

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America) Case No: 3:19-cr-00392
Plaintiff,) Judge James G. Carr
vs.) Motion to Suppress
Eugene Nicholson)
Defendant.)

Now comes the defendant, Eugene Nicholson, by and through counsel, and hereby respectfully moves this Court for an order suppressing any evidence seized from the residence at 603 Wayne Street, Apartment 1, Sandusky, Ohio 44870 pursuant to a search warrant executed on August 24, 2018 at 6:30 A.M. As discussed more fully in the accompanying memorandum, the affidavit supporting the warrant did not create probable cause, as there was not a nexus between the place to be searched and the evidence sought. Therefore any and all evidence obtained pursuant to such warrant was illegally seized in violation of the Defendant's constitutional rights as protected under the Fourth and Fourteenth Amendment to the United States Constitution. Defendant further

contends that the good faith exception to the exclusionary rule does not apply and that the suppression of the evidence is an appropriate remedy.

WHEREFORE, the Defendant, Eugene Nicholson, by and through his attorney, Kati E. Tharp, respectfully prays that the evidence obtained in the above-mentioned illegal search and seizure is suppressed for good cause shown.

MEMORANDUM IN SUPPORT

I. BACKGROUND

On August 23, 2018, Detective Ronald Brotherton, III of the Sandusky Police Department signed an affidavit for Search Warrant for the search of persons: Siron K. Mills, Daryl B. Castille, and **Eugene Nicholson**; along with the residences of: 317 Perry Street, Apartment 2, Sandusky, Ohio 44870; **603 Wayne Street, Apartment 1, Sandusky, Ohio 44870**, the curtilage, outbuildings and vehicles on the curtilage. The Affidavit for Search Warrant went on to state that the 603 Wayne Street residence,

"is further described as a multi-level, multi-unit apartment building. The residence is on the south west corner of Wayne Street and East Madison Street. The residence is tan in color with maroon trim. The numbers "603" are on the east side of the building. The vehicle is further described as a 2001, White, GMC Truck, Bearing Ohio Registration GVM, 4631, VIN #2GTEX19V611100398." See Attached Exhibit, Affidavit for Search Warrant, 1.

Detective Brotherton testified in his affidavit that Drug Enforcement Agent, Kenneth Meier (SA Meier) believed Castille and Nicholson were "working together to distribute large quantities of drugs in Sandusky, Ohio." Affidavit for Search Warrant, 17. He further testified in his affidavit that SA Meier believed that

"[O]n August 22, 2018, Castille obtained an unknown quantity of heroin and/or cocaine or other type of drug from Nicholson at 603

Wayne Street and then drove his Chevrolet Tahoe directly to the parking lot of Metro Housing parking where he provided Mills the drugs in exchange for US Currency. SA Meier believes that after Castille completed the transaction with Mills, Castille returned to the 603 Wayne Street to provide Nicholson the proceeds of the drug deal he had just completed with Mills." Affidavit for Search Warrant, 17.

As it pertains to Mr. Nicholson, Detective Brotherton supported these allegations with the following information:

1. SA Meier conducted a criminal history check of Castille and observed a prior drug conviction in 2003, and was aware that Nicholson was convicted as part of this same drug conspiracy.
2. SA Meier reviewed the text messages obtained by search warrant from Verizon Wireless reference phone number 419-360-9272 and observed Castille in contact with an **unknown person**, using phone number 907-232-6560. SA Meier observed that the **unknown user** of phone number 907-232-6560 appeared to be working in concert with Castille to distribute drugs and believe that the **unknown user** of that phone **could possibly** be Nicholson.
3. From August 7, 2018 to August 18, 2018, SA Meier observed the Chevrolet Tahoe, presumed to be Castille's, of which GPS tracking was installed on August 2, 2018, travel to 603 Wayne Street four (4) times. Three (3) times were observed via GPS tracker and one (1) unknown if physically observed or observed via GPS tracker.
4. On August 20, 2018, at approximately 7:19 PM, Detective Brotherton, via physical surveillance observed Nicholson driving a grey Ford F-150 pickup truck and park at 603 Wayne Street. At approximately 7:23 PM, Detective Brotherton observed Nicholson departing from 603 Wayne Street.
5. On August 22, 2018, at approximately 3:46 PM, SA Meier observed Castille leave the Health and Strength Gym and go to 603 Wayne Street. At approximately 4:45 PM, SA Meier observed Castille walking from the porch of 603 Wayne Street, enter the Chevrolet Tahoe and depart the area. SA Meier then observed Castille arrive at the Metro Housing at approximately 4:50 PM, located at 322 Warren, and park in the parking lot. SA Meier observed, via remote surveillance camera Mills walk toward the passenger side of the Chevrolet Tahoe that was parked in the Metro Housing parking lot, then walk to the GMC Sierra, open the door and reach toward the glove compartment area.
6. At Approximately 4:52 PM, Detective Brotherton observed the Chevrolet Tahoe depart from the Metro Housing parking lot and travel back to 603 Wayne Street, where he observed Nicholson and Castille Sitting on the front porch. At approximately 4:59 PM, Detective Brotherton observed Castile departing from Wayne Street.

7. SA Meier then observed, via remote surveillance, the Chevrolet Tahoe arrive and park in the driveway of 3011 E. Bayview Lane. Castille was observed exiting the vehicle, walking to the tailgate, retrieving a trash can from the curb, and walking up the driveway.

The affidavit provided no information as to why SA Meier believed that 907-232-6560 was Eugene Nicholson's number. Nor did the affidavit state with any certainty that drugs or narcotics were at the residence of 603 Wayne Street, Apartment 1. Based on Detective Brotherton's affidavit, a search warrant was issued on August 23, 2018. Police executed the warrant and seized various items that the State seeks to use in its prosecution of the Defendant.

II. LAW AND ARGUMENT

A. The Search Warrant Was Not Based on Probable Cause

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. To protect that interest, a search warrant may issue only upon a showing of probable cause. "Probable cause is 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *United States v. King*, 227 F.3d 732, 742 (6th Cir. 2000). Probable cause requires more than mere suspicion. *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008). Review of the affidavit and search warrant is based on a "totality of the circumstances" determination with deference to the magistrate judge's finding of probable cause. *Id.*; *United States v. Allen*, 211 F.3d 970, 973 (6th Cir. 2000) (en banc). That deference is not absolute, and a reviewing court must ensure that the issuing magistrate did "not serve merely as a rubber stamp for the police." *United States v. Leon*, 468 U.S. 897, 914 (1984). The reviewing court is "limited to information presented in the four corners of the affidavit." *United States v. Jackson*, 470 F.2d

299, 306 (6th Cir. 2006).

In determining whether an Affidavit for Search Warrant creates probable cause, “[t]he task of the issuing magistrate is simply to make a practical, commonsense decision, whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of person supplying hearsay information, there is a fair probability that contraband evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 at 2332. This Court, in reviewing the magistrate’s decision, has a duty “to ensure that the magistrate had a substantial basis for concluding that probable cause existed.” *State v. Sheppard* (1998), 84 Ohio St.3d 230, 236.

A merely conclusory affidavit will not create probable cause. An affiant must give enough specific information regarding his basis for knowledge to allow a magistrate to make an independent determination that probable cause exists. For example, in *U.S. v. Bennett*, the Court found that, “[A]fter excising the affidavit's false statements, all that remains in the affidavit is that an informant told Officer Horn that he saw 'paraphernalia which is used in the sale of marihuana' in Bennett's house, and an anonymous informant claimed that Bennett was selling drugs from his residence and was bringing in a shipment the night of April 1, 1988. We hold that these statements are not sufficient to provide reasonable grounds to believe that sheriff's officers would find marijuana at Bennett's residence on April 8, 1988.” *U.S. v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990).

In the situation at hand, there is not a single person stating that they witnessed the sale or possession of drugs at 603 Wayne Street, Apartment 1. There is a conclusory statement by SA Meier that he believes Nicholson and

Castille were engaged in distributing large amounts of heroin and/or cocaine, but there is no evidence supporting this. SA Meier asserts that he believes that a certain phone number is Mr. Nicholson's, and that phone number engaged in conversations indicative of drug trafficking, however SA Meier does not provide the magistrate with any verification of why this number is believed to be Nicholson's number. In fact, SA Meier asserts, "the unknown user of that phone could possibly be Nicholson," and repeatedly refers to the particular number in question as that of one of an "unknown person." Affidavit for Search Warrant, 13.

The other evidence that is relied upon is the fact that a person previously convicted of drug trafficking, Daryl Castille, went to 603 Wayne Street four (4) times in an eleven (11) day time period. Mr. Castille then went to the 603 Wayne Street address again on August 22, 2018, after Castille met briefly with Mills at the Metro Housing. However, Detective Brotherton does not assert that a drug transaction actually took place between Mills and Castille. However, he attests that SA Meier saw both Nicholson and Castille sitting on the front porch, immediately upon Castille's return, but does not make mention of any exchange witnessed. In fact, SA Meier states that he observed Castille return to a different address, retrieve something from the back of his vehicle, and retire to the house.

In the instant case the factual basis upon which the search warrant was predicated does not satisfy the threshold requirements for the issuance of a search warrant under the guidelines set forth in the applicable case law as there is no evidence of illegal activity at the 603 Wayne Street, Apartment 1 address.

B. There is no Nexus Between the Place to be Searched and the Evidence Sought

"To justify a search, the circumstances must indicate why evidence of illegal activity will be found in a particular place." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc). The affidavit in support of the warrant must set forth "a nexus between the place to be searched and the evidence sought." *United States v. Beals*, 698 F.3d 248, 364 (6th Cir. 2012); *United States v. McPherson*, 469 F.3d 518, 524 (6th Cir. 2006); *United States v. Laughton*, 409 F.3d 744, 747 (6th Cir. 2005); *United States v. Van Shutters*, 163 F.3d 331, 336-37 (6th Cir. 1998). A defendant's status as a drug dealer alone is insufficient to find probable cause to search the defendant's residence without other facts indicating illegal activity at the residence. *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005) (quoting *Gates*, 462 U.S. at 231).

The affidavit must present information that allows the magistrate to independently determine probable cause; "his action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239; *United States v. Weaver*, 99 F.3d 1372, 1376 (6th Cir. 1996). A conclusory affidavit is one which contains "only the affiant's belief that probable cause existed." *United States v. Finch*, 988 F.3d 349, 352 (6th Cir. 1993).

In *McPherson*, the Sixth Circuit affirmed the district court's suppression of evidence discovered during a search of defendant's residence after a pat down on the porch revealed crack on the defendant's person. Even "a high incidence of child molestation . . . may not demonstrate that a child molester is likely to possess child pornography" for purposes of establishing probable cause. *United*

States v. Hodson, 543 F.3d 286, 293 (6th Cir. 2008). There must be some reliable evidence connecting criminal activity to the residence or place to be searched.

