v. Powell*, 943 F. Supp. 2d 759, 779 (E.D. Mich. 2013), *aff'd on other grounds* 847 F.3d 760 (6th Cir. 2017). This nexus issue has added importance after *Carpenter*.

We need not resolve the issue here. This case's affidavit would pass muster under any test. The affidavit summarized the 2007 investigation of the Rivas-Lopez brothers, their distribution to Byron Mayes, and the DEA's large seizure of drugs and money at that time. The affidavit next summarized the Rivas-Lopez brothers' post-prison drug trafficking in 2016 and the seizure of a large amount of drugs and money from the Louisville stash house. It also noted that Freddy told an undercover DEA agent on June 14, 2017, that he had just spoken with "his Louisville distributor" and that he wanted the agent to deliver ten kilograms of cocaine to the distributor. Freddy later told the agent that the Louisville distributor would pay in cash at a price of $27,000 per kilogram. Using "toll analysis" of Freddy's phone from June 14, the DEA identified the phone number and phone that this Louisville distributor likely used to speak with Freddy. The prepaid phone had no identifiable customer. The affidavit explained that, in the officer's experience, drug dealers commonly use that type of phone to remain anonymous.

Considered collectively, this information provided a "substantial basis" for the state judge's finding that probable cause existed to obtain the phone's location data. *Gates*, 462 U.S. at 238 (citation omitted). An undercover agent had learned from Freddy Rivas-Lopez—a known drug trafficker—that Freddy planned to undertake a large deal with "his Louisville distributor." Unlike with information from a confidential informant, we presume the reliability of information from this government agent. *See United States v. Ventresca*, 380 U.S. 102, 111 (1965); *United States v. Lapsins*, 570 F.3d 758, 764 (6th Cir. 2009); 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.5(a) (6th ed), Westlaw (database updated Sept. 2020). The affidavit also explained why the phone likely was used by the Louisville distributor "in connection with" this pending deal: It was the number used when Rivas-Lopez told the

undercover agent that he had spoken to his distributor. *Powell*, 943 F. Supp. 2d at 779. And the phone's location would likely yield useful evidence of criminal activity, including the distributor's identity. *See Hayden*, 387 U.S. at 307. Thus, no matter the nature of the required "nexus" between the phone's location data and criminal activity, a sufficient nexus existed here. *Thornton*, 822 F. App'x at 402; *see United States v. Gibbs*, 547 F. App'x 174, 179 (4th Cir. 2013).

Sheckles's responses fall short. He first asserts that the affidavit offered no more facts than that "a known drug dealer" (Freddy Rivas-Lopez) "call[ed] another phone." Appellant's Br. 33. The affidavit provided much more than that: An undercover agent summarized how Freddy was planning a large drug deal with his Louisville distributor, and Freddy's phone records showed that the distributor was using this other phone to arrange that crime.

Sheckles next contends that even if probable cause existed when the judge issued the warrant, it "dissipated" days later when officers learned from the undercover agent that the distributor's cocaine deal with Rivas-Lopez had fallen through. Sheckles correctly notes that, at least for a traditional search warrant of a home, "there must be probable cause at the time the judge issues the warrant and at the time officers execute it[.]" *United States v. Archibald*, 685 F.3d 553, 560 (6th Cir. 2012). If new information comes to light in the interim (say, the police learn that the home has just been subject to a consent search that uncovered no evidence), this new information could eliminate the probable cause that existed when the judge issued the warrant. *See United States v. Bowling*, 900 F.2d 926, 932 (6th Cir. 1990).

The caselaw has not addressed how this rule should apply to technologically advanced (and ongoing) searches like the kind at issue with the tracking warrant. *See* LaFave, *supra*, § 4.7(a); *cf.* Orin S. Kerr, *Search Warrants in an Era of Digital Evidence*, 75 Miss. L.J. 85, 102–04, 115–24 (2005) (computer search); *United States v. Nyah*, 928 F.3d 694, 699–701 (8th Cir. 2019) (electronic-service-provider data). But the rule would not affect the outcome anyway. Evidence should not be suppressed if probable cause continued to exist despite the new facts. *See Bowling*, 900 F.2d at 934. Even if the officers needed probable cause for every "ping" of the phone, the new fact (that the deal with Rivas-Lopez had fallen through) did not negate probable cause. The undercover agent noted that this deal would not proceed precisely because

the distributor had bought other drugs. So a fair probability remained that the phone pinging would reveal evidence of a crime even after the warrant's issuance. *See United States v. Green*, 554 F. App'x 491, 495–96 (6th Cir. 2014); *see also United States v. Porter*, 774 F. App'x 978, 979 (6th Cir. 2019).

2. Warrants for Sheckles's Two Apartments

Sheckles next challenges the search warrants for the Crescent Centre and Terrace Creek apartments. Probable cause for these two warrants required a fair probability that the specific place to be searched contained the specific things to be seized. *See Zurcher*, 436 U.S. at 556. Or, as our cases put it, there must be a "nexus" between the place to be searched and the evidence sought. *Carpenter*, 360 F.3d at 594.

A virtually identical affidavit was used for both warrants in this case. The affidavit provided facts supporting three propositions: that Sheckles was a drug dealer, that he lived at the Terrace Creek apartment, and that he sold drugs from the Crescent Centre apartment. Start with Sheckles's drug-dealer status. The affidavit included the information from the tracking warrant, describing the 2007 investigation of the Rivas-Lopez brothers and the 2016 investigation of the stash house affiliated with Julio. It added that officers had watched Sheckles visit this house after they learned that Julio had shipped drugs there. The affidavit also summarized the undercover agent's discussion with Freddy about the delivery of ten kilograms of cocaine to "his Louisville distributor" who used a specific phone. It explained that Sheckles likely was this distributor because the phone had pinged at apartments connected to him. It also noted that Freddy later told the undercover agent that this deal would not proceed because the distributor (Sheckles) had "invested" "in other drugs."

The affidavit also included facts indicating that Sheckles lived at the Terrace Creek apartment complex. The phone of Freddy's Louisville distributor pinged at this location. Officers then observed a Ford Expedition rented by Sheckles there. And internet searches showed that Sheckles leased a specific apartment at the complex.

The affidavit lastly included facts indicating that Sheckles was selling drugs at the Crescent Centre apartment. The phone pinged at this apartment building after the ping at Terrace

Creek. An officer observed Sheckles's Expedition parked in the spot for a specific apartment. The next day, an employee at the building relayed the anonymous drug-dealing complaint about that apartment. The tipster noted that the apartment was leased to John Murphy, who had sublet it to "D" and "Boy" to sell drugs. An employee had smelled marijuana in the apartment when replacing a filter. The officer also smelled marijuana from the apartment when walking past it.

The affidavit sought search warrants to seize drugs; drug paraphernalia; drug proceeds; and drug records, including "cellular phones(s) . . . which may contain the identities of suppliers or buyers." Does the affidavit's information provide a sufficient "nexus" between these items and the apartments? We will address each apartment in turn.

a. *Crescent Centre Apartment*. The nexus is obvious for the Crescent Centre apartment. Probable cause exists to search a residence if an affidavit "directly connect[s] the residence with the suspected drug dealing activity[.]" *United States v. Miller*, __ F. App'x __, 2021 WL 1102302, at *2 (6th Cir. Mar. 23, 2021) (quoting *United States v. Brown*, 828 F.3d 375, 384 (6th Cir. 2016)). We have found such a connection when an anonymous tipster complained about drug sales at a home and officers later smelled drugs there. *See United States v. Yarbrough*, 272 F. App'x 438, 442–43 (6th Cir. 2007) (per curiam); *United States v. Elkins*, 300 F.3d 638, 659–60 (6th Cir. 2002); *see also Johnson v. United States*, 333 U.S. 10, 13 (1948); *United States v. Talley*, 692 F. App'x 219, 222 (6th Cir. 2017).

The Crescent Centre apartment has the same connection to drug dealing. An officer smelled marijuana at the apartment the day he sought the warrant. The officer's senses were corroborated by an apartment-building employee who had smelled marijuana at the apartment. They were further corroborated by an anonymous complainant's tip that individuals were selling drugs there. This apartment-specific evidence alone likely created probable cause. *See Yarbrough*, 272 F. App'x at 442–43. Yet it sat atop general evidence that Sheckles was a distributor for a large-scale drug trafficker. So a "substantial basis" existed for the warrant. *Gates*, 462 U.S. at 238 (citation omitted).

In response, Sheckles challenges two pieces of evidence used to establish probable cause. He first criticizes the anonymous tip. True, an anonymous tip by itself might fall short of probable cause. *See Allen*, 211 F.3d at 976. But "an anonymous tip that is corroborated by independent police work may" well suffice. *Yarbrough*, 272 F. App'x at 442. And this tip was corroborated by cross-border police work.

Sheckles next challenges the value of the officer's detection of a marijuana odor, noting that it could have come from another apartment and that the occupants could have been marijuana users, not sellers. But any amount of illegal contraband can justify a warrant to seize it (marijuana remains illegal in Kentucky). *See United States v. Church*, 823 F.3d 351, 355 (6th Cir. 2016). And the smell of marijuana must be viewed with all the other evidence, which made it quite unlikely that the officer had the wrong apartment. *See Christian*, 925 F.3d at 311.

b. *Terrace Creek Apartment*. The Terrace Creek apartment presents a much closer call. The affidavit shows that Sheckles was a drug dealer who lived there. Is that enough to create a "nexus" to search the apartment? Our cases point in both directions on this question. *See Reed*, 2021 WL 1217871, at *4. For his part, Sheckles relies on statements in our cases dismissing the notion that a "defendant's status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in his home." *United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005). Yet many other cases call it "well established that if there is probable cause to suspect an individual of being an ongoing drug trafficker, there is a sufficient nexus between the evidence sought and that individual's home." *United States v. Feagan*, 472 F. App'x 382, 392 (6th Cir. 2012). These cases have repeatedly noted that "[i]n the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020) (citation omitted).