In *U.S. v. Christian*, the Sixth Circuit concluded that the facts alleged in the affidavit in support of the warrant application were insufficient to support the issuance of a search warrant. *U.S. v. Christian*, 893 F.3d 846 (6th Cir. 2018). The affidavit for search warrant stated the following facts: (1) search warrants were executed at Christian's residence in the past; (2) Christian has a history of years' old drug convictions; (3) he engaged in one sale of drugs at the residence eight months prior to the application for a search warrant; (4) unidentified subjects of unknown reliability reported that Christian was selling drugs in the more recent past; and (5) a man with no connection to Christian was found to be in possession of drugs after leaving the area of the residence on the date of the search warrant affidavit. *U.S. v. Christian*, 893 F.3d 846 (6th Cir. 2018).

In comparing the evidence in the search warrant affidavit of 603 Wayne Street, Apartment 1 to the search warrant in *U.S. v. Christian*, it is clear that there is not a nexus between the place to be searched and the evidence sought. In *Christian*, even when the Court had evidence that the Defendant had engaged in the sale of drugs at the residence previously, and that a man leaving the residence was found to be in possession of drugs after leaving the area of the residence, the Court still found that probable cause did not exist to issue a search warrant.

The affidavit for search warrant of 603 Wayne Street, Apartment 1 lacks any evidence that drugs or proceeds from drugs were at or in the residence. There are no controlled buys at the residence, there are no controlled buys with individuals prior to them exiting or entering the residence, and there are no

statements that drugs or proceeds from drug sales are at the residence. In basic terms, the affidavit presents evidence that a previously convicted drug dealer entered the residence, but provides no evidence that he was bringing drugs or proceeds of drug transactions to the residence. A neutral and detached magistrate would have to make an attenuated logical leap to find that probable cause existed to search the premises of 603 Wayne Street, Apartment 1.

Applying the requisite legal standards to the challenged affidavit here, this Court must find that the issuing judge did not have a "substantial basis" for concluding that probable cause existed from the information furnished to him in the affidavit.

C. The Good Faith Exception Does Not Apply.

The United States Supreme Court in *Leon* held that the Exclusionary rule is will not serve as a an effective deterrent to Fourth Amendment violations when an officer relies on the legal sufficiency of the warrant. "The marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405

However, the Supreme Court of the United States held in *Leon*, that there are certain circumstances under which an officer cannot be said to have acted in objectively reasonable reliance on the sufficiency of the warrant.

"Suppression remains an appropriate remedy where; 1) the magistrate or judge was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, 2) the issuing magistrate wholly abandoned his judicial role, 3) an officer purports to rely upon a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or 4) where a warrant is facially deficient." *State v.*

George, 45 Ohio St.3d 325, 544 N.E.2d 640 at 646 citing *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. at 3421.

In the present case, there are essentially three components to the affidavit offered in support of the search warrant.

The first component of the affidavit is the reliance upon the criminal history of both Castille and Nicholson. The second component involves the unsupported assumption that Mr. Nicholson's phone number was 907-232-6560, and that he was engaged in drug trafficking conversations with Castille. The third component consists of the stops by Mr. Castille at 603 Wayne Street.

As stated earlier, such information cannot establish the probable cause necessary for the issuance of the warrant given the affidavits failure to set forth definite evidence of drug activity occurring at 603 Wayne Street, Apartment 1. Similarly, *Leon* holds that the good faith exception to the exclusionary rule does not apply when, "an officer purports to rely upon a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id* at 3421. Under the circumstances as stated above, there existed no indicia of reliability of the conclusory statement that drug trafficking was occurring at 603 Wayne Street, Apartment 1.

Therefore, should this Court determine that the affidavit offered in support of the search warrant does not contain information sufficient to support the finding of probable cause by the issuing magistrate and that none of the good faith exceptions applies in this case, an order suppressing all evidence seized at 603 Wayne Street, Apartment 1 is the appropriate remedy.

III. CONCLUSION

WHEREFORE, the defendant, Eugene Nicholson, by and through his attorney, respectfully prays that the Court finds his Motion to Suppress well taken and granted for good cause shown inasmuch as the search was violative of his constitutional rights under both the United States and Ohio Constitution.

Respectfully Submitted,
/s/: Kati E. Tharp
Kati E. Tharp, (0091779)
Attorney for Defendant
Wittenberg, Phillips & Levy
420 Madison Ave., Ste. 1101
Toledo, OH 43604
Phone No.: (419) 255-6070

CERTIFICATION

This is to certify that a copy of the foregoing was filed with the Court electronically this 27th day of November 2019. Notice of filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/: Kati E. Tharp
Kati E. Tharp, (0091779)

SANDUSKY MUNICIPAL COURT
222 MEIGS ST.
SANDUSKY, OH 44870 (419) 627-5920

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Page 1

STATE OF OHIO,

Person(s): Siron K. Mills, B/M, [REDACTED]
SSN: 276-80-0978
Daryl B. Castile, B/M, [REDACTED]
Eugene Nicholson Jr., B/M, [REDACTED]

Residence(s): 317 Perry Street, Apartment 2
Sandusky, OH 44870, curtilage, outbuildings and vehicles on the
curtilage.
603 Wayne Street, Apartment 1, Sandusky, Ohio 44870, curtilage,
outbuildings and vehicles on the curtilage.
Vehicle(s): 2001, White, GMC Truck, Bearing Ohio Registration GVM
4631, VIN # 2GTEC19V611100398

SANDUSKY MUNICIPAL COURT

18 AUG 30 PH 1:22

KIM PIOTROWSKI
CLERK

ERIE COUNTY, OHIO

No.

3082

SEARCH WARRANT

TO: Chief John Orzech or any law enforcement officer with authority,

From affidavit(s) to before a judge of a court of record, I, as judge of this court of record, find that grounds exist (probable cause) for issuing this warrant.

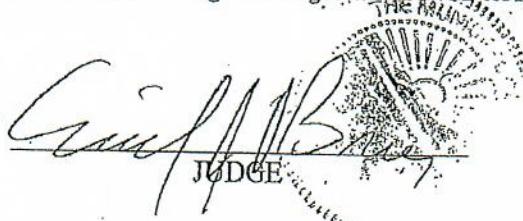
YOU ARE COMMANDIED TO SEARCH the Person/Place and seize the Property described below. Your search shall be within the territorial jurisdiction of this court, within three days (excluding the date this warrant is issued, Saturday, Sunday, and any legal holiday), and (X one): only in the daytime (7:00 a.m. to 8:00 p.m.). any time of day or night. Promptly return this warrant, together with a written inventory of any property taken (X one): to the undersigned judge.

* * Property to be searched and seized (description): COCAINE, HEROIN AND OTHER NARCOTIC DRUGS AND/OR OTHER PARAPHERNALIA USED IN THE TAKING OF DRUGS AND/OR PREPARATION OF ILLEGAL DRUGS FOR SALE, USE, OR SHIPMENT, RECORDS OF ILLEGAL TRANSACTION, ARTICLES OF PERSONAL PROPERTY, PAPERS AND DOCUMENTS TENDING TO ESTABLISH THE IDENTITY OF PERSONS IN CONTROL OF THE PREMISES, CONTRABAND INCLUDING BUT NOT LIMITED TO MONEY, GUNS, SCALES, SAFES, PLASTIC BAGS, CIGARETTE ROLLING PAPERS AND ALL OTHER EVIDENCE OF THE VIOLATION OF THE OHIO DRUG LAWS, TO WIT: 2925.03 AND 2925.11 OF THE OHIO REVISED CODE ET SEQ.

Place to be searched (description): Person(s) of: Siron K. Mills, B/M, [REDACTED] Daryl B. Castile, B/M, [REDACTED] Eugene Nicholson Jr., B/M, [REDACTED] Residence(s) of: 317 Perry Street, Apartment 2, Sandusky, Ohio 44870, the curtilage, outbuildings and vehicles on the curtilage. The residence is further described as a multi-level, multi-family apartment building. The residence is the third residence, south of East Washington Street and is on the west side of Perry Street. The residence is grey in color with white trim. The numbers "317" are on the east side of the building. 603 Wayne Street, Apartment 1, Sandusky, Ohio 44870, the curtilage, outbuildings and vehicles on the curtilage. The residence is further described as a multi-level, multi-unit apartment building. The residence is on the south west corner of Wayne Street and East Madison Street. The residence is tan in color with maroon trim. The numbers "603" are on the east side of the building. The vehicle is further described as a 2001, White, GMC Truck, Bearing Ohio Registration GVM, 4631, VIN # 2GTEC19V611100398.

X city ____ village ____ twp. of Sandusky, Erie County, OHIO

8/23/18 at 9:16 A.M.


JUDGE

SANDUSKY MUNICIPAL
222 MEIGS ST.
SANDUSKY, OH 44870 (419) 627-5920

COURT

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Page 1

STATE OF OHIO,

vs.

SANDUSKY MUNICIPAL, COUN

18 AUG 30 PM 1:22

KIM PIOTROWSKI
CLERK

Person(s): Siron K. Mills, B/M [REDACTED]

Daryl B. Castile, B/M, [REDACTED]

Eugene Nicholson Jr., B/M, [REDACTED]

Residence(s): 317 Perry Street, Apartment 2
Sandusky, OH 44870, curtilage, outbuildings and vehicles on the
curtilage
603 Wayne Street, Apartment 1, Sandusky, Ohio 44870, curtilage,
outbuildings and vehicles on the curtilage
Vehicle(s): 2001, White, GMC Truck, Bearing Ohio Registration
GVM 4631, VIN # 2GTEC19V611100398

ERIE COUNTY, OHIO

No.

Det. Ron Brotherton (Sandusky Police Dept.)
affiant, states these facts and circumstances:

AFFIDAVIT
(For Search Warrant)

- (1) [Property-Provision of law violation relationship.] The Property to be searched for and seized is involved with the Provision of law violation.
- (2) [Property-Person/Place relationship.] The Property to be searched for and seized will be found on/at the Person/Place to be searched.

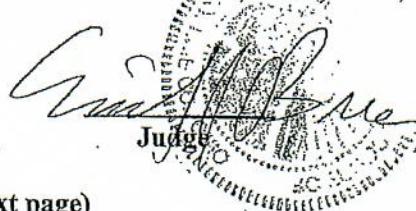
[Nighttime search authority (if applicable).] There is reasonable cause for permission to search in the nighttime, as well as the daytime.

- Provision of law violation (description - code, section number, name of offense): Trafficking in Drugs-2925.03, Possession of Drugs -2925.11
- **Property to be searched for and seized (description):** COCAINE, HEROIN AND OTHER NARCOTIC DRUGS AND/OR OTHER PARAPHERNALIA USED IN THE TAKING OF DRUGS AND/OR PREPARATION OF ILLEGAL DRUGS FOR SALE, USE, OR SHIPMENT, RECORDS OF ILLEGAL TRANSACTION, ARTICLES OF PERSONAL PROPERTY, PAPERS AND DOCUMENTS TENDING TO ESTABLISH THE IDENTITY OF PERSONS IN CONTROL OF THE PREMISES, CONTRABAND INCLUDING BUT NOT LIMITED TO MONEY, GUNS, SCALES, SAFES, PLASTIC BAGS, CIGARETTE ROLLING PAPERS AND ALL OTHER EVIDENCE OF THE VIOLATION OF THE OHIO DRUG LAWS, TO WIT: 2925.03 AND 2925.11 OF THE OHIO REVISED CODE ET SEQ.

Place to be searched (description): Person(s) of: Siron K. Mills, B/M, [REDACTED] Daryl B. Castile, B/M, [REDACTED] Eugene Nicholson Jr., B/M, [REDACTED] Residence(s) of: 317 Perry Street, Apartment 2, Sandusky, Ohio 44870, the curtilage, outbuildings and vehicles on the curtilage. The residence is further described as a multi-level, multi-family apartment building. The residence is the third residence, south of East Washington Street and is on the west side of Perry Street. The residence is grey in color with white trim. The numbers "317" are on the east side of the building. 603 Wayne Street, Apartment 1, Sandusky, Ohio 44870, the curtilage, outbuildings and vehicles on the curtilage. The residence is further described as a multi-level, multi-unit apartment building. The residence is on the south west corner of Wayne Street and East Madison Street. The residence is tan in color with maroon trim. The numbers "603", are on the east side of the building. The vehicle is further described as a 2001, White, GMC Truck, Bearing Ohio Registration GVM 4631, VIN # 2GTEC19V611100398.

X city village twp. of Sandusky, ERIE County, Ohio

8/22/18 at 9:16P M.


Judge

X (X if continued on next page)

GOVT-00956

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AFFIDAVIT (For Search Warrant)

* Probable cause for search (facts and circumstances, stated here or in attached exhibit):

(PLEASE SEE ATTACHED CONTINUATION PAGES)

Permission for nighttime search (from 8:00 p.m. to 7:00 a.m.) (X if applicable):

 is not requested X is requested for the above and the following reasons and facts: In order to preserve evidence and for the protection of the officers executing the warrant the element of surprise is essential.

Incorporated into this affidavit are the following (X if applicable):

 The testimony of _____ appearing personally before the undersigned judge and being examined under oath, whose testimony was taken down by (X one): court reporter. recording equipment.

X The audio tape recording on _____, of the statement by Det. R. Brotherton
Other: _____

Applicant for warrant (signature): _____
who is (X one): X a law enforcement officer. a prosecuting attorney.

Sworn to before me, a judge of a
court of record, and signed in my
presence on:

8/23/19 / at 9:16 AM
Mo Da Yr Time

DARRELL B. PIOTROWSKI

Affiant (signature)

David B. Piotrowski

Judge (signature)

David B. Piotrowski
CLERK

AUG 30 PM 1:22



GOVT-00957

AFFIDAVIT (FOR SEARCH WARRANT)

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FACTS TENDING TO ESTABLISH PROBABLE CAUSE:

Your Honor,

1. I am Detective Ronald Brotherton III of the Sandusky Police Department (hereinafter SPD). I am currently assigned to the Narcotics Division of the SPD. I am a certified police officer in the State of Ohio and a graduate from the Medina County Law Enforcement Training Academy in 2012. I have been with SPD full-time since August 2012. I have attended a DEA Basic Narcotics Investigator Course, an OSP Drug interdiction course, a patrol drug operations course, a search & seizure course, a basic narcotics investigator course and the NARCO conference. I have also attended a class in the handling of Clandestine Labs. I have been involved in many investigations as well as the execution of over one hundred search warrants. These investigations have resulted in many successful arrests and prosecutions for violations of the Ohio Revised Code. For the remainder of this affidavit, I will refer to myself as Affiant.

Person(s): Siron K. Mills (hereinafter MILLS)

B/M [REDACTED]

Daryl B. Castile (hereinafter CASTILE), B/M, [REDACTED]

Eugene Nicholson Jr. (hereinafter NICHOLSON), B/M, [REDACTED]

Residence(s): 317 Perry Street, Apartment 2, Sandusky, Ohio 44870
603 Wayne Street, Apartment 1, Sandusky, Ohio 44870
3011 E. Bayview Lane, Sandusky, Ohio 44870

Vehicle(s): 2001, White, GMC Truck, Bearing Ohio Registration GVM 4631, VIN # 2GTEC19V611100398

2. Affiant has knowledge of the following facts that pertain to the residence(s) and vehicle of :

- a. 317 Perry Street, Apartment 2, Sandusky, Ohio 44870 which is associated with the person of MILLS. 317 Perry Street, Apartment 2, Sandusky, Ohio 44870 is further described as a multi-level, multi-family apartment building. The residence is the third residence, south of East Washington Street and is on the west side of Perry Street. The residence is grey in color with white trim. The numbers "317" are on the east side of the building. The door leading into the residence is on the north side of the building.
- b. 603 Wayne Street, Apartment 1, Sandusky, Ohio 44870 which is associated with the person(s) of NICHOLSON. The residence is further described as a multi-level, multi-unit apartment building. The residence is **X** (X if continued on Attachment Page)

SANDUSKY MUNICIPAL
13 AUG 30 PH 1:22
KIM PIOTROWSKI
CLERK

GOVT-00958

**AFFIDAVIT (FOR Search Warrant)
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on the south west corner of Wayne Street and East Madison Street. The residence is tan in color with maroon trim. The numbers "603" are on the east side of the building. The door leading into the residence is near the northwest corner of the building.

- c. **3011 E. Bayview Lane, Sandusky, Ohio 44870** which is associated with the person of CASTILE. The residence is further described as a multi-story, single family residence. The residence is tan in color with off-white trim. The numbers "3011" are on the mailbox, to the left of the door. The door leading into the residence faces east and is on the east side of the residence. The residence is on the corner of Pease Lane and E. Bayview Lane.
- d. The vehicle is further described as a 2001, White GMC Truck, Bearing Ohio Registration GVM 4631, VIN #2GTEC19V611100398 which is associated with the person of MILLS.

3. The information in this affidavit is based on Affiant's personal knowledge, information provided by other law enforcement officers, individuals, and the reports and memoranda of other law enforcement officers. The information in this affidavit is provided for the limited purpose of establishing probable cause in connection with an application for a search warrant. The information is not a complete statement of all the facts relating to this investigation.

4. The Sandusky Police Department (hereinafter SPD) in conjunction with the Drug Enforcement Administration (hereinafter DEA) has been investigating a narcotics trafficker operating in Sandusky, Ohio identified as MILLS. Based on this investigation, which has included physical and electronic surveillance, Title III intercepts and debriefings of confidential sources, MILLS has been identified as distributing narcotics in Sandusky, Ohio.

5. A check of MILLS' prior drug related convictions include cocaine conspiracy (2002), conspiracy to distribute and possession of cocaine and marijuana (2002), felony possession of cocaine (2009), felony possession of drugs (July, 2010), felony possession of drugs (August 2010).

6. On March 27, 2018, at approximately 4:00 P.M., your Affiant, while conducting physical surveillance, observed CASTILE driving a 2007 Chevrolet Tahoe bearing Ohio license plate EXE4224, arrive and park in the parking lot of Metro Housing located at

SANDUSKY MUNICIPAL COURT
1333 1/2 W. PARK
DETROIT, MI 48226

X (X if continued on Attachment Page)

GOVT-00959

**AFFIDAVIT (FOR Search Warrant)
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322 Warren Street, Sandusky, Ohio 44870. Special Agent (hereinafter SA) Kenneth Meier (hereinafter Meier) of DEA conducted a query on license plate EXE4224 (which is affixed to the Chevrolet Tahoe) through Ohio Law Enforcement Gateway (OHLEG) and observed that the Chevrolet Tahoe is registered to CASTILE at **3011 E. Bayview Lane, Sandusky, Ohio**.

7. Shortly after your Affiant observed the Chevrolet Tahoe arrive into the parking lot and park, your Affiant conducting physical surveillance, observed MILLS enter the front passenger side of the Chevrolet Tahoe. After approximately 2 minutes, your Affiant observed MILLS exit the Chevrolet Tahoe and walk back towards his residence located at **317 Perry Street, Sandusky, Ohio**. Your Affiant then observed CASTILE depart, drive the Chevrolet Tahoe around the block and then leave the area. Based ^{on my} training and experience, your Affiant believed that CASTILE was driving in a manner consistent with counter surveillance or in a manner to attempt to identify if law enforcement was watching him.

8. On April 25, 2018, SA Meier served First Energy an administrative subpoena ^{for} reference utilities at the residence of MILLS located at **317 Perry Street, Sandusky, Ohio**.

9. On May 7, 2018, SA Meier received a response back from First Energy that showed Siron K. MILLS listed as the account holder paying utilities for **317 Perry Street #2, Sandusky, Ohio**. The account information showed a move in date of March 9, 2017 listed for MILLS at **317 Perry Street #2, Sandusky, Ohio**.

10. On June 8, 2018, at approximately 2:54 P.M., Task Force Officer (hereinafter TFO) Adam West (hereinafter West) of DEA observed MILLS, via a remote surveillance camera, exit his apartment building located at **317 Perry Street, Sandusky, Ohio**. TFO West observed MILLS wearing a gray shirt with gray shorts. TFO West observed MILLS walk to the south side of the parking lot where his 1990 maroon Buick LeSabre, bearing Ohio license plate HEC8146, was parked and open the trunk of the vehicle. At approximately 2:55 P.M., TFO West observed MILLS close the trunk of the Buick LeSabre and enter his apartment building. At approximately 3:01 P.M., TFO West observed MILLS exit his apartment building. At approximately 3:02 P.M., TFO West observed MILLS put on a gray sweatshirt. TFO West further observed MILLS reach into his waistband and put something inside the left front pocket of his sweatshirt. At approximately 3:07 P.M., TFO West observed MILLS talking on a cell phone. At approximately 3:08 P.M., TFO West observed the item in MILLS' left front sweatshirt pocket was a large amount of cash. At approximately 3:11 P.M., TFO West observed MILLS start walking westbound towards the parking lot of Metro Housing, 322 Warren

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Street, Sandusky, Ohio. SA Meier was aware that the parking lot of Metro Housing is the same parking lot that your Affiant had previously observed MILLS meeting with CASTILE on March 27, 2018 while CASTILE was driving the Chevrolet Tahoe. At approximately 3:13 P.M., TFO West observed MILLS return to the parking lot behind his residence located at 317 Perry Street. At approximately 3:14 P.M., TFO West observed MILLS walk over to his Buick LeSabre and open the trunk. After a few more minutes outside, TFO West observed MILLS enter his apartment building.