Conflict? No, we have reconciled our cases in fact-specific ways. *See Reed*, 2021 WL 1217871, at *4–5. When we have used a drug dealer's drug activities alone to find probable cause to search the dealer's home, the dealer was engaged in "continual and ongoing operations" typically involving large amounts of drugs. *United States v. McCoy*, 905 F.3d 409, 418 (6th Cir. 2018); *see Reed*, 2021 WL 1217871, at *9 (citing cases). In one case, for example, officers stopped a "large scale [h]eroin dealer" in a car filled with some 11 kilograms of cocaine.

United States v. Davis, 751 F. App'x 889, 891 (6th Cir. 2018). In another, officers learned, among other things, that a drug dealer had picked up a package containing a kilogram of cocaine. *United States v. Miggins*, 302 F.3d 384, 393–94 (6th Cir. 2002). When, by contrast, we have found that drug distribution alone did not suffice, the police had evidence only of "a single instance of drug possession or distribution[.]" *McCoy*, 905 F.3d at 418 n.5; *see Brown*, 828 F.3d at 383–84. Or they lacked independently corroborated evidence that the defendant was even a drug dealer (as opposed to a drug user). *See United States v. McPhearson*, 469 F.3d 518, 524–25 (6th Cir. 2006).

Our caselaw "leaves unclear the amount of drug activity required to invoke this nexus principle." *Reed*, 2021 WL 1217871, at *7. For two reasons, though, the affidavit in this case gave the state judge a "substantial basis" to rely on the decisions that find probable cause in this setting. *Gates*, 462 U.S. at 238 (citation omitted). Most notably, the affidavit described Sheckles's connection to a "large, ongoing drug trafficking operation" centered in Mexico and led by the Rivas-Lopez brothers. *Brown*, 828 F.3d at 383 n.2. It described, among other facts, how Sheckles had been negotiating with Freddy to buy 10 kilograms of cocaine. *Cf. Davis*, 751 F. App'x at 891. And it explained that Sheckles had not completed this deal because he had invested in other drugs. The affidavit also detailed the evidence from the Crescent Centre apartment, corroborating the ongoing nature of Sheckles's drug distribution.

Apart from Sheckles's work with an international drug-trafficking operation, the officers also identified a specific connection between his residence and one item they sought to seize—a phone. Sheckles had used a particular cellphone to coordinate the drug deal with Freddy in Mexico. This phone had "pinged" at the Terrace Creek residence days before the search. The phone was the type of property that, in the words of the affidavit, might contain information about Sheckles's "suppliers or buyers." *Cf. Sumlin*, 956 F.3d at 887 & n.5. And there was a fair probability that it was at his residence. The totality of the circumstances thus permitted the state judge to find probable cause to search this apartment.

B. The Vehicle Stop

Sheckles next claims that the officers conducted an "unreasonable" "seizure" under the Fourth Amendment when they stopped him as he drove away from the Crescent Centre apartment at night on June 12. The government concedes two preliminary points for this claim. It concedes that the officers engaged in a "seizure" when they stopped Sheckles. *See Brendlin v. California*, 551 U.S. 249, 255 (2007). And it concedes that the officers seized Sheckles because of his suspected drug crimes, not because of any traffic offense. Sheckles argues that the seizure was unreasonable because the officers arrested him at the outset of the encounter and lacked the probable cause required for an arrest. *See Bailey v. United States*, 568 U.S. 186, 192–93 (2013). But we need not decide whether the officers had probable cause to arrest Sheckles based solely on the drug-dealing evidence they used to obtain the search warrants. *Cf. United States v. Baker*, 976 F.3d 636, 645–46 (6th Cir. 2020). They at least had a "reasonable suspicion" to initiate the stop, and the handgun they later discovered gave them probable cause to arrest Sheckles at that point.

1. *Initial Stop*. Even when officers lack probable cause, the Fourth Amendment permits them to undertake "brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Officers may engage in these "*Terry* stops" if they have a "reasonable suspicion" of criminal activity. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). This reasonable-suspicion test turns on the same totality of the circumstances that governs probable cause. *See United States v. Cortez*, 449 U.S. 411, 417–18 (1981). But it requires less than the "probability or substantial chance of criminal activity" necessary for probable cause. *Wesby*, 138 S. Ct. at 586 (citation omitted); *Alabama v. White*, 496 U.S. 325, 330 (1990). The officers need only "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (quoting *Cortez*, 449 U.S. at 417–18). And since probable cause itself "is not a high bar," *Wesby*, 138 S. Ct. at 586 (citation omitted), it follows that reasonable suspicion is not either, *see United States v. Bailey*, 743 F.3d 322, 332 (2d Cir. 2014).

The Supreme Court has said that the police may initiate a *Terry* stop when they reasonably suspect that "criminal activity '*may be afoot*.'" *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 30) (emphasis added). But what does that ambiguous phrase mean? Must officers suspect that a crime is being committed (or is about to be committed) at the *precise moment* they make a stop? *Terry* involved that scenario: an officer believed individuals were in the process of "casing a job" to "stick-up" a store. 392 U.S. at 6. But the Court has since held that *Terry* is not limited to such preventative purposes. The police may also engage in *Terry* stops to investigate past crimes. "[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *United States v. Hensley*, 469 U.S. 221, 229 (1985).

Given the broad scope of a permissible *Terry* stop, several courts have allowed officers to pull over individuals seen driving away from a residence when the officers have obtained (or are about to obtain) a search warrant for the residence. *See Bailey*, 743 F.3d at 333–36; *United States v. Montieth*, 662 F.3d 660, 665–67 (4th Cir. 2011); *United States v. Bullock*, 632 F.3d 1004, 1014 (7th Cir. 2011); *United States v. Taylor*, 857 F.2d 210, 213 (4th Cir. 1988); *United States v. Pantoja-Soto*, 768 F.2d 1235, 1236 (11th Cir. 1985) (per curiam). Admittedly, the individuals had *left* the premises subject to the search warrant, so they did not fall within the Supreme Court's bright-line rule allowing officers to detain all people present at a place to be searched. *See Bailey*, 568 U.S. at 192–202 (limiting *Michigan v. Summers*, 452 U.S. 692 (1981)). Yet the probable cause justifying "a narcotics search warrant" can also sometimes provide "the reasonable suspicion necessary to conduct an investigative stop of" individuals "whose suspected drug trafficking [is] the target of the warrant." *Montieth*, 662 F.3d at 665; *see Bailey*, 743 F.3d at 333. That is so even if the individuals were not engaged in a drug-trafficking crime at the specific time that the officers pulled over their vehicle. *See Bullock*, 632 F.3d at 1014.

This case falls squarely within that precedent. The officers stopped Sheckles as he left the Crescent Centre apartment and while they were obtaining a search warrant. *Cf. Pantoja-Soto*, 768 F.2d at 1236. By then, they had learned all the information justifying the

warrant, including Sheckles's connection to the Rivas-Lopez brothers and his suspected drug sales at the apartment. The officers also knew that Sheckles had a prior felony drug conviction. This evidence gave them at least a "particularized and objective basis" to question Sheckles about his ongoing drug trafficking. *Glover*, 140 S. Ct. at 1187 (citation omitted). Their investigatory stop was thus justified at its inception.

Sheckles responds that even if the officers had a reasonable suspicion that he was engaged in drug dealing generally, "there was no proof that [he] was engaged in drug trafficking activity that night, in his vehicle." Appellant's Br. 18. As the Seventh Circuit noted when rejecting the same argument, Sheckles misunderstands the scope of a valid *Terry* stop. *See Bullock*, 632 F.3d at 1014. Officers may stop a suspect not only for criminal-prevention purposes, but also for criminal-investigation purposes. *See Hensley*, 469 U.S. at 229. They do not need a specific suspicion that a suspected drug dealer is en route to a drug transaction or in a vehicle brimming with drugs.

Sheckles also argues that the initial stop of his vehicle itself qualified as a full "arrest" that required probable cause. But it is black-letter law that *Terry* applies to stops of drivers on the public roads just as much as it applies to stops of pedestrians on the public sidewalks. *See Glover*, 140 S. Ct. at 1187. If Sheckles is arguing that the officers *subjectively* intended to arrest him (not simply question him) when they pulled over his vehicle, this claim conflicts with the objective nature of this Fourth Amendment inquiry. *See Whren v. United States*, 517 U.S. 806, 812–13 (1996). The lawfulness of a stop does not turn on the subjective "motivation" of the officer making it; it turns on the objective facts justifying the stop. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004); *cf. United States v. Magnum*, 100 F.3d 164, 170 (D.C. Cir. 1996). The officers here had a particularized and objective basis to undertake a brief investigatory stop.