11. On June 10, 2018, Ohio State Highway Patrol (hereinafter OSHP) conducted a DEA coordinated traffic stop on a vehicle being driven by MILLS as it was traveling north from Columbus, Ohio toward Sandusky, Ohio. The traffic stop by OSHP led to the seizure of approximately 1000 grams of cocaine and the arrest of MILLS. During the arrest of MILLS, a Motorola GSM_XT1922 phone assigned phone number 202-427-4611 was located in the possession of MILLS and seized by OSHP.
12. On June 14, 2018, Wood County Court of Common Pleas Judge Matthew Reger (hereinafter Judge Reger) authorized a search warrant for the Motorola GSM_XT1922 cellular phone that was in MILLS possession when he was arrested on June 10, 2018. On June 20, 2018, Detective Pat Jones (hereinafter Jones) of the Perrysburg Police Department (hereinafter PPD) executed that search warrant on the Motorola GSM_XT1922 cellular phone and conducted a forensic examination of the cellular phone and provided the results of his examination and extraction from the cellular phone to TFO Anthony Martin (hereinafter Martin) of DEA.
13. SA Meier reviewed the results of the phone extraction from the Motorola GSM_XT1922 cellular phone and observed text message communication between MILLS using phone number 202-427-4611 and an unknown person using phone number 419-360-3940, who SA Meier believes to be CASTILE based on common call and phone toll analysis. SA Meier reviewed text messages between MILLS using phone number 202-427-4611 and the unknown person using phone number 419-360-3940 and observed text messages on June 8, 2018 as follows: An outgoing text message on June 8, 2018 at approximately 11:50 A.M., to phone number 419-360-3940 that stated, "6,pack when u off" and an incoming text message at approximately 11:50 A.M. from phone number 419-360-3940 that stated, "Bet". SA Meier believes that based on his training and experience and knowledge of this case that when MILLS stated, "6,pack when u off" that MILLS was placing an order for 6 ounces of cocaine or heroin to his drug source, which SA Meier believes to be CASTILE. At approximately 3:06 P.M., SA Meier observed an incoming text message from phone number 419-360-3940 that stated, "3 min" and at approximately 3:07 P.M. an outgoing text message to phone number 419-360-3940 that stated, "K". Based on a comparison of these text messages along with the surveillance of

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MILLS from June 8, 2018 and the previous surveillance by your Affiant observing MILLS meet CASTILE in the Chevrolet Tahoe in this same adjacent parking lot on March 27, 2018, SA Meier believes MILLS was meeting CASTILE and provided CASTILE the currency that was observed in the sweatshirt of MILLS in exchange for drugs.

14. On June 26, 2018, Intelligence Analyst (hereinafter IA) Chris Reighard (hereinafter Reighard) served Verizon Wireless an administrative subpoena reference phone number 419-360-3940 requesting subscriber and phone toll information. On June 27, 2018, IA Reighard received the results back from that subpoena. SA Meier reviewed the results and observed that phone number 419-360-3940 was subscribed to Bob Johnson listing Toledo, Ohio as the city for the location of the subscriber. SA Meier observed that last outgoing calls and text messages from phone number 419-360-3940 occurred on June 13, 2018. SA Meier knows that this is around the same date that MILLS was released from Morrow County Jail following his traffic stop and arrest on June 10, 2018. SA Meier believes that the user of phone number 419-360-3940, who SA Meier believes to be CASTILE, stopped using that phone number after discovering MILLS had been arrested with drugs.

15. IA Reighard conducted a common call toll analysis from the phone tolls of phone number 202-427-4611 and was able to determine phone number 385-323-9022 had similar toll patterns as phone number 202-427-4611. On June 27, 2018, IA Reighard served Sprint administrative subpoenas reference phone number 385-232-9022. SA Meier reviewed information provided by Sprint in response to the subpoenas and observed phone number 385-232-9022 had an activation date of June 18, 2018. Based on the common call analysis showing that the tolls from phone number 202-427-4611 were similar in pattern to the phone tolls of 385-232-9022, it indicated that MILLS was now using phone number 385-232-9022.

16. On June 28, 2018, IA Reighard conducted a common call analysis reference the tolls he analyzed from phone number 419-360-3940 and based on the common call analysis of those tolls, IA Reighard observed that the new phone being used by the unknown subject to be 419-360-9272.

17. On June 28, 2018, IA Reighard served Verizon Wireless an administrative subpoena reference phone number 419-360-9272. On June 29, 2018, IA Reighard received the response back from the administrative subpoena from Verizon Wireless and observed the subscriber to be Mike Green listing an address of 120 First Street, Oak Harbor, Ohio. SA Meier observed the activation date of phone number 419-360-9272 to be June 13, 2018 (the same date phone number 419-360-3940 stopped making outgoing calls and text messages).

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18. SA Meier reviewed the tolls from phone number 419-360-9272 (Mike Green subscriber) as compared to the tolls from phone number 419-360-3940 (Bob Johnson subscriber) and observed the tolls to be similar indicating that the same person who had been using phone number 419-360-3940 was now using phone number 419-360-9272.

19. On July 14, 2018, Meier observed the Chevrolet Tahoe parked in the driveway of **3011 E. Bayview Lane, Sandusky, Ohio**, the residence of CASTILE. At approximately 11:38 A.M., Meier observed an unknown black male walking from the area of **3011 E. Bayview Lane**, enter the Chevrolet Tahoe that was parked in the driveway of **3011 E. Bayview Lane** and depart. Based on Meier's observations and telephone activity which is described below, Meier believes this male to be CASTILE.

20. On July 14, 2018, SA Meier, via a remote surveillance camera, observed the Chevrolet Tahoe (registered to CASTILE) parked in the driveway of 3011 E. Bayview Lane, Sandusky, Ohio 44870, the residence of CASTILE. At approximately 11:38 a.m., SA Meier observed a black male walking from the area of 3011 E. Bayview Lane, enter the Chevrolet Tahoe that was parked in the driveway of 3011 E. Bayview Lane and depart. Based on SA Meier's observations, SA Meier believed this male to be CASTILE.

On July 14, 2018 at approximately 1:38 p.m., SA Meier, via a remote surveillance camera, observed the Chevrolet Tahoe (registered to CASTILE) arrive and park in a parking space on the north side of the Metro Housing parking lot located at 322 Warren Street, Sandusky, Ohio. Note: This parking lot is just west of MILLS' residence. At approximately 1:39 p.m., SA Meier observed MILLS exit from his residence located at **317 Perry Street, Sandusky, Ohio** and walk west from his residence toward the Metro Housing parking lot. SA Meier observed that MILLS was wearing a dark colored t-shirt and black shorts. At approximately 1:39 P.M., SA Meier observed MILLS walk up to the passenger side of the Chevrolet Tahoe and out of view. Approximately 20 seconds later, SA Meier observed MILLS walking away from the Chevrolet Tahoe and walking back toward the direction of his apartment building parking lot and the Chevrolet Tahoe departing. SA Meier knows that based on his training and experience that drug deals commonly happen inside and around vehicles and based on his training and experience and knowledge of this case, SA Meier believes that MILLS was conducting a drug deal with CASTILE inside the Chevrolet Tahoe. At approximately 1:40 P.M., SA Meier observed MILLS walking east through his apartment building parking lot. SA Meier then observed MILLS walk north in the lot out of view behind a fence in an area SA Meier previously observed MILLS park his vehicles. At approximately 1:42 P.M., SA Meier observed MILLS walk back into view from the fenced in parking area and then enter his apartment building that is located at **317 Perry Street, Sandusky, Ohio**. At approximately 1:56 P.M., SA Meier observed the Chevrolet Tahoe arrive and park in the driveway of **3011 E. Bayview Lane, Sandusky, Ohio**, the residence of CASTILE.

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21. On July 20, 2018, SA Meier served Verizon Wireless a preservation letter for the date range of June 13, 2018 through July 20, 2018, requesting Verizon Wireless preserve text messages for Verizon Wireless phone number 419-360-9272 for that date range. On July 30, 2018, SA Meier presented a search warrant to the Honorable Magistrate Judge James R. Knepp (hereinafter Magistrate Judge Knepp) of the United States District Court Northern District of Ohio to obtain the text messages for Verizon Wireless phone number 419-360-9272 for the time period that covered the date range mentioned in the preservation letter. On July 30, 2018, Judge Knepp authorized the search warrant and SA Meier served Verizon Wireless the search warrant.

22. On August 1, 2018, SA Meier received the results back from the Verizon Wireless search warrant and observed text messages on July 14, 2018 and July 19, 2018 between phone number 419-360-9272 (which SA Meier believes to be used by CASTILE) in phone contact with phone number 385-232-9022 (which SA Meier believes to be used by MILLS). SA Meier observed those text messages to correspond to surveillance of MILLS meeting with the Chevrolet Tahoe in the Metro Housing Parking lot on both July 14, 2018 and July 19, 2018.

23. SA Meier reviewed the text messages on July 14, 2018, and at approximately 1:15 P.M. observed an incoming text message from phone number 385-232-9022 to phone number 419-360-9272 which stated, "50pack". At approximately 1:16 P.M., SA Meier observed an outgoing text message from phone number 419-360-9272 to phone number 385-232-9022 which stated, "15 min" and at approximately 1:18 P.M., SA Meier observed an incoming text message from phone number 385-232-9022 to phone number 419-360-9272 that stated, "Bet". At approximately 1:37 P.M., SA Meier observed an outgoing text message from phone number 419-360-9272 to phone number 385-232-9022 which stated, "Pulling up" and at approximately 1:38 P.M., SA Meier observed an outgoing text message from phone number 419-360-9272 to phone number 385-232-9022 that stated, "Here". Based on SA Meier's training and experience and knowledge of this case, SA Meier believes that when MILLS (using phone number 385-232-9022) sent a text message stating "50pack," that MILLS was ordering up an amount of drugs from CASTILE (using phone number 419-360-9272). Based on the text message content and the surveillance observing the Chevrolet Tahoe arrive to the parking lot at the time the text message was sent stating, "Here" and then observing MILLS meet with the Chevrolet Tahoe, SA Meier believes that CASTILE transported drugs to the parking lot in the Chevrolet Tahoe and then provided them to MILLS on July 14, 2018.