2. *Continued Detention*. Yet "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). The permissible scope and duration of a stop depends on the officer's reasons for undertaking it. *See Rodriguez v. United States*, 575 U.S. 348, 354 (2015). Take, for example, the typical traffic stop. Once an officer completes the normal tasks associated with the stop (e.g., gets the driver's information, checks

for warrants and proof of insurance, and issues a ticket), the officer cannot hold the driver to investigate other crimes. *See id.* at 355–57. At the same time, officers often learn new information during the stop—for example, the driver might confess to having drugs in the car. *United States v. Lott*, 954 F.3d 919, 923 (6th Cir. 2020). This new information can create reasonable suspicion to detain the driver longer in order to investigate the other crimes. *Id.*; *see also, e.g.*, *United States v. Winters*, 782 F.3d 289, 297 (6th Cir. 2015); *United States v. Davis*, 430 F.3d 345, 354–55 (6th Cir. 2005); *United States v. Hill*, 195 F.3d 258, 272–73 (6th Cir. 1999).

These principles do not help Sheckles. We need not decide what would have been the permissible scope and duration of the initial stop to investigate Sheckles's drug dealing because the officers immediately learned significant new information when they approached his vehicle. *Cf. Bailey*, 743 F.3d at 336–39; *Bullock*, 632 F.3d at 1014–17. They smelled marijuana, suspected that the vehicle contained drugs, and called for a K-9 unit. Sheckles's detention from this point until the K-9 unit arrived about 48 minutes later was based on the new suspicion that Sheckles had drugs in his vehicle. That suspicion was eminently reasonable. Indeed, our court has repeatedly held that officers have probable cause to search a vehicle "when they detect the odor of illegal marijuana coming from" it. *United States v. Brooks*, 987 F.3d 593, 599–600 (6th Cir. 2021) (citing cases). The new information provided at least the reasonable suspicion required to extend the stop for a K-9 unit to arrive, especially considering that the officers were already investigating Sheckles for drug-trafficking crimes. *See Lott*, 954 F.3d at 922–23. And after the police dog alerted to contraband, officers found a handgun in the center console. At that point they had probable cause to arrest Sheckles, a felon who could not possess firearms.

Sheckles responds that the 48-minute wait for the K-9 unit transformed this investigative stop into a full-scale arrest requiring probable cause. An investigative stop certainly "can become unlawful if it is prolonged beyond the time reasonably required" to serve its purpose. *Caballes*, 543 U.S. at 407. The Supreme Court reinforced this point when it found impermissible a 90-minute wait for a drug-sniffing dog to search a detained traveler's luggage at an airport. *United States v. Place*, 462 U.S. 696, 709–10 (1983). But the officers in this case likely had probable cause (not just reasonable suspicion) from the smell of the marijuana.

See Brooks, 987 F.3d at 599. Besides, even under *Terry*, we and other courts have repeatedly upheld vehicle stops of less than (and sometimes even more than) an hour. *See, e.g.*, *United States v. Perez*, 440 F.3d 363, 373 (6th Cir. 2006); *Davis*, 430 F.3d at 354–55; *United States v. Orsolini*, 300 F.3d 724, 730 (6th Cir. 2002); *see also, e.g.*, *United States v. Reedy*, 989 F.3d 548, 553–54 (7th Cir. 2021); *United States v. Salgado*, 761 F.3d 861, 866 (8th Cir. 2014); *United States v. Davis*, 113 F. App'x 500, 502–03 (3d Cir. 2004); *United States v. Hardy*, 855 F.2d 753, 761 (11th Cir. 1988). Sheckles also has made no argument that the officers were intentionally or negligently dilatory.

Sheckles next claims that he had already been arrested when the officers found the handgun because they placed him in handcuffs before then. Yet handcuffing "does not affect the legitimacy of the *Terry* stop" as long as the facts justify the precaution. *United States v. Marxen*, 410 F.3d 326, 332 (6th Cir. 2005); *Houston v. Clark Cnty. Sheriff Deputy John Does 1–5*, 174 F.3d 809, 815 (6th Cir. 1999); *cf. United States v. Lopez-Arias*, 344 F.3d 623, 627–28 (6th Cir. 2003). The officers could conclude that the facts warranted it here. Although the record leaves unclear when the officers actually handcuffed Sheckles during this encounter, there is no dispute that they did so because of his "animated" or "aggravated" behavior on the side of the road. *Cf. United States v. Atchley*, 474 F.3d 840, 849 (6th Cir. 2007). In addition, the officers were investigating Sheckles for serious offenses, not a moving violation. *Cf. Marxen*, 410 F.3d at 332.

Sheckles also doubts the sincerity of the officers' claim that they smelled marijuana. "But this factual debate was for the district court to resolve." *Brooks*, 987 F.3d at 599. And the district court found their testimony credible. *Sheckles*, 2019 WL 325637, at *5–6. Given one officer's unambiguous recollection that there was a "really strong odor of marijuana," the court's conclusion was not clearly erroneous.

Switching topics, Sheckles lastly argues that the officers questioned him during the stop in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The magistrate judge found his challenge moot because the government stipulated that it would not introduce the statements at trial. *See Sheckles*, 2018 WL 7297867, at *5 n.4; *cf. United States v. Sims*, 603 F. App'x 479, 483–84 (6th Cir. 2015). Sheckles did not object to this conclusion in the district court or respond to the government's identical claim on appeal. We thus need not consider the issue.

C. Search of the Storage Unit

That leaves Sheckles's challenge to the storage-unit search, which rested on the consent of his girlfriend, Cristal Flores. Although consent to a search avoids the need for a warrant or probable cause, the consent must be voluntary and must come from a party with apparent or actual authority over the premises. *See Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973). Sheckles attacks both aspects of a valid consent: He argues that Flores's consent was involuntary and that she lacked authority over the storage unit.

1. *Was Flores's consent voluntary?* The government must prove that a party consented to a search by a preponderance of the evidence. *See United States v. Lee*, 793 F.3d 680, 685 (6th Cir. 2015). To be valid, the consent must be "voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *United States v. Alexander*, 954 F.3d 910, 918 (6th Cir. 2020) (quoting *United States v. Canipe*, 569 F.3d 597, 602 (6th Cir. 2009)). When deciding whether a party's consent was freely given or coercively extracted, a court should consider the totality of the circumstances, including, for example, the party's age and education and the nature of the questioning from which the consent originated. *Schneckloth*, 412 U.S. at 226. We review the finding that a party gave voluntary consent for clear error. *Lee*, 793 F.3d at 684.

This deferential standard of review resolves this appeal. Nobody disputes that Flores signed a consent form and thus gave "specific" and "unequivocal" consent. *See Alexander*, 954 F.3d at 918. But the parties paint starkly different pictures of the scene from which this consent arose. Flores notes that some nine to ten officers barged into her apartment with guns drawn in the dark of night, that she was pregnant, undressed, and asleep with a small child, that she was questioned for an hour, and that she was scared and simply wanted the officers to leave. The officers respond that the atmosphere was not hostile by the time that Flores spoke with them, that she politely and cooperatively discussed the storage unit, and that they did not threaten her in any way. The magistrate judge (whose findings the district court adopted) resolved these contrasting portraits of the scene by siding with the officers. The judge noted that the initial "displays of force," while "startling," "took place long before Flores signed the consent form"

and that "[e]vents closer to her written consent were much more cordial." *Sheckles*, 2018 WL 7297867, at *7. The judge added that the officers calmy spoke with Flores, told her that she was not under investigation, and never "threatened or yelled at her." *Id.*

Given these findings, the judge did not clearly err when concluding that Flores consented to the search without coercion. *See United States v. Perry*, 703 F.3d 906, 909 (6th Cir. 2013) (abrogated on other grounds). In fact, many decisions have upheld consent searches when the officers' initial "show of force" had "dissipated" by the time the party gave consent. *United States v. Warwick*, 928 F.3d 939, 945 (10th Cir. 2019); *see, e.g.*, *United States v. Snype*, 441 F.3d 119, 131–32 (2d Cir. 2006); *United States v. Barnett*, 989 F.2d 546, 555–56 (1st Cir. 1993). In this case, too, the "initial melee of agents, badges and weapons" was not so "inherently coercive" as to render any later consent automatically invalid—no matter how freely it was given or how much time had passed. *United States v. Taylor*, 31 F.3d 459, 463, 464 (7th Cir. 1994).

In response, Sheckles compares this case to *United States v. Starnes*, 501 F. App'x 379 (6th Cir. 2012). *Starnes* reversed a finding that a woman had voluntarily consented to a search of her apartment while the police raided it to arrest her husband. *Id.* at 388–90. But the consent in *Starnes* does not resemble the consent in this case. There, the woman did not think she had a choice but to consent because the officers were already in the process of searching her apartment; she was visibly "angry" and "upset"; and she was in handcuffs up until just before she gave the consent. *Id.* at 389–90. Here, by contrast, Flores was calm. According to one officer, she even said that she felt "relieved about the whole incident." Substantial time had also passed between the officers' stressful entrance and Flores's consent. And the officers were not in the process of searching the storage unit when she consented, so they did not create any false impression that the search of that unit was all but inevitable.

Sheckles also notes that the officers did not inform Flores of her right to refuse consent. But the Supreme Court has adopted a totality-of-the-circumstances test to assess whether a consent is voluntary. Although "knowledge of the right to refuse consent" is a relevant factor, it is not "a necessary prerequisite" for finding voluntariness. *Schneckloth*, 412 U.S. at 232. The magistrate judge thus correctly looked to the totality of the circumstances when finding that Flores consented.

2. *Did Flores have authority to consent?* Even if Flores voluntarily consented to the search of the storage unit, she still must have had the *power* to do so for the search to be reasonable under the Fourth Amendment. A stranger to a property obviously cannot consent to its search. But what type of connection to the property must a party possess? The Supreme Court has held that the constitutional power to consent exists if the party has "actual" or "apparent" authority over the property. *See Rodriguez*, 497 U.S. at 188–89; *United States v. Ayoub*, 498 F.3d 532, 541 (6th Cir. 2007). We review de novo the ultimate question whether this authority existed (while reviewing any factual findings for clear error). *United States v. Hudson*, 405 F.3d 425, 431 (6th Cir. 2005).

What does it take for a party to have "actual" authority over property? The Supreme Court addressed this question at a time when it was emphasizing the Fourth Amendment's privacy purposes and downplaying property-law concepts (think of the "reasonable expectation of privacy" test for a "search"). *See United States v. Matlock*, 415 U.S. 164, 171 & n.7 (1974); *see also Georgia v. Randolph*, 547 U.S. 103, 110 (2006). The Court thus noted that this authority to consent does not "rest on the law of property," *Matlock*, 415 U.S. at 171 n.7, including, for example, on whether a person has a property-law right to permit another to enter without committing a trespass, *Randolph*, 547 U.S. at 110–11. Rather, the authority to consent depends on the "mutual use of the property by persons generally having joint access or control for most purposes[.]" *Rodriguez*, 497 U.S. at 181 (quoting *Matlock*, 415 U.S. at 171 n.7). This definition follows from a privacy-based paradigm: When a party shares property with others, the entire group has a reduced expectation of privacy because the group members have "assumed the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7.

Since *Matlock*, however, the Supreme Court has held in other contexts that the protections arising from the Court's privacy-based approach to the Fourth Amendment have only "*added to*, not *substituted for*," the protections that arise from the "traditional property-based understanding" of the amendment. *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (citing *United States v. Jones*, 565 U.S. 400, 409 (2012)). So although a state-law right to allow others onto a property may not be a *sufficient* condition for a party to possess the actual authority to consent to

a search, it might be argued that such a right remains a *necessary* condition for such authority. *See Fernandez v. California*, 571 U.S. 292, 308 (2014) (Scalia, J., concurring). But Sheckles does not argue the point here so we need not address whether this recent caselaw affects consent searches.

Even so, "[t]he meanings of 'mutual use' and 'joint access' are far from clear" under *Matlock*'s actual-authority test. *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990). It is thus useful to consider how courts have applied this test to storage units. They have held that a party has actual authority to consent to a storage-unit search when the party has a right to enter the unit under the terms of the rental agreement with the storage facility. *See United States v. Smith*, 353 F. App'x 229, 230–31 (11th Cir. 2009) (per curiam); *United States v. Trotter*, 483 F.3d 694, 699 (10th Cir. 2007) (judgment vacated on other grounds); *United States v. Camp*, 157 F. App'x 121, 122–23 (11th Cir. 2005) (per curiam); *United States v. Kim*, 105 F.3d 1579, 1582 (9th Cir. 1997); *United States v. Warren*, 18 F.3d 602, 603–04 (8th Cir. 1994). In one case, a court found actual authority when the defendant instructed a third party to lease storage units in the third party's name, and the third party occasionally supervised the loading of goods into the units. *Kim*, 105 F.3d at 1582. Actual authority existed, the court held, even though the third party did not usually possess the key and could not open the units. *Id.* In another case, a court found actual authority when the defendant had his girlfriend lease the storage unit in her name and she stored some items in the unit. *See Camp*, 157 F. App'x at 122–23. The court reached this conclusion even after the defendant had changed the locks and denied his girlfriend access to the unit. *Id.*

This caselaw demonstrates that Flores had actual authority over the storage unit. The storage facility's records showed that Sheckles identified Flores as having authorized access to the unit under his rental agreement. *See Sheckles*, 2018 WL 7297867, at *7 & n.6. Flores thus had a legal right to enter and store items in the unit. *Cf. Warren*, 18 F.3d at 603–04. This right of access would likely satisfy any sort of property-based approach. *See Jones*, 565 U.S. at 409. In addition, Flores exercised her shared right of access by using the unit. She told officers that she had been to the unit to store clothes and one-dollar bills for her daughter, and the officers discovered these items there. Their mutual use of the unit and Sheckles's decision to list her on

the rental agreement prove that he "assumed the risk" that Flores would invite others to examine it under *Matlock*'s privacy-based approach. *Kim*, 105 F.3d at 1582; *see Matlock*, 415 U.S. at 171 n.7.

Sheckles responds that the officers did not obtain the storage facility's records confirming that Flores had a right to enter and use the storage unit until *after* their search. He adds that Flores lacked *apparent* authority to consent at the time of the search. Apparent authority exists when "the facts available to the officer at the moment" would lead a reasonable officer to believe that a party had actual authority. *Rodriguez*, 497 U.S. at 188 (citation omitted). Sheckles claims that the facts that the officers knew at the time—that Flores "had stuff" at the unit but did not have a key—would not permit a reasonable officer to believe that she had actual authority. But we need not address this apparent-authority question. *Cf. United States v. Burcham*, 388 F. App'x 478, 482 (6th Cir. 2010). Even assuming that Flores lacked apparent authority when the officers questioned her, a valid consent search requires either actual authority or apparent authority; it does not require both. *See Chaidez*, 919 F.2d at 1201; *see also United States v. Gardner*, 887 F.3d 780, 783 (6th Cir. 2018). The Supreme Court made this point in *Rodriguez* when it held that a consent search would violate the Fourth Amendment if the police lacked apparent authority, "unless authority actually exists." 497 U.S. at 189. Authority actually existed here.

Does it matter, though, that the officers did not discover Flores's actual authority until after they searched the unit? In raising this claim, Sheckles attempts to import into this actual-authority question the apparent-authority requirement to consider only the facts that the officers knew "at the moment" they obtained consent. *See id.* at 188 (citation omitted). Yet actual authority depends on the *actual* facts; only apparent authority depends on the officers' reasonable (if mistaken) "*impressions* of the facts." *Ayoub*, 498 F.3d at 541 (emphasis added); *cf.* Restatement (Second) of Agency § 49(a) (Am. L. Inst. 1958). The actual facts in this case—including, most notably, Flores's authorized access under the rental agreement—prove actual authority.

We affirm.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:17CR-00104-01-RGJ

DWYANE SHECKLES — Defendant

* * * * *

MEMORANDUM OPINION & ORDER

This matter comes before the Court on Defendant, Dwayne Sheckles's, two Motions to Suppress. [DE 33, DE 68]. Defendant filed his first Motion to Suppress on January 16, 2018. [DE 33]. Subsequently, after motions for discovery and continuance were filed, an evidentiary hearing was held on April 27, 2018. [DE 55]. A second hearing on the suppression matter was held on May 21, 2018. [DE 58]. Sheckles filed a second Motion to Suppress on August 31, 2018. [DE 68]. Plaintiff, the United States of America, filed timely responses to the Motions to Suppress, [DE 34, 72, 73], and a Reply was filed by Sheckles on September 28, 2018. [DE 76]. On November 11, 2018, United States Magistrate Judge Colin H. Lindsay issued a Findings of Fact, Conclusions of Law, and Recommendation ("R&R") on the remaining issues, recommending that the Motions to Suppress be denied. [DE 78]. Objections were timely filed by Defendant. [DE 79]. These matters are now ripe for adjudication.

For the reasons set forth below, the Court **OVERRULES** Defendant's Objections [DE 79], **ACCEPTS** Magistrate Judge Lindsay's R&R without modification [DE 78] and **DENIES** Defendant's Motions to Suppress [DE 33, 68].

DISCUSSION

Sheckles makes no objections to the R&R's factual findings. [DE 78]. As such, those factual findings are incorporated by reference and relied on as true for purposes of discussing Sheckles's objections to the Magistrate Judge Lindsay's legal analysis.

A. Standard Of Review.

Pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Criminal Procedure 59(b)(1), a district court may refer a motion to suppress to a Magistrate Judge to conduct an evidentiary hearing, if necessary, and submit proposed findings of fact and recommendations for the disposition of the motion. This Court must "make a *de novo* determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); Fed. R. Crim. P. 59(b)(3). After reviewing the evidence, the Court is free to accept, reject, or modify the proposed findings or recommendations of the Magistrate Judge. *Id.* The Court, however, need not review, under a *de novo* or any other standard, those aspects of the report and recommendation to which no specific objection is made. *Thomas v. Arn,* 474 U.S. 140, 150 (1985). Rather, the Court may adopt the findings and rulings of the Magistrate Judge to which no specific objection is filed. *Id.* at 151.

B. Objections To Probable Cause For The Cell Phone Location Tracker.

Sheckles first objects to "toll analysis" being accepted as contributing to the establishment of probable cause for the cell-phone location tracker instead of being dismissed as wholly conclusory. [DE 79, at 419; DE. 78, at 406]. Sheckles argues that "[t]he magistrate's determination that probable cause existed relied upon the assertion that 'Rivas-Lopez had contacted a drug recipient in Louisville by calling the target phone.' The issuing judge was not provided with any basis to determine the factual nature of that assertion. . ." [DE 79, at 419]. This is the entirety of

Sheckles's objection on this issue. Moreover, this is identical to the argument made by the Defendant in his Motion to Suppress. [DE 33, at 121; 33-2 at 133].

An "objection . . . that merely reiterates arguments previously presented, does not adequately identify alleged errors on the part of the magistrate judge." *Altyg v. Berryhill*, No. 16-11736, 2017 WL 4296604, at *1 (E.D. Mich. Sept. 28, 2017). Therefore, Sheckles's repetition of the arguments already made in his Motion to Suppress is insufficient to qualify as an objection. As such, the Court need not conduct a *de novo* review of the Magistrate Judge's report with regard to Sheckles's first objection. *Ells v. Colvin*, No. 3:16-CV-00604-TBR, 2018 WL 1513674, at *2 (W.D. Ky. Mar. 27, 2018).