24. SA Meier reviewed the text messages on July 19, 2018, and at approximately 5:57 P.M., SA Meier observed an incoming text message from phone number 385-232-9022 to phone number 419-360-9272 which stated, "50pack around 715". SA Meier believes

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based on his training and experience and knowledge of this case, that when MILLS stated, "50 pack around 715" that MILLS was ordering up drugs from CASTILE and wanted them at 7:15 P.M.

25. On July 19, 2018, at approximately 5:57 P.M., SA Meier observed an outgoing text message from phone number 419-360-9272 to phone number 385-232-9022 that stated, "Bet". At approximately 6:35 P.M., SA Meier observed the Chevrolet Tahoe depart from **3011 E. Bayview Lane**. At approximately 7:16 P.M., TFO West observed the Chevrolet Tahoe arrive and park in the Metro Housing parking lot. At approximately 7:17 P.M., SA Meier observed an outgoing text message from phone number 419-360-9272 to phone number 385-232-9022 that stated, "Here". At approximately 7:18 P.M., SA Meier observed MILLS walking west from the area of his residence located at **317 Perry Street**, and TFO West observed MILLS get into the Chevrolet Tahoe. At approximately 7:22 P.M., TFO West observed MILLS exit the Chevrolet Tahoe, and SA Meier observed MILLS walk back into the parking lot of **317 Perry Street**, walk out of view behind a white fence into a parking lot where MILLS has previously parked his vehicles, and then walk back into view and walk toward the doorway of **317 Perry Street**.

26. At approximately 8:12 P.M., SA Meier observed, via a remote surveillance camera, the Chevrolet Tahoe arrive back to **3011 E. Bayview Lane** and park in the driveway. SA Meier observed an unknown person, who SA Meier believes to be CASTILE, exit the driver's side of the Chevrolet Tahoe and walk toward CASTILE's residence located **3011 E. Bayview Lane**. SA Meier believes based on the text message content on July 19, 2018, along with the surveillance of the Chevrolet Tahoe arriving to the Metro Housing parking lot and MILLS meeting with the Chevrolet Tahoe, that CASTILE used the Chevrolet Tahoe to transport a quantity of drugs to the Metro Housing parking lot where CASTILE then provided the drugs to MILLS.

27. SA Meier reviewed all the messages obtained from Verizon Wireless for the time period June 13, 2018 through July 20, 2018 and the content that showed text messages between CASTILE (using phone number 419-360-9272) and MILLS (using phone numbers 646-281-4708 and 385-232-9022) arranging to meet for suspected drug transactions on June 14, 2018, June 20, 2018, July 4, 2018, as well as the previously described July 14, 2018 and July 19, 2018 dates. The chart below shows the dates and context of the text messages between CASTILE and MILLS covering the time period June 13, 2018 through July 20, 2018:

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Date/Time	Phone Number	User	Text Message Content 419-360-9272
June 14, 2018 1:22 P.M.	646-281-4708	Siron MILLS	Outgoing Text: "About 4"
June 14, 2018 1:24 P.M.	646-281-4708	Siron MILLS	Incoming Text: "What was that you gave me"
June 14, 2018 1:24 P.M.	646-281-4708	Siron MILLS	Outgoing Text: "100"
June 14, 2018 1:25 P.M.	646-281-4708	Siron MILLS	Outgoing Text: "Ok"
June 14, 2018 4:15 P.M.	646-281-4708	Siron MILLS	Outgoing Text: "In Route"
June 14, 2018 5:43 P.M.	646-281-4708	Siron MILLS	Incoming Text: "Is it a no go"
June 14, 2018 11:04 P.M.	646-281-4708	Siron MILLS	Incoming Text: "Thank u again for what u did. Holla at u tomorrow when court over"
June 20, 2018 12:50 P.M.	385-232-9022	Siron MILLS	Incoming Text: "New number. 65 when u get off"
June 20, 2018 1:25 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Bet"
June 20, 2018 3:06 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "In route"
June 20, 2018 3:08 P.M.	385-232-9022	Siron MILLS	Incoming Text: "Bet"
June 20, 2018 3:08 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Ok"
June 20, 2018 3:26 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Pulling up in 30 min"
July 4, 2018 2:15 P.M.	385-232-9022	Siron MILLS	Incoming Text: "2 pack"
July 4, 2018 2:15 P.M.	385-232-9022	Siron MILLS	Incoming Text: "When u ready"
July 4, 2018 3:49 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "10 min"
July 4, 2018 3:49 P.M.	385-232-9022	Siron MILLS	Incoming Text: "Bet"
July 4, 2018 4:10 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Pulling up"
July 14, 2018 1:15 P.M.	385-232-9022	Siron MILLS	Incoming Text: "50 pack"
July 14, 2018 1:16 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "15 min"

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July 14, 2018 1:18 P.M.	385-232-9022	Siron MILLS	Incoming Text: "Bet"
July 14, 2018 1:37 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Pulling up"
July 14, 2018 1:38 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Here"
July 19, 2018 5:57 P.M.	385-232-9022	Siron MILLS	Incoming Text: "50pack around 715"
July 19, 2018 5:57 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Bet"
July 19, 2018 7:08 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "In Route"
July 19, 2018 7:17 P.M.	385-232-9022	Siron MILLS	Outgoing Text: "Here"

28. SA Meier conducted a call by call toll analysis of phone number 419-360-9272 for the date of July 14, 2018, and observed contact with phone number 385-232-9022. Specifically, SA Meier observed an outgoing text message at approximately 1:37 p.m., and an outgoing text message at approximately 1:38 p.m., both messages from phone number 419-360-9272 to phone number 385-232-9022. SA Meier believes that this call by call analysis showing phone number 419-360-9272 (which SA Meier believes to be used by CASTILE) in phone contact with phone number 385-232-9022 (which SA Meier believes to be used by MILLS) just prior to observing MILLS meet with the driver of the Chevrolet Tahoe in the parking lot of Metro Housing, indicates that CASTILE was using phone number 419-360-9272 to communicate with MILLS. Furthermore, SA Meier believes that CASTILE is using his cellular phone to facilitate drug trafficking, to include text messages between CASTILE and MILLS to arrange meeting times, drug quantity orders and other content that would assist in the transactions associated with the sale and distribution of narcotics.

29. On July 23, 2018, SA Meier conducted a criminal history check of CASTILE and observed a prior drug conviction in 2003. SA Meier observed CASTILE was convicted of conspiracy to distribute and possess with intent to distribute cocaine, cocaine base and marijuana. CASTILE was convicted as part of the same drug conspiracy as MILES. SA Meier is aware that NICHOLSON was also convicted as part of this same drug conspiracy.

30. A check of NICHOLSON's prior drug related convictions include conspiracy to distribute and possess with intent to distribute cocaine, cocaine base and marijuana (2002).

31. SA Meier reviewed the text messages obtained by search warrant from Verizon Wireless reference phone number 419-360-9272 and observed CASTILE in contact with

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an unknown person, using phone number 907-232-6560. SA Meier observed that the unknown user of phone number 907-232-6560 appeared to be working in concert with CASTILE to distribute drugs and believe that the unknown user of that phone could possibly be NICHOLSON. SA Meier observed text messages between the unknown user and CASTILE on July 12, 2018 stating, "think we gonna have some original by the weekend". SA Meier believes that when the unknown user stated, "original by the weekend" that the unknown user was telling CASTILE that there would be a shipment of drugs coming in on the weekend. Meier observed a text message from the unknown user on July 13, 2018, stating to CASTILE, "original 9 mixer 7". SA Meier believes that the unknown user was advising CASTILE the amount of drugs they had available for distribution. Based on text messages and surveillance, SA Meier believes that CASTILE did drug deals with MILLS on July 14, 2018 and July 19, 2018 and corresponded with the unknown user of phone number 907-232-6560 to facilitate those drugs deals. The chart below shows the dates and context of the text messages between the unknown user and CASTILE:

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Date/Time	Phone Number	User	Text Message Content 419-360-9272
July 12, 2018 12:37 P.M.	907-232-6560	Unknown User	Incoming Text: "think we gonna have some original by the weekend"
July 13, 2018 5:38 P.M.	907-232-6560	Unknown User	Incoming Text: "original 9 mixer 7"
July 14, 2018 10:41 A.M.	907-232-6560	Unknown User	Incoming Text: "Call Me"
July 14, 2018 2:00 P.M.	907-232-6560	Unknown User	Incoming Text: "u good"
July 14, 2018 2:01 P.M.	907-232-6560	Unknown User	Outgoing Text: "yep"
July 14, 2018 2:01 P.M.	907-232-6560	Unknown User	Incoming Text: "k" KIM 8 AM 2:30
July 19, 2018 9:05 A.M.	907-232-6560	Unknown User	Incoming Text: "faRe PLOT czuz'in????"
July 19, 2018 10:41 A.M.	907-232-6560	Unknown User	Outgoing Text: "Don't know yet"
July 19, 2018 10:49 A.M.	907-232-6560	Unknown User	Incoming Text: "K" KIM 1:22
July 19, 2018 5:59 P.M.	907-232-6560	Unknown User	Outgoing Text: "Lil bro hit me up. I think it's clear"

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32. On July 31, 2018, SA Meier served First Energy an administrate subpoena reference utilities at **3011 E. Bayview Lane, Sandusky, Ohio**. On August 9, 2018, SA Meier received the results back from that administrative and observed that the move in date for **3011 E. Bayview Lane** was listed as November 29, 2006 and that the customer contact was CASTILE.

33. On August 1, 2018, SA Meier presented a federal search warrant for the application and use of a GPS tracking device for a 2007 Chevrolet Tahoe Ohio license plate EXE4224 and VIN: 1GNFK13007R327291, to the Honorable Magistrate Judge Knepp of the United States District Court Northern District of Ohio. On August 1, 2018, Magistrate Judge Knepp signed and authorized the search warrant.

34. On August 2, 2018, at approximately 12:14 A.M., your Affiant observed the Chevrolet Tahoe bearing Ohio license plate EXE4224, parked in driveway of **3011 E. Bayview Lane, Sandusky, Ohio**. Your Affiant was able to execute the search warrant order and install the GPS tracking device on the Chevrolet Tahoe.

35. On August 7, 2018, SA Meier observed, via GPS tracker, that the Chevrolet Tahoe had traveled to the area of **603 Wayne Street, Sandusky, Ohio**. SA Meier observed that the Chevrolet Tahoe had arrived to the area of **603 Wayne Street** at approximately 8:52 P.M. and departed the area of **603 Wayne Street** at approximately 9:07 P.M.

36. On August 8, 2018, SA Meier, via GPS-tracker, observed the Chevrolet Tahoe travel to the area of **603 Wayne Street**. SA Meier observed that the Chevrolet Tahoe had arrived to the area of **603 Wayne Street** at approximately 8:33 P.M. and departed the area of **603 Wayne Street** at approximately 9:44 P.M.