However, even if the Court were to consider the merits of this objection and conduct a *de novo* review, the R&R is well-reasoned on this issue. When a defendant challenges the constitutionality of a warrant-supported search, the court must "simply . . . ensure that the magistrate had a substantial basis for concluding that probable cause existed." *United States v. Laughton*, 409 F.3d 744, 747 (6th Cir. 2005). "[G]reat deference" should be accorded to the magistrate's original determination. *United States v. Leon*, 468 U.S. 897, 914 (1984). A warrant's supporting affidavit establishes probable cause if it contains, on its face, "facts that indicate a fair probability that evidence of a crime will be located on the premises of the proposed search." *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005) (internal quotations omitted). Those facts must be particularized enough to inform the reviewing magistrate's probable cause determination; "boilerplate recitations designed to meet all law enforcement needs" are inadequate. *Illinois v. Gates*, 462 U.S. 213, 239 (1983); *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1998). Likewise, mere "suspicions, beliefs or conclusions" are insufficient. *Id.*

Here, the detective's affidavit relayed detailed, clear, and precise information from the undercover agent, specifically that Mr. Rivas-Lopez had contacted a drug recipient in Louisville by calling the target phone. It was reasonable to suspect, because the target phone was prepaid, owned by an anonymous person, and was used to contact a drug recipient, that tracking the phone would lead to a drug trafficker and possibly a stash location. After considering the arguments of the parties, the Magistrate Judge properly concluded that probable cause existed and that Defendant's motion to suppress should be denied.

C. **Objections To Probable Cause For Search of Sheckles's Residence.**

Sheckles purports to object to probable cause for the search of his residence on three grounds. First, Sheckles objects to the conclusion that the target pinging outside the apartment to be searched and the fact that Sheckles was seen leaving one of the apartments with many bags was sufficient to establish probable cause to search. [DE 79, at 419; DE 78, at 409]. As to support for this argument Sheckles merely states that "[s]urely this cannot suffice to establish a likelihood of criminal activity." [DE 79, at 419]. This objection is simply factually inaccurate and sets forth no specific error of the Magistrate Judge. [DE 78, at 408-09].

As stated previously, an "objection . . . that merely reiterates arguments previously presented, does not adequately identify alleged errors on the part of the magistrate judge." *Altyg,* 2017 WL 4296604, at *1. Moreover, Sheckles's purported objection is nothing more than a simple disagreement with Magistrate Judge Lindsay's conclusion on this issue. *U.S. v. Ocampo,* 919 F. Supp.2d 898, 910 (E.D. Mich. 2013). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Id.* at 747. Consequently, the filing of vague, general, or conclusory objections does not meet the requirement of specific

objections and is tantamount to a complete failure to object. *Id.* at 747–48; *See also, Miller v. Currie,* 50 F.3d 373, 380 (6th Cir.1995); *Cole v. Yukins,* 7 F. App'x 354, 356 (6th Cir. 2001).

The Sixth Circuit has explained that this specificity requirement is necessary to conserve judicial resources. If review of general objection is permitted, "[t]he functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them and runs contrary to the purposes of the Magistrates Act." *Howard v. Sec. of Health and Human Svc.,* 932 F.2d 505, 509 (6th Cir. 1991). As such, the Court need not conduct a *de novo* review of the Magistrate Judge's report with regard to this objection. *Ells v. Colvin*, No. 3:16-CV-00604-TBR, 2018 WL 1513674, at *2 (W.D. Ky. Mar. 27, 2018).

Even if the Court were to consider the merits of this objection, the R&R is well-reasoned on this issue. The target phone number had already been sufficiently connected to an ongoing drug operation in Louisville. Detectives had relied on "precise information from an undercover agent: that Rivas-Lopez has contacted a drug recipient in Louisville by calling the target phone. It was reasonable to suspect that the target phone, because it was prepaid and owned by an anonymous person, was being used for drug activity." [DE 78, at 406-07]. There was a "fair probability that tracking the phone would lead them to a drug trafficker and his stash location." [DE 78, at 407]. Because it was reasonable to suspect that the phone was being used for drug activity and a fair probability that the phone could lead them to the trafficker and the stash location, the fact that the target phone was pinging outside the apartments to be searched was relevant to the establishment of probable cause.

Additionally, the target phone pinging outside the apartments to be searched and the fact that Sheckles was seen leaving one of the apartments with many bags were not the only facts relied

upon to establish probable cause. The court relied upon many facts including: Sheckles's prior drug trafficking conviction [DE 56, at 246], his presence at the Salmiron stash house in 2016 [DE 56, at 187], GPS pings of the target phone at two apartments – Terrace Creek and Crescent Centre [DE 56, at 192-94; DE 59, at 281], observation of Sheckles's rental car at both apartments [DE 33-3, at 138-39], observation of Sheckles's walking in and out of Crescent Centre with many bags [DE 33-3, at 139], an anonymous complaint of a Crescent Centre employee about drug activity in apartment 234 [DE 59, at 278-80], the smell of marijuana coming from apartment 234 [DE 59, at 280], and the fact that Sheckles's rental car was parked in the Crescent Centre garage in the parking spot reserved for apartment 234 [DE 56, at 192-94; DE 59, at 281]. All of these facts taken together support a finding of probable cause.

Second, Sheckles objects to the "acceptance of the 'characterization of Sheckles as a known narcotics trafficker'" to justify probable cause to search his residence, specifically clarifying that the affidavit mentions him as a "kilogram narcotics trafficker" when his 2005 conviction was for less than a kilogram. [DE 79, at 419; DE 78, at 409]. While Sheckles disagrees with this characterization as a "known narcotics trafficker," the terminology used in the R&R, this argument is directly addressed. Magistrate Judge Lindsay noted that the characterization was not, as Sheckles had argued, solely based on the 2005 conviction, but from the investigation involving the Salmiron stash house in 2016 and from the detective's current investigation. [DE 78, at 409].

Third, Sheckles objects to the finding of a sufficient nexus with Sheckles's residence based on an assertion that it is fair to infer that "drug traffickers use their homes to store drugs." [DE 79, at 420; DE 78, at 409]. Sheckles states that "'[t]o infer permissibly that a drug-dealer's home may contain contraband, the warrant application must connect the drug-dealing activity and the residence.'" *United States v. McCoy*, 905 F.3d 409, 417 (6th Cir. 2018). In this case, Sheckles

asserts that the affiant "strung together inferences upon inferences to justify an invasion of Mr. Sheckles' residence." [DE 79, at 420].

Probable cause exists in this case because of the continual and ongoing operation. "When a warrant application presents reliable evidence that a drug-trafficking operation is ongoing, 'the lack of a direct known link between the criminal activity and [dealer's] residence, becomes minimal.'" *United States v. McCoy,* 905 F.3d 409, 417-18 (6th Cir. 2018) (*citing United States v. Newton,* 389 F.3d 631, 635-36 (6th Cir. 2004)); *see United States v. Greene,* 250 F.3d 471, 481 (6th Cir. 2001). In *United States v. Jenkins,* a sufficient nexus between drug-related activity and the defendant's residence was formed because GPS phone ping data linked defendant's cell phone to the residence and a car, seen driven by the defendant after several controlled buys, was registered at the same address.[1] 743 F. App'x 636, 642-44 (6th Cir. 2018). Upon review by the Sixth Circuit, and as noted by the district court, the court concluded that the phone and the GPS data obtained from the phone connected it and the drug activity to the defendant's residence. *Id.* The court also connected the car Howell was spotted in after several controlled buys to the same address. *Id.* Similarly, in this case, an undercover agent provided information about Rivas-Lopez's Louisville operation and the cell phone number of his Louisville distributor. This information along with the phone pings from that number established a continual and ongoing operation.

In June of 2017, DEA agents in Las Cruces, Mexico provided information to the Louisville DEA office that an undercover operation revealed Freddy Rivas wanted to continue sending drugs

[1] Controlled buys were staged using a confidential informant from an individual known as "Ghost," later identified as one of the defendants, Howell. *United States v. Jenkins,* 743 F. App'x 636, 638 (6th Cir. 2018). A GPS phone ping search warrant was executed after the first controlled buy. *Id.* The phone was frequently located on Dori Drive during the day and overnight. *Id.* Additionally, the same black Chrysler was seen driven by Howell after some of the buys. *Id.* This car was also registered to the same address on Dori Drive. *Id.* A search warrant was executed on the Dori Drive address and heroin, cash, and firearms were among the items found. *Id.*

to Louisville and was planning a shipment of ten kilograms of cocaine. [DE 56, at 192]. They provided a phone number of the person they believed would receive the cocaine in Louisville. *Id.* Members of the Louisville DEA office and Metro Narcotics obtained a pen register or "ping" order for the phone in early July and used it to connect the phone to the Terrace Creek Apartments, where Sheckles lived. *Id.* Investigators conducted surveillance at the Terrace Creek Apartments and found a white Ford Expedition rented by Sheckles. [DE 56, at 192-94]. The cell phone ping also led investigators to another apartment complex, the Crescent Centre Apartments located at 644 South 3rd Street in Louisville, Kentucky, where they also observed the white Expedition rented by Sheckles. *Id.* Also in early July, Crescent Centre management obtained an anonymous drug trafficking complaint regarding Apartment 234. [DE 1, at 3]. Sheckles's rented car had been parked in the assigned spot belonging to Apartment 234. *Id.* Additionally, during the officer's investigation he also identified the smell of marijuana emanating from Apartment 234. [DE 59, at 280]. Based on these facts, as well as Sheckles's prior conviction for drug trafficking and his relation to the 2016 investigation of the Salmiron stash house, there was a sufficient nexus between the drug related activity and Sheckles's residence.

D. Objections To Reasonable Suspicion For Investigative Stop.

Sheckles objects to the Magistrate Judge's conclusion that the officers were justified in initiating the investigative stop. [DE 79, at 420; DE 78, at 410-12]. Sheckles states that "[n]o criminal activity had been observed; no controlled buys had been conducted. Instead, there were suspicions and hunches that were not sufficient to warrant a person of reasonable causation to believe that the seizure of Mr. Sheckles was a reasonable action to take at that time." [DE 79, at 421]. This is identical to the argument made by Sheckles in his Motion to Suppress and his Post-Hearing Brief in Support of Suppression. [DE 33, at 115-16; DE 70, at 369-71].

As stated previously, an "objection . . . that merely reiterates arguments previously presented, does not adequately identify alleged errors on the part of the magistrate judge." *Altyg,* 2017 WL 4296604, at *1. Moreover, Sheckles's purported objection is nothing more than a simple disagreement with Judge Lindsay's conclusion on this issue. *Ocampo,* 919 F. Supp.2d at 910. "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Id.* at 747. Consequently, the filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object. *Id.* at 747–48; *See also, Miller,* 50 F.3d at 380; *Cole,* 7 F. App'x at 356.

However, even if the Court were to consider the merits of this objection, the R&R is well-reasoned on this issue. An investigative stop must only be supported by reasonable suspicion. *Terry v. Ohio,* 392 U.S. 1, 30 (1968). Reasonable suspicion requires more than a "hunch," but less than probable cause. *United States v. Sokolow,* 490 U.S. 1, 7 (1989). "A suspicious string of separately-innocent acts can be enough to justify a stop." [DE 78, at 411]; *United States v. Arvizu,* 534 U.S. 266, 274-75 (2002).

Here, the police had more than reasonable suspicion to support the stop, they had probable cause. The stop was based on more than "suspicion and hunches," but a string of suspicious acts. These suspicious acts include: Sheckles's prior drug trafficking conviction [DE 56, at 246], observation of Sheckles at the Salmiron stash house in 2016 [DE 56, at 187], phone ping data placing Sheckles cell phone at Terrace Creek and the Crescent Centre [DE 56, at 192-94; DE 59, at 281], observation of Sheckles rental vehicle at Crescent Centre in the spot assigned to Apartment 234 [DE 56, at 192-94; DE 59, at 281], an anonymous employee's complaint about drug activity in Apartment 234 at Crescent Centre [DE 59, at 278-80], and a detective's report of the smell of

marijuana outside of Apartment 234. [DE 59, at 280]. Based on this information, the police had at least reasonable suspicion to support the investigative stop.

E. Objections To Credibility of Witness Testimony.

Sheckles purports to object to the credibility of witness testimony on two grounds. First, Sheckles objects to the Magistrate's acceptance of the "officer's claims that there was a smell of marijuana emanating from his vehicle." [DE 79, at 421]. Sheckles alleges that "[t]here are no contemporaneous records to that effect…" *Id.* Second, Sheckles objects to the conclusion that the officers' testimony was more credible than Ms. Flores' testimony. [DE 79, at 421; DE 78, at 415]. Sheckles alleges that "[s]uch an assertion essentially means that witnesses for the defense cannot be considered credible…" [DE 79, at 421]. However, "[t]he Magistrate Judge, as the fact-finder who sees and hears the witnesses, is uniquely situated to assess the credibility of the witnesses. Thus, this Court must 'accord[] great deference to such credibility determinations.'" *United States v. Conway,* No. 17-43-DLB-CJS, 2018 WL 3435353, at *5 (E.D. Ky. July 17, 2018); *United States v. Crawford,* No. 17-34-DLB-CJS, 2018 3388135, at * 10 (E.D. Ky. July 12, 2018).

At the Suppression Hearing, Officer Schardein testified that he smelled marijuana during the investigative stop. [DE 56, at 244-45, 249, 255-56]. Magistrate Judge Lindsay was able to assess the credibility of Officer Schardein's testimony and his decision to accept the officer's claim should be given deference despite the lack of a contemporaneous record.

Further in assessing the credibility of all witness' testimony, Judge Lindsay found the officer's testimony more credible that Ms. Flores's for two reasons. [DE 78, at 415]. First, the officers' testimony was corroborated by each other. *Id.* The results of the search also corroborated the officers' testimony as they found exactly what Ms. Flores indicated they would find. *Id.* Second, Ms. Flores's "interest in the outcome of this case are severe." *Id.* She is in a relationship

with Sheckles, has a child with him, and relies upon him as a source of financial support. *Id.* For these reasons, Magistrate Judge Lindsay determination that the officer's testimony was more credible should be accorded deference.

CONCLUSION

Accordingly, for the reasons stated herein, **IT IS ORDERED** as follows:

(1) The **Report** and **Recommendation** of the United States Magistrate Judge, [DE 78], is accepted **without modification** as the findings of fact and conclusions of law of this Court;

(2) Defendant's Objections, [DE 79], are overruled as set forth herein;

(3) Defendant's Motions to Suppress, [DE 33, DE 68], are **DENIED;** and

(4) This matter is scheduled for a **Status Conference** on **January 31, 2019 at 2:00 p.m.** before the Honorable Rebecca Grady Jennings at the Gene Snyder United States Courthouse.

Rebecca Grady Jennings, District Judge
United States District Court

January 25, 2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CRIMINAL ACTION NO. 3:17-CR-104-RGJ

UNITED STATES OF AMERICA, **Plaintiff,**

v.

DWYANE SHECKLES, **Defendant.**

Report & Recommendation

Defendant Dwayne Sheckles has filed two motions which together ask the Court to suppress the evidence obtained in five distinct searches.[1] (DNs 33, 68.) Both motions are now ripe for review.

Sheckles "has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Richards*, 659 F.3d 527, 536 (6th Cir. 2011) (quoting *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978)). For the following reasons, the undersigned Magistrate Judge finds that he has not met that burden regarding any of the challenged searches. Accordingly, the undersigned recommends that the District Judge DENY both motions in full.

I. THE TARGET PHONE

Sheckles first challenges law enforcement's warrant-supported tracking of a cell phone's location data. In its analysis, this Court may consider only the statements contained in the warrant's supporting affidavit. *United States v. Weaver*, 99 F.3d 1372, 1377 (6th Cir. 1996).

In July 2017, a Louisville Metro Police Department detective requested a "tracking warrant" for a cell phone belonging to "an unknown drug trafficker" from the Jefferson Circuit

[1] Sheckles's motion and proposed order have been docketed as DN 68. A second copy of the motion and an exhibit have been docketed as DN 69.

Court. (DN 33-2, PageID # 126.) He posited that the target phone's location data would enable law enforcement to surveil the phone's owner and "identify locations where evidence of criminal activity may be located." (PageID # 129.)

According to the detective's affidavit, Alfredo Rivas-Lopez, a convicted drug distributor, had told an undercover agent that he had contacted a drug recipient in Louisville. Rivas-Lopez intended to use that undercover agent, who was posing as a drug transporter, to deliver 10 kilograms of cocaine to Louisville. "Toll analysis" of Rivas-Lopez's phone revealed the drug recipient's phone number. (PageID # 128.) That target phone was a prepaid and anonymous device, and it had made calls with other phones throughout the Southwest. According to the detective's training and experience, these facts indicated drug activity. (PageID # 129.) Investigators believed (erroneously, as it would turn out) that Byron Mayes, a drug dealer who had previously been convicted alongside Rivas-Lopez, was the target phone's owner. (PageID # 127, 129.)

The Jefferson Circuit Judge signed the warrant permitting the Louisville Metro detectives to continually access the phone's location data at "any time of the day or night" for 60 consecutive days. (PageID # 132.) The Judge also expressly excluded "the contents of any communications" from the warrant. (PageID # 132–33.)

Sheckles argues that law enforcement's tracking of the cell phone "was an intrusive search . . . not supported by probable cause." He claims that the detective's supporting affidavit was "entirely conclusory" and objects to law enforcement's tracking of an unidentified individual's cell phone. (DN 33, PageID # 121.) The United States argues that "credible information" in the supporting affidavit establishes probable cause; that the prepaid phone's anonymity bolstered drug

trafficking suspicions, if anything; and that the original belief that Mayes owned the phone is inconsequential. (DN 73, PageID # 386.)

A search or seizure which is reasonable is also constitutional, and "a judicial warrant issued upon probable cause" is the best way to demonstrate reasonableness.[2] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). A warrant's supporting affidavit establishes probable cause if it contains, on its face, "facts that indicate a fair probability that evidence of a crime will be located on the premises of the proposed search." *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005) (internal quotations omitted). Those facts must be particularized enough to inform the reviewing magistrate's probable cause determination; "boilerplate recitations designed to meet all law enforcement needs" are inadequate. *Illinois v. Gates*, 462 U.S. 213, 239 (1983); *Weaver*, 99 F.3d at 1378. Likewise, mere "suspicions, beliefs or conclusions" are insufficient. *Weaver*, 99 F.3d at 1378.