37. On August 13, 2018, Meier observed the Chevrolet Tahoe arrived to the area of **603 Wayne Street** at approximately 9:30 P.M. and depart the area of **603 Wayne Street** at approximately 10:03 P.M.

38. On August 13, 2018, SA Meier conducted an open sources database check on **K. NICHOLSON** and observed the address **603 Wayne Street Apt #1, Sandusky, Ohio** listed as a residence for NICHOLSON.

39. On August 18, 2018, SA Meier observed, via GPS tracker, the Chevrolet Tahoe arrive to the area of **603 Wayne Street** at approximately 5:12 P.M. and depart the area of **603 Wayne Street** at approximately 6:27 P.M.

40. On August 20, 2018, at approximately 7:19 P.M., your Affiant, via physical surveillance, observed NICHOLSON driving a grey Ford F-150 pickup truck north on

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Hancock Street near Madison Street in Sandusky, Ohio. Shortly thereafter, your Affiant observed the Ford F-150 parked left wheel to curb on Madison Street across from **603 Wayne Street**. At approximately 7:23 P.M., your Affiant observed NICHOLSON departing from the area of **603 Wayne Street** driving the Ford F-150. SA Meier conducted an OHLEG query of Ohio license plate GSC2954 and observed the Ford F-150 is registered to NICHOLSON at 1008 W. Adams Street, Sandusky, Ohio.

41. On August 22, 2018, at approximately 6:08 A.M., SA Meier observed, via GPS tracker, the Chevrolet Tahoe depart from **3011 E. Bayview Lane** and arrive at Ventra located at 3020 Tiffin, Sandusky, Ohio at approximately 6:21 A.M. At approximately 2:34 P.M. SA Meier observed the Chevrolet Tahoe depart Ventra. At approximately 3:01 P.M., SA Meier observed, via physical surveillance, CASTILE driving the Chevrolet Tahoe arrive and park at the Health and Strength Gym located at 1176 Cleveland Road, Sandusky, Ohio. Shortly thereafter, SA Meier observed CASTILE exit the Chevrolet Tahoe and enter the gym. At approximately 3:40 P.M., SA Meier observed, via GPS tracker, the Chevrolet Tahoe departing from the gym and travel to the area of **603 Wayne Street**, arriving at approximately 3:46 P.M. Shortly thereafter, your Affiant observed, via physical surveillance, the Chevrolet Tahoe parked on the north side of Madison Street (near **603 Wayne Street**) and NICHOLSON's Ford F-150 parked on the south side of Madison Street (near **603 Wayne Street**).

42. At approximately 4:29 P.M., SA Meier observed, via a remote surveillance camera, a red Buick Verano arrive to the parking lot of **317 Perry Street** and stop in the parking lot. Shortly thereafter, SA Meier observed Siron MILLS exit the front passenger seat of the Buick Verano and appear to use a key to enter into **317 Perry Street**. SA Meier noted that the vehicle appeared to be the same vehicle that MILLS was traffic stopped driving on June 10, 2018, when he was arrested with approximately 1000 grams of cocaine as he was traveling northbound I-71 from Columbus, Ohio. At approximately 4:31 P.M., SA Meier observed MILLS exit **317 Perry Street** carrying a red plastic cup and MILLS handed the cup to the unknown driver of the Buick Verano. Shortly thereafter, SA Meier observed MILLS walk back inside of **317 Perry Street** and the Buick Verano depart southbound on Perry Street.

43. At approximately 4:40 P.M., SA Meier observed, via a remote surveillance camera, MILLS exit **317 Perry Street** and walking around the parking lot near his white GMC Sierra pick-up truck bearing Ohio license plate GVM4631. SA Meier conducted an OHLEG query of license plate GVM4631 and observed the vehicle is registered to MILLS at 515 Meigs Street, Sandusky, Ohio.

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44. At approximately 4:45 P.M., SA Meier observed CASTILE walking from the porch of **603 Wayne Street** and your Affiant observed CASTILE enter the Chevrolet Tahoe and depart from the area of **603 Wayne Street**. At approximately 4:48 P.M., SA Meier observed, via a remote surveillance camera, the Chevrolet Tahoe arrive to Metro Housing located at 322 Warren Street and park in the parking lot,

45. At approximately 4:50 P.M., SA Meier observed, via a remote surveillance camera, MILLS standing in the parking lot of **317 Perry Street** with his cell phone in his hand. SA Meier then observed MILLS look down at his phone and then walk west from the parking lot of **317 Perry Street** toward the parking lot of Metro Housing. SA Meier observed MILLS walk to the passenger side of the Chevrolet Tahoe that was parked in the Metro Housing parking lot.

46. At approximately 4:52 P.M., Meier observed, via a remote surveillance camera, MILLS walking away from the Chevrolet Tahoe and into the parking lot of **317 Perry Street**. SA Meier observed MILLS walk directly to the passenger side of the GMC Sierra, open the passenger door and reach toward the glove compartment area of the GMC Sierra and then close the door and enter into his residence located at **317 Perry Street**.

47. At approximately 4:52 P.M., your Affiant observed the Chevrolet Tahoe departing from the Metro Housing parking lot and traveling directly back to **603 Wayne Street**. Shortly thereafter, SA Meier observed, via physical surveillance, CASTILE sitting in the Chevrolet Tahoe and NICHOLSON sitting on the porch of **603 Wayne Street**. Your Affiant then observed CASTILE exiting the Chevrolet Tahoe and walking toward **603 Wayne Street**. SA Meier then observed CASTILE walking up onto the porch of **603 Wayne Street** and then sitting in a chair on the porch next to NICHOLSON.

48. At approximately 4:59 P.M., your Affiant observed CASTILE walking from the area of **603 Wayne Street**, enter the Chevrolet Tahoe and depart.

49. On August 22, 2018, SA Meier observed, via remote surveillance, the Chevrolet Tahoe arrive and park in the driveway of **3011 E. Bayview Lane** and CASTILE exit the driver's side door. SA Meier then observed CASTILE walk to the tailgate of the Chevrolet Tahoe and then retrieve a trash can from the curb and walk up the driveway toward **3011 E. Bayview Lane**.

50. At approximately 8:06 p.m., SA Meier observed MILLS exit the apartment building at 317 Perry Street, walk to the driver's side of the white GMC Sierra, appear to enter the

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driver's side door and then walk away from the GMC Sierra and enter the apartment building at 317 Perry Street.

51. Based on SA Meier's training, experience and knowledge of this case, SA Meier believes that CASTILE and NICHOLSON are working together to distribute large quantities of drugs in Sandusky, Ohio. SA Meier believes that CASTILE has delivered drugs to MILLS numerous times, including; June 8, 2018 ("6pак"), June 14, 2018 ("100"), June 20, 2018 ("65"), July 4, 2018 ("2pack"), July 14, 2018 ("50pack"), July 19, 2018 ("50pack") and an unknown quantity on August 22, 2018.

52. SA Meier believes that on August 22, 2018, CASTILE obtained an unknown quantity of heroin and/or cocaine or other type of drug from NICHOLSON at **603 Wayne Street** and then drove his Chevrolet Tahoe directly to the parking lot of Metro Housing parking where he provided MILLS the drugs in exchange for US Currency. SA Meier believes that after CASTILE completed the transaction with MILLS, CASTILE returned to **603 Wayne Street** to provide NICHOLSON the proceeds of the drug deal he had just completed with MILLS.

A Computerized Criminal History (CCH) was completed on **MILLS, NICHOLSON** and **CASTILE**. In 2001, **MILLS** was convicted of Domestic Violence. In 2002, **MILLS** was convicted of Conspiracy to Distribute Cocaine and Marijuana. In 2009, **MILLS** was convicted of Felony Possession of Cocaine. In 2010, **MILLS** was convicted of Felony Possession of Drugs. In 1993, **NICHOLSON** was convicted of Domestic Violence. In 2002, **NICHOLSON** was convicted of Conspiracy to Distribute and Possess with Intent to Distribute Cocaine, Cocaine Base and Marijuana. In 2003, **CASTILE** was convicted of Conspiracy to Distribute and Possess with Intent to Distribute Cocaine, Cocaine Base and Marijuana.

53. Based on my training, experiences and participation in narcotics and drug related investigations, and the training and experience of other officers with whom I am working closely with in this investigation, I know that:

- Individuals who deal in illegal controlled substances maintain books, records, receipts, notes, ledgers, bank records, money orders and other papers relating to the importation, manufacture, transportation, ordering, sale and distribution of illegal controlled substances. These books, records, receipts, notes, ledgers, bank records, money orders, etc. are maintained where the dealers in illegal controlled substances have ready access to them, such as in secured locations within their residence, the residences of friends and associates, in places of operation of the drug distribution activity, such as a stash house or safe house, or in a business location with which the trafficker is associated.

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- Individuals who deal in illegal controlled substances routinely conceal in their residences or in the residences of friends and associates, in their business locations, or in the places of operation of the drug distribution activity, such as a stash house or safe house, large quantities of currency, financial instruments, precious metals, jewelry and other items of value, typically proceeds of illegal controlled substance transactions.
- It is common for individuals who deal in the sale of and distribution of illegal controlled substances to secret contraband related to the activity, such as scales, packaging materials, cutting agents, cooking utensils and other containers at their residences, or the residences of friends or associates, in their business locations, or in the places of operation of the drug distribution activity, such as a stash house or safe house.
- Individuals who deal in the sale and distribution of controlled substances commonly maintain addresses and telephone number books or papers which reflect names addresses and/or telephone numbers for their associates in their illegal organization. These individuals utilize cellular telephones, computers, and electronic devices to maintain contact with their associates in their illegal businesses. These telephone records, bills, numbers and electronic devices are often found in their place of residence, or the residences of friends of associates, in their business locations, or in the places of operation of the drug distribution activity, such as a stash house or safe house.
- Individuals who deal in illegal controlled substances often take photos of themselves, their associates, their property and illegal contraband. These photos are usually maintained in their place of residence, or the residences of friends or associates, in their business locations, or in the places of operation of the drug distribution activity, such as a stash house or safe house. These individuals also utilize cellular telephones, computers, and electronic devices to maintain these pictures.
- Persons who traffic controlled substances maintain documents, letters and records relating to illegal activity for long periods of time.

This documentary evidence is usually secreted in their residences, or the residences of friends or associates, in their business locations, or in the places of operation of the drug distribution activity, such as a stash house

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or safe house. This documentary evidence includes but is not limited to telephone numbers, telephone books, address books, credit card and hotel receipts, plane and bus tickets and receipts, car rental receipts, accounts and records in fictitious names, false identifications, money orders, cashier's checks relating to cash transactions and records indicating the existence of storage facilities used in narcotics trafficking.