When a defendant challenges the constitutionality of a warrant-supported search, the court must "simply . . . ensure that the magistrate had a substantial basis for concluding that probable cause existed." *United States v. Laughton*, 409 F.3d 744, 747 (6th Cir. 2005). "[G]reat deference" should be accorded to the magistrate's original determination. *United States v. Leon*, 468 U.S. 897, 914 (1984).

The undersigned finds that the Jefferson Circuit Judge had a substantial basis for concluding that probable cause existed. The detective's affidavit relayed precise information from an undercover agent: that Rivas-Lopez had contacted a drug recipient in Louisville by calling the target phone. It was reasonable to suspect that the target phone, because it was prepaid and owned

[2] Government acquisition of cell phone location data is "a search within the meaning of the Fourth Amendment," subject to the general warrant requirement. *Carpenter v. United States*, 138 S. Ct. 2206, 2220–21 (2018).

by an anonymous person, was being used for drug activity. And even though investigators mistakenly believed that the phone belonged to Mayes, there was a fair probability that tracking the phone would lead them to a drug trafficker and his stash location. Accordingly, the tracking authorized by the warrant was constitutional.

II. THE APARTMENT SEARCHES

Sheckles next challenges two warrant-supported apartment searches. Once again, only the statements contained in the supporting affidavits may be considered. *Weaver*, 99 F.3d at 1377.

One week after applying for the tracking warrant, the same detective submitted search warrant affidavits for two apartments: a suspected stash house at the Crescent Centre (DN 33-3) and Sheckles's suspected residence on Terrace Creek Drive (DN 33-4). The same supporting affidavit was attached to both warrants. It contained generally the same background information as the tracking warrant's affidavit. However, at this point in the investigation, the detective suspected that Sheckles rather than Mayes owned the target phone. The affidavit mentioned that officers had spotted a rental vehicle leased to Sheckles at an unrelated stash house operated by Giovanni Salmiron in 2016. (PageID # 138–39.)

The affidavit also contained new investigative details about both apartments. The day after the tracking warrant was signed, the target phone "pinged" at the Terrace Creek apartment complex. When officers visited the complex, they observed a white Expedition with California tags. It turned out to be a different rental vehicle leased to Sheckles, who also had a registered address at the complex. (PageID # 138.)

A few days later, officers learned that the cocaine deal anticipated in the tracking warrant's affidavit had fallen through. But the same undercover agent reported that the Louisville

distributor—now believed to be Sheckles, not Mayes—had invested his money in other drugs. (PageID # 139.)

Soon thereafter, the target phone "pinged" at the Crescent Centre apartments. Officers investigated and noticed the white Expedition inside the building's secure lot. When one detective visited the building's management office, an employee relayed an anonymous complaint about drug dealing from Apartment 234. Another employee had reportedly smelled marijuana inside that apartment while replacing an air filter. When the investigating detective walked past the apartment, he also smelled marijuana. Surveillance footage showed a black male walking in and out of the Crescent Centre with many bags. (PageID # 139.)

The affidavit concluded that Sheckles was receiving large quantities of drugs from Rivas-Lopez, operating out of the Crescent Centre apartment, and living at the Terrace Creek apartment. (PageID # 139.) A Jefferson County Judge found probable cause and signed both warrant applications. (PageID # 136–37, 141–42.) The warrants permitted law enforcement to search both apartments, the white Expedition, and Sheckles's person. (PageID # 135.)

Sheckles argues that the detective's affidavit was "entirely conclusory" and failed to establish that Sheckles was even utilizing the two apartments. (DN 33, PageID # 117.) He also asserts that "absolutely no allegations" connect the Terrace Creek apartment to any drug activity. (PageID # 119.) The United States argues that the statement sufficiently linked Sheckles to Rivas-Lopez, Salmiron's stash house, and the target phone. (DN 73, PageID # 387.)

The undersigned finds that the Jefferson Circuit Judge had a substantial basis for concluding that probable cause existed. In three ways, the detective's statement presented enough evidence for the reviewing judge to independently determine that the target phone belonged to a drug trafficker who was accessing both apartments.

First, the officers' investigative findings supported the finding of probable cause. Officers saw Sheckles's vehicle outside both apartments, at the same time as the target phone was pinging at each location. They also watched security footage of a man whose appearance was consistent with Sheckles's enter and leave the Crescent Centre with many bags. These observations established "a fair probability" that the apartments contained evidence. *See Frazier*, 423 F.3d at 531.

Second, the detective's characterization of Sheckles as a known narcotics trafficker was reasonable. That characterization was not, as Sheckles argues, based solely on his 2005 trafficking conviction—officers had also seen Sheckles visit the Salmiron stash house in 2016. A week after that surveillance, officers executed a search warrant at that stash house and seized heroin and drug money. (PageID # 138–39.)

Finally, the detective's statement established a sufficient nexus between the Terrace Creek apartment and the suspected drug activity. This circuit and others have fairly inferred that "drug traffickers use their homes to store drugs and otherwise further their drug trafficking." *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008). The target phone pinged at Terrace Creek, and officers reasonably expected other evidence of drug trafficking to be present there. Particularly in light of the deference owed to the Jefferson County Judge's original probable cause determination, Sheckles has failed to establish that the Terrace Creek search violated his constitutional rights.

III. THE INVESTIGATIVE STOP

Sheckles next challenges both the initial basis for and the duration of a July 2017 automobile stop. The Court heard testimony about the stop from several officers during a two-day evidentiary hearing. (DNs 56, 59.)

A. Initiation of the Stop

The stop took place in the early morning of July 12, 2017, shortly after officers saw Sheckles leave the Crescent Centre. (PageID # 244.) The two apartment search warrants discussed above were signed by the judge shortly after officers initiated the stop. (PageID # 253–54.) Unsurprisingly, the support for the warrants and the justifications for the stop overlap significantly.

The information known to the officers at the time of the stop can be broken into five key points. First, Sheckles had a prior drug trafficking felony conviction. (DN 56, PageID # 246.) Second, Sheckles had been seen at Salmiron's stash house in 2016. (PageID # 187.) Third, officers had tracked the target phone to and observed Sheckles's rental vehicle at both Terrace Creek, where Sheckles had a registered address, and at the Crescent Centre—though the phone and vehicle weren't always together. (PageID # 192–94, 281.) Fourth, an anonymous tipper and an employee had complained about drug activity in Apartment 234 at the Crescent Centre. Sheckles's vehicle had been parked in that apartment's assigned spot. (PageID # 278–80.) And fifth, while walking through a hallway accompanied by Crescent Centre staff, a detective had also smelled marijuana outside Apartment 234. (PageID # 280.)

Shortly after Sheckles left the Crescent Centre that night, officers blocked his rented Expedition with a van and removed him from the vehicle. (PageID # 251.)

Sheckles argues that the officers had no articulable suspicion of criminal activity. (DN 33, PageID # 115–16; DN 70, PageID # 370.) In support, he points out that the officers didn't see the Expedition do anything suspicious other than leave the Crescent Centre and that they were aware that the anticipated Rivas-Lopez cocaine shipment wasn't coming after all. (PageID # 370.) The United States argues that the officers had more than an articulable suspicion to initiate the stop

because they had probable cause to believe that Sheckles was trafficking drugs. (DN 73, PageID # 388).

The parties agree that this was an investigative stop, not a routine traffic stop.[3] (DN 70, PageID # 369–70; DN 70, PageID # 388.) The Fourth Amendment's "protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *see also Terry v. Ohio*, 392 U.S. 1 (1968). Such a stop is constitutional if it is "supported by reasonable suspicion to believe that criminal activity may be afoot." *Arvizu*, 534 U.S. at 273 (internal quotations omitted). When a defendant challenges the constitutionality of an investigative stop, the court must "must look at the 'totality of the circumstances,'" including the detaining officers' experiences and training, to determine whether they had "a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)). No "neat set of legal rules" can be used to determine whether a reasonable suspicion existed. *Id.* at 274. More than a "hunch," but less than probable cause, is required. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). A suspicious string of separately-innocent acts can be enough to justify a stop. *Arvizu*, 534 U.S. at 274–75; *see also Sokolow*, 490 U.S. at 9–10; *Terry*, 392 U.S. at 22.

The undersigned finds that the officers were justified in initiating the stop. The fruit of the investigation at that time was an "objective manifestation" that Sheckles was "engaged in criminal activity." *See Cortez*, 449 U.S. at 417. The information known by the officers gave them enough of an articulable suspicion to stop Sheckles and investigate further. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v.*

[3] One officer testified that Sheckles was speeding. (PageID # 244.) But he also testified that the stop was an investigative stop, not a traffic stop. (PageID # 261.) No traffic charges were filed. (PageID # 250.)

Williams, 407 U.S. 143, 145 (1972). Even though the apartment search warrants had not yet been signed, stopping Sheckles was a reasonable intermediate response given the circumstances.

B. Duration of the Stop

When the officers approached Sheckles, he was visibly agitated. He denied any contact with the Crescent Centre, despite having just left there. (PageID # 246, 249.) At some point, he was handcuffed.[4] (PageID # 246–47.) An officer moved Sheckles's vehicle out of traffic's way. (PageID # 252–53.) Some officers smelled marijuana emanating from Sheckles's vehicle, and they requested a drug canine. (PageID # 244, 255.) Sheckles was detained for approximately 45 minutes while they waited for the dog to arrive. (PageID # 226–27, 253–54.) When the dog scanned the vehicle, no marijuana was found, but officers did find a Glock pistol in the center console. (PageID # 246, 256–57.) Sheckles was then placed under arrest. (PageID # 196.)