- Individuals involved in narcotics trafficking often own, possess and/or use weapons as a means to facilitate their illegal drug activities. Such weapons are most often secreted in their residences, or the residences of friends or associates, in their business locations, or in the places of operation of the drug distribution activity, such as a stash house or safe house.

54. Based on the above listed factual information, I respectfully submit that there is probable cause to believe that an individual who utilizes or otherwise frequents, 3011 E. Bayview Lane, Sandusky, Ohio, 317 Perry Street, Sandusky, Ohio and 603 Wayne Street, Sandusky, Ohio as described herein, is involved in the possession and sale of heroin, in violation of the Ohio Drug Laws, to wit: 2925.03 and 2925.11 of the Ohio Revised Code et seq.

55. In order to preserve valuable evidence, and for the protection of the officers executing the warrant, the element of surprise is essential. Therefore, Affiant is requesting a nighttime warrant. Affiant further requests that the statutory precondition for nonconsensual entry be waived due to MILLS' and NICHOLSON's propensity for violence as displayed in their prior conviction(s) for Domestic Violence. It should be noted, Affiant is also requesting a nighttime warrant due to the fact that CASTILE leaves his residence at approximately 6:00 a.m., for work.

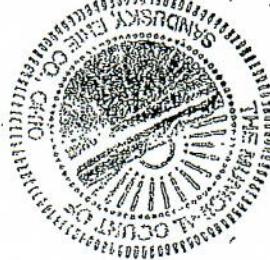
Sworn to before me, and subscribed in my presence this 23rd of August 2018.

Darrell B. Bue
Affiant

Judge

KIM PIDTROWSKI
CLERK

SANDUSKY MUNICIPAL COURT
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

United States of America,

Case No. 3:19CR392

Plaintiff

v.

ORDER

Eugene Nicholson,

Defendant

This is a drug conspiracy case in which defendant Eugene Nicholson is charged with seven other defendants.

Pending is Nicholson's motion to suppress evidence seized from his residence at 603 Wayne Street, Apartment #1, Sandusky, Ohio. (Doc. 64). A Judge of the Sandusky Municipal Court issued the search warrant on the basis of a seventeen-page, single-spaced affidavit signed by a Sandusky Police Department Detective, Ronald Brotherton, III.¹ Somewhat more than four of the affidavit's pages (Doc. 64-1, PageID 247-52), and twelve of fifty-two numbered paragraphs (30-52), relate to Nicholson. The remainder relates to codefendants Mills and Castile.

The motion contends that the affidavit failed to: 1) establish probable cause that drugs and related items and evidence were on the premises; and 2) show a nexus between the places to

¹ Though Det. Brotherton executed the affidavit, a substantial portion of the information therein came from DEA Agent Kenneth Meier.

be searched and the things to be seized. The government disagrees and contends that, in any event, the good faith exception should apply. (Doc. 74).²

On a close reading of the affidavit, I find that it established ample probable cause to believe that Nicholson was directly involved in drug dealing with the defendant Castile, and through him, was indirectly involved in drug dealing with defendant Mills. As explained at the end of this order, however, I will order the submission of a supplemental brief on the defendant's claim (raised for the first time in his reply brief) that the warrant does not satisfy the Fourth Amendment's particularity requirement.

Background

A. The Affidavit

1. Mills and Castile – Probable Cause Established

The bulk of the affidavit, which I review in some detail, relates to the working relationship between Mills and Castile and the lack, for much of the pertinent time period (mid-June/late August, 2018), of reference to Nicholson.

The affidavit asserts that the investigation has included physical surveillance, electronic surveillance, Title III surveillance, and debriefing of confidential informants. (Doc. 64, Exh. 1 ¶4, PageID 239). But the only evidence from such sources comes from physical surveillance, GPS tracking of Castile's Chevy Tahoe, and "remote surveillance." The investigators also obtained provider-retained toll call data and text messages.³

² I agree with the government that the defendant, who did not request a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), is not entitled to a *Franks* hearing.

³ Though I would not deem such data and messages as coming from "electronic surveillance," perhaps that's what the affiant was referring to in his recitation of previously undertaken investigatory methods.

But the affidavit, despite its reference to such, contains nothing that the investigators knew from either their debriefings (or use) of confidential informants, execution of Title III orders, or other modes of electronic surveillance, such as recorded hand-to-hand buys and pen register/trap-trace orders, if any of those techniques were used. Consequently, the evidentiary foundation as to all three defendants is circumstantial. There was no direct observation of apparent exchanges of drugs or money, though a fair inference of such exchanges could be made as to Mills and Castile. Only Mills was caught in possession of drugs – a kilogram of cocaine found after a traffic stop. (*Id.*, ¶¶11, PageID 241). Before execution of search warrants at the residences of Mills, Castile, and Nicholson, no other drugs were found or observed in the possession of any of them.

Despite the circumstantial nature of the evidence on which the affiant relied, there is, as to Mills and Castile, more than a fair probability that they were drug dealers working with each other. That's all that's needed for a warrant to issue. *E.g., Illinois v. Gates*, 462 U.S. 213, 238 (1983).

This probability arises from “common call toll analysis” – review of toll data showing concurrent text communication between phones being used by Mills and Castile, the drug-related meaning of the code they used to arrange their ensuing drug transactions, and observation of subsequent drug-related events as arranged in those communications.

The earliest indication in the affidavit of a relationship between Mills and Castile was on March 27, 2018. Mills left his residence at 4:00 p.m. and drove to the Metro House. Detective Brotherton saw Castile drive around the block before heading off – an action that Brotherton interpreted as counter-surveillance. (*Id.*, ¶¶ 6, 7, PageID 240).

On June 8, 2018, at 2:54 p.m., Mills left his residence and went to his car in the parking lot. He opened, then closed, the car's trunk. He went back inside, then came back out a few minutes later. Task Force Officer West saw him take something from his waistband and put something in his pocket. The officer then saw that Mills had a large amount of cash in his pocket.

At 3:07 p.m., Officer West saw Mills on his cell phone. Mills started walking to the south side of the parking lot. Mills walked to his car, opened the trunk, and a few minutes later went back into his residence. (*Id.*, ¶ 10, PageID 240).

Two days later, on June 10, 2018, an Ohio State Highway Patrol Trooper stopped Mills' car for a traffic violation. During an ensuing search, Troopers found and seized a kilogram of cocaine and his cell phone. Mills was northbound, headed to Sandusky. (*Id.*, ¶ 11, PageID 241).

This event had major implications. First, it confirmed the investigating officers' suspicions that Mills was a drug dealer. Second, it gave them access to the cell phone's historical call data. Through that data they ascertained the call history between Mills and Castile.

Thus, on inspection of the phone's contents *via* a search warrant to the service provider, investigators found text messages between the phone seized from Mills on June 10th – phone number 202 427 4611 (4611) – and a phone, 419 360 3940 (3940), subscribed by "Bob Johnson" and "believed to be used by Castile." (*Id.*, ¶ 14, PageID 242).

On June 8th, Mills had texted "6 Pack when u off" at 11:50 a.m., to which 3940 immediately responded, "Bet." (*Id.*, ¶ 13, PageID 242). At 3:06 p.m., 3940 texted Mills, "3 min," to which Mills responded at 3:07, "K." (*Id.*).

The affiant interpreted this exchange as an offer by Castile to sell six ounces of cocaine or heroin to Mills, for which Mills would pay the cash with which he'd been seen shortly before Castile's Tahoe arrived at the Metro House parking lot at 3:07. (*Id.*, ¶¶ 13, 14, PageID 241-42).

The sequence of calls from the phone seized on June 10th coincided with what the officers had observed two days before the OSHP stopped Mills' car and seized the kilogram of cocaine and the phone. Which means Castile and Mills were dealing drugs together.

In addition, common call toll analysis showed a pattern of concurrent communications: outgoing communication from Mills and incoming calls received by 3940 – Castile – and vice-versa. (*Id.*, ¶ 15, PageID 242).

Investigators determined that the call pattern linkage between Mills and Castile was similar to a pattern found to exist on two other phones, both acquired after the June 10th traffic stop/seizure: 419 360 9022 (9022), activated June 18, 2018, and 419 360 9272 (9272), activated June 13, 2018. This replication creates a more than fair probability that one phone belonged to Mills, the other to Castile. (*Id.*, ¶¶ 15-18, PageID 242-43).

On July 14, 2018, Castile's Tahoe left his residence at 11:30 a.m. and arrived at the Metro House parking lot at 1:38 p.m. One minute later, Mills walked out of his residence and approached the Tahoe's passenger side, at which point he went out of view. After about twenty seconds, Mills started walking toward the parking lot where he kept his car. Castile's Tahoe arrived back at his residence at 1:54 p.m. (*Id.*, ¶¶ 19, 20, PageID 243).

On July 20, 2018, Agent Meier obtained a search warrant for communications by phone 9272. (*Id.*, ¶ 21, PageID 244). A search of that phone showed text messages from phone 9272, believed to be used by Castile, with phone 9022, believed to be used by Mills. (*Id.*, ¶ 22, PageID 244). Those messages corresponded with when the Tahoe was in the Metro House parking lot on July 14th and 18th. (*Id.*, ¶ 22, PageID 244).

Thus, at 1:15 p.m. on July 14, 2018, phone 9022 texted, "50pack" to 9272. At 1:16 p.m., phone 9272 responded, "15min," and phone 9022 replied at 1:18 p.m., "Bet." At 1:37 p.m. phone

9272 texted phone 9022, “Pulling up”, to which phone 9022 responded one minute later, “Here” (*Id.* ¶¶ 22, 23, PageID 244).

That sequence of texts between the two numbers establishes that Mills, who was walking up when 9022 sent “Here” was the user of 9022, and that the person who had just used phone 9272 to text “Pulling up” was Castile. Their use of “pack” and “Bet” duplicated the exchange between Mills and the other party on June 8th, two days before the traffic stop. (*Id.* ¶ 13, PageID 241).

A text exchange began on July 19th at 5:50 p.m. with a message from Mills to Castile, “50pack around 715.” Castile replied at 5:57 p.m., “Bet.” Castile left home at 6:35 p.m., and arrived at the Metro House meet location at 7:16 p.m. A minute later he texted Mills, “Here,” and at 7:18 p.m. Mills appeared and got into the Tahoe. At 7:22 p.m., Mills got out of the Tahoe and was heading toward his own parking spot when he went out of view. Castile arrived home at 8:12. p.m. (Doc. 64, Exh. 1 ¶ 25-26, PageID 245).

These June 8th, July 14th, and July 18th linguistic linkages of “pack”/”Bet” within the texts, and the temporal linkages between the texts and ensuing events on July 14th and 18th, are like signatures and photographs: they indisputably confirm Mills’ use of phone 9022 and Castile’s use of phone 9272. That being so, the affidavit displays ample probable cause as to those two defendants.

With particular regard to the significance of the temporal linkages between the texts and the events, the Supreme Court’s decision in *Draper v. U.S.*, 358 U.S. 307 (1959), is instructive. There an informant of unknown reliability and credibility had told officers that Draper would be carrying drugs when he arrived on a particular train on either of two specific dates, dressed in a certain way, carrying a distinctive bag and walking fast. The officers met the train as it arrived,

spotted Draper looking and doing as predicted. The Court found ample probable cause for the ensuing warrantless arrest. *Id.* at 313.

So too here as to what happened on July 14th and July 18th between Mills and Castile. They, though, not some untested source, were the “informants,” telling the officers, albeit by hindsight, what to look for: they broadcast and then fulfilled their own forecast.

There was ample probable cause as to Mills and Castile. Finding such as to Castile is a predicate to determining whether there is also probable cause as to the movant, Nicholson.

2. Probable Cause as to Nicholson

The first pertinent portion of the affidavit regarding Nicholson is a chart of Castile’s texts from July 12th and 19th between his phone, 9272, and phone number 907 232 6560 (6560). (*Id.*, PageID 248). The chart shows:

Date/Time	Sender	Message
• 7.12/12:37 pm	Unk.	Gonna have some original by the weekend
• 7.13/5:13 pm	Unk.	Original 9 mixer 7
• 7.14/10:41 am	Castile	Call me
• 7.14/2:00 pm	Unk.	n.g.
• 7.14/12.01 pm	Castile	yep
• 7.14/2:01 pm	Castile	K
• 7.19/9:05 am	Castile	fake cuzz’in???
• 7.19/10:41 am	Unk.	Don’t know yet
• 7.14/10:49 am	Castile	K
• 7.19/5:59 pm	Unk.	Lil’ bro hit me up. I think it’s clear

(*Id.*, PageID 248).

After this series of text exchanges, the investigators obtained authority on July 31, 2018, from U.S. Magistrate Judge James R. Knepp, II, to use a GPS tracking device to follow the movements of Castile’s Tahoe. (*Id.*, ¶ 33, PageID 249).

On August 7th, Castile's Tahoe had been at Nicholson's residence at 603 Wayne St. from 8:52-9:04 p.m. (*Id.* at ¶¶ 32-35, PageID 249). The Tahoe was there again on August 8th (8:32-9:04 p.m.), August 13th (9:30-10:03), and August 18th (5:12-6:27 p.m.). (*Id.*, at ¶¶ 33-39, PageID 249). On August 20th, the affiant saw Nicholson driving a gray Ford F-150 pickup truck; he confirmed that the vehicle was in Nicholson's name (*Id.*, ¶ 40, PageID 249-50).

On August 22, 2018, at 4:40 p.m., Castile returned to the area of Nicholson's residence. At 4:45 p.m., he walked away from the porch, returning to his vehicle, and driving off. (*Id.*, ¶¶ 43, 44, PageID 250-51). At 4:50 p.m., remote surveillance viewed Mills on his phone in the parking lot of his residence. After looking down at his phone, he approached and looked into the Chevy Tahoe, which was parked at the Metro House lot. At 4:52, he walked to his own car, a Sierra, and reached in the direction of the glove compartment. Also at 4:52, the Tahoe left and drove to Nicholson's residence.

When Castile arrived at Nicholson's residence, probably around 4:55 p.m.,⁴ Nicholson was on the porch – where Castile joined him. At 4:59 p.m., Castile left and returned to his residence. On arriving there, he took a trash can from the back of his vehicle.

At 8:06 p.m., Mills left his residence, went to his Sierra, and appeared to enter the driver's side door and then returned to his residence.

Agent Meier concluded that the events of August 22nd show that Nicholson supplied heroin and/or cocaine to Castile, who got the drugs to Mills, who put them in the Sierra, from

⁴ The affidavit does not state the time of Castile's arrival back at 603 Wayne St. It had only taken three minutes for him to go there from his house en route to the Metro House parking lot. (*Id.*, ¶44, PageID 251) (Depart, 4:45; arrive, 4:58). There is no reason to believe the return trip took more or less time.

where Mills retrieved them. Then, Agent Meier believed, Castile took the proceeds to Nicholson. (*Id.*, ¶¶ 41-52, PageID 250-52).

All three defendants had prior convictions for drug offenses. (*Id.*, ¶¶ 29, 30, 52, PageID 248, 252).

The affidavit concludes with a lengthy list of items that, based on the affiant's training and experience, are likely to be found on premises occupied by drug dealers. (*Id.*, ¶ 52, PageID 251-53).

Detective Brotherton presented the affidavit to a Judge of the Sandusky Municipal Court on August 23, 2018, the day after the last meeting between Castile and Mills in the Metro House parking lot. (*Id.*, PageID 235).

Discussion

A. Probable Cause -- Generally

With regard to all showings of probable cause – whether of criminal conduct or a relationship between such conduct, the premises to be searched, and the things to be seized – my review of an issuing judge's probable cause determination is not *de novo*. *E.g.*, *Gates, supra*, 462 U.S. at 236. Rather, I must give deference to the issuing judge's determination of probable cause. *Id.* at 237. Probable cause exists when there is a “fair probability,” *Gates, supra*, 462 U.S. at 238, that, in light of the defendant's activities, he is a drug dealer and drugs and related items are on the premises to be searched. *E.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1975); *U.S. v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006); *U.S. v. Nagy*, 345 F. Supp. 3d 887, 896 (N.D. Ohio 2018) (Boyko, J.).

1. Probable Cause as to Drug Dealing

In light of those requirements, and on the basis of a thorough review of a dense and complicated affidavit, I conclude that, in light of the totality of the circumstances, *e.g., Maryland v. Pringle*, 540 U.S. 366, 371 (2003), the affidavit showed probable cause to believe that Nicholson engaged in at least two drug transaction with Castile. There was also probable cause to conclude that he was Castile's supplier, though that may not have been so.⁵

I base this conclusion on: 1) the apparent nature of the nine text messages between the user of phone 6560 and that of the 9272 phone; 2) the temporal congruence between those texts and transactions between Castile and Mills on July 14th and 18th; and 3) the mirror-like quality of the events of August 22nd with those on the July dates.

Turning first to the text exchanges between July 12th and 19th. These brief, guarded, and apparently coded communications are barren of anything that suggests they involve a legitimate subject or undertaking. Moreover, and importantly, they are of a type and tenor that, especially in light of the events of July 14th, 18th, and August 22nd, could justify a finding of probable cause. Like those events, the texts involved someone – Castile – as to whom, as I have already found, there was probable cause to believe was a drug dealer.

Second: there is a temporal relationship between those oblique texts and what happened shortly after on July 14th and 18th: namely, meetings in the Metro House parking lot that bore hallmarks of repetition, furtiveness, and brevity of an exchange of drugs for cash.

Finally, the August 22nd meeting between Castile and Mills mirrored those of July 14th and 18th, though at that time, Castile had taken a few minutes en route to meet Mills to stop by

⁵ That the indictment puts Nicholson at the bottom of its list of indictees suggests he may have been at the bottom of the distribution chain, rather than at its top.

Nicholson's residence. When one is abroad on a risky errand of the sort that Castile appeared to be running, why make even a short and brief detour? If for an innocent purpose, then why another detour and brief visit on the way home?

Viewed in their totality, the observed events that followed easily add up to probable cause that Nicholson was the unknown party to the guarded communications. What twice followed equated, to a considerable likelihood, that he had arranged inbound drug shipments, part, at least, of which went from him to Castile to Mills on August 22nd. Indeed, no deference is needed, as even on a *de novo* basis this affidavit passes muster.

This is so, despite the defendant's emphasis on Agent Meier's belief that Nicholson "possibly," as opposed to likely or probably, was the unknown participant in the July 12th and 19th texting with Castile.

In the end, how Agent Meier subjectively assessed the strength, or lack thereof, of his belief that Nicholson was the other texter doesn't matter. It is black-letter law that an officer's subjective beliefs do not define Fourth Amendment rights. *Jacobs v. Vill. of Ottawa Hills*, 111 F. Supp. 2d 904, 910 (N.D. Ohio 2000) (Carr, J.) (citing *U.S. v. Anderson*, 923 F.2d 450, 457 (6th Cir.1991) (a court's finding of probable cause is "not disturbed by the observation that it is unclear whether the officers themselves thought they had probable cause to arrest.")).

So here: that Agent Meier thought something only possible, when, in fact, it turned out to be probable, is immaterial: it has zero effect on my calculation of whether the circumstances added up to probable cause. Regardless of what Agent Meier thought – either way – the probable cause in this affidavit was more than ample to allow the judge to issue the warrant.

2. Crime-Place-Things Nexus

Even if probable cause existed, the defendant argues, the affidavit failed to show a nexus between his drug dealing, his residence, and evidence of such dealing.

In support, the defendant properly points out that, “[t]o justify a search, the circumstances must indicate why evidence of illegal activity will be found in a particular place.” *U.S. v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc). The defendant likewise properly states that the affidavit must show “a nexus between the place to be searched and the evidence sought.” *U.S. v. Beals*, 698 F.3d 248, 364 (6th Cir. 2012). Moreover, as the defendant again rightly states, probable cause to search a defendant’s home needs more: simply that he is a drug dealer, standing alone, is insufficient to find probable cause to search his residence. *U.S. v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005).

Here, though, contrary to the defendant’s contentions, there is more – much more – than just the probable cause I’ve outlined above as to his criminal conduct and apparent role. There is the frequency of his observed contacts with Castile, and through him, Mills.

Before that, there were the texts and their predictive quality about what was to come. Second, and crucially, there was his several contacts with Castile; not just Castile’s visits on August 22nd as he was going to and from his “meet” with Mills and their apparent consummation of a drugs-for-cash exchange.

By then, it was clear to the officers – and, no doubt, later to the issuing judge – that Castile was a go-between. From the texts, once Nicholson was unmasked as the unknown party, the officers could reasonably, though apparently by hindsight, conclude that Nicholson was importing, Castile was wholesaling, and Mills was retailing drugs.

At the time, Nicholson's status thus reasonably appeared to be much more than of a hand-to-hand seller, one of whose deals a confidential informant had recorded once.

Had there been just the texts, or had there just been the possibly random visits to Nicholson's residence, that might arguably have not been enough. What ultimately matters, though, is what happened on August 22nd, when Castile and Mills came together in the Metro House parking lot, as they had before, and transacted what a judge could fairly view as a drugs-for-cash (or cash-for-drugs) transaction.

What happened