Sheckles argues that the officers had no basis to keep Sheckles waiting so long for the drug dog. In support, he points out that one officer didn't report smelling marijuana during Sheckles's preliminary hearing and that none was found in the car. (DN 70, PageID # 371.) The United States argues that because the stop was investigative and not a routine traffic stop, the waiting period "was simply part of the investigation and not an unreasonable delay." (DN 73, PageID # 390.) The prosecution also asserts that Sheckles's aggravated demeanor, his false denial of knowledge about Crescent Centre, the smell of marijuana, and his prior drug conviction justified the vehicle search. (PageID # 388–89.)

Law enforcement may not extend a routine traffic stop to wait for a drug dog. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). But traffic stops are about traffic violations—

[4] In his post-hearing brief, Sheckles argues that his statements made during the stop should be suppressed because he wasn't mirandized before officers questioned him. (DN 70, PageID # 371.) But the United States does not intend to admit any of those statements at trial. (DN 73, PageID # 379–80.) Therefore, this issue is moot.

investigative stops are a different matter entirely. "[A]n officer can extend a stop where something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot." *United States v. Zuniga*, 613 F. App'x 501, 507 (6th Cir. 2015) (internal quotations omitted); *see also United States v. Place*, 462 U.S. 696, 701–02 (1983) (seizure of luggage upon an "articulable suspicion").

The undersigned finds that this investigative stop was justifiably extended while officers waited for the drug dog. In *Place*, a 90-minute delay was too long under the circumstances. 462 U.S. at 709–10. Sheckles has presented no authority to support his position that the 49-minute delay in this case was too severe. "[T]he ultimate touchstone of the Fourth Amendment is reasonableness," *Rodriguez*, 135 S. Ct. at 1617 (2015), and Sheckles's wait was reasonable. Furthermore, the officers had more than a suspicion when they requested the drug dog—the smell of marijuana and the other information they had regarding Sheckles's recent activity "provided them with probable cause to search the vehicle without a search warrant." *United States v. Foster*, 376 F.3d 577, 588 (6th Cir. 2004). The fact that one testifying officer didn't recall smelling marijuana does not negate the testimony of another officer who did.

IV. THE STORAGE UNIT

Lastly in his first motion, Sheckles challenges the purported consent search of a storage unit. Several officers and Cristal Flores, Sheckles's girlfriend, testified during the two-day evidentiary hearing. (DNs 56, 59.) While they agreed about the general circumstances of the Terrace Creek search, they presented conflicting accounts of their conversations inside and the circumstances of Flores's supposed consent to the storage unit search.

A. Undisputed Facts

While the Crescent Centre search was still ongoing, other officers executed the second warrant at Terrace Creek. It was the middle of the night. Flores was pregnant and asleep alongside her six-year-old daughter. (PageID # 207–08, 311–12.) Approximately eight to twelve officers entered the apartment with guns drawn. (PageID # 207–08, 289–90, 311–12.) They ordered Flores to get on the ground. She only made it onto her knees. When she explained that she was pregnant, the officers told her to get back up, holstered their weapons, and turned the bedroom lights on. (PageID # 310, 312.)

The officers questioned Flores first in the bedroom apart from her daughter, then later in the living room. (PageID # 207–08, 248.) They assured her that she wasn't the target of the investigation. (PageID # 282.) They learned that she had dated and lived with Sheckles continuously for several years, and that Sheckles would be the father of her expected child. (PageID # 310, 319–20.)

While searching the apartment, officers found documents with a unit number and gate access code for a self-storage facility. (PageID # 283.) They presented them to Flores and asked about the unit. Roughly two hours after the officers' initial entry, Flores signed a form consenting to a search of the unit. (PageID # 197, 284, 314–15.)

B. Findings of Fact

According to the officers' testimonies, Flores was nice, cooperative and polite. She expressed relief that Sheckles's drug activity was coming to an end. The environment was not hostile or coercive. (PageID # 198.) Though she didn't provide a key to the storage unit, she said that she had visited it. (PageID # 291–92.) She also described property of hers—some clothes and some money for her children—that could be found in the storage unit. (PageID # 197, 283.)

When officers told Flores that they had recovered heroin at the Crescent Centre, she recalled that Sheckles had recently retrieved $40,000 from the storage unit and counted it on their bed at Terrace Creek. She speculated that Sheckles had used that money to purchase the heroin. (PageID # 283.)

According to Flores's testimony, she denied having any knowledge of or authority to access the storage unit. (PageID # 313, 316.) She never mentioned any clothes or money that could be found in the unit. (PageID # 316, 321.) She claimed that she only signed the consent form under duress:

> "I mean, I didn't know what I was signing at the time. I didn't know I was signing a consent form at the time. I mean, I signed it because I wanted them to just leave my apartment. I wanted to get everything over with. . . . Because there was just so many of them and I was pregnant and I was anxious. I was nerve—not nervous, but my anxiety. I just wanted everything—everybody to leave my house."

(PageID # 315.) The undersigned finds that the officers' testimonies are more credible than Flores's testimony for two main reasons. First, the officers' accounts are corroborated, not only by each other, but by their search of the storage unit. Within the unit, they found the clothes and money which she had described at Terrace Creek, as well as a separate large sum of cash. (PageID # 197, 284–85.) And second, as the United States points out, Flores's interests in the outcome of this case are severe. Sheckles is her significant other, the father of one of her children, and her source of financial support. (DN 73, PageID # 391.) The following legal analysis is based on this credibility determination.

C. Consent to Search

Sheckles first argues that Flores did not have any authority to consent to the search. (DN 33, PageID # 120.) He further argues that her consent was not freely or voluntarily given because the environment of the Terrace Creek search was coercive.[5] (DN 70, PageID # 372–73.) The

[5] Sheckles also argues that Flores's consent is automatically invalid because it was conveyed during the Terrace Creek apartment search, which he claims was unconstitutional. (DN 33, PageID # 120.) As

United States maintains that "Flores had apparent authority to consent to the storage unit search and consented to the search freely and voluntarily without coercion." (DN 73, PageID # 391.)

Consent to a search is "one of the specifically established exceptions to the requirements of both a warrant and probable cause." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Where someone other than the defendant has purportedly consented to a search, the prosecution must show two things: First, that she possessed "either actual or apparent authority over the item or place to be searched." *United States v. Purcell*, 526 F.3d 953, 961 (6th Cir. 2008); *see also Georgia v. Randolph*, 547 U.S. 103, 106 (2006). Such authority rests on "mutual use of the property by persons generally having joint access or control for most purposes." *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974). And second, that her consent "was freely and voluntarily given." *Florida v. Royer*, 460 U.S. 491 at 497 (1983). The question of voluntariness "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227.

The undersigned finds that Flores had both actual and apparent authority to consent to the search. The storage facility's records indicate that she was authorized to access the unit.[6] (PageID # 199, 202, 209–10.) She therefore had joint access and control over the unit at the time of the Terrace Creek search. Furthermore, her descriptions of items which she was keeping in the unit caused the officers to reasonably believe that she and Sheckles made mutual use of the unit.

The undersigned further finds that Flores's consent to the search was freely and voluntarily given. Her encounter with the officers at Terrace Creek was startling, to say the least—they woke her up with their weapons drawn and issued commands to her. But those initial displays of force,

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discussed above, that search was proper. Therefore, substantive analysis of Flores's consent to the storage unit search must take place.

[6] The United States received the facility's "Customer Information Sheet" via subpoena, after the storage unit search took place. (PageID # 199.) The Court took the document under submission during the first day of the evidentiary hearing (PageID # 198–200), but it was never actually entered as an exhibit. Only testimony about the document is in the record.

which were not unordinary measures for officers executing a search warrant, took place long before Flores signed the consent form. Events closer to her written consent were much more cordial. As Flores admitted during the hearing, no officers threatened or yelled at her. (PageID # 321.) They explained that she wasn't a target of the investigation, and they spoke calmly with her for a lengthy period of time. Considering the totality of the circumstances, the environment of the Terrace Creek search was not unduly coercive. Accordingly, Flores's consent was valid, and the storage unit search was constitutional.

V. THE SEIZED PHONES

In March 2017, Sheckles was attacked and shot outside his home. While he received medical attention, officers seized two cell phones that were found on his person. They later obtained a search warrant to examine the phones. (DN 68, PageID # 360–61.)

In his second motion to suppress, Sheckles challenges the searches of two cell phones. In its response, the United States discloses that it does not intend to introduce the evidence obtained from the phones at trial. Accordingly, the motion to suppress is moot.

For the foregoing reasons, the undersigned Magistrate Judge RECOMMENDS as follows:

1) That Sheckles's first motion to suppress (DN 33) be **DENIED**.
2) That Sheckles's second motion to suppress (DN 68) be **DENIED** as moot.

Colin H Lindsay, Magistrate Judge
United States District Court

January 25, 2019

Notice

Pursuant to 28 U.S.C. § 636(b)(1)(B)–(C), the above-signed Magistrate Judge hereby files with the Court the instant findings and recommendations. A copy shall forthwith be electronically

transmitted or mailed to all parties. 28 U.S.C. § 636(b)(1)(C). Within fourteen (14) days after being served, a party may serve and file specific written objections to these findings and recommendations. FED. R. CRIM. P. 59(b)(2). Failure to file and serve objections to these findings and recommendations constitutes a waiver of a party's right to appeal. *Id.*; *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir. 1981); *see also Thomas v. Arn,* 474 U.S. 140 (1985).

cc: Counsel of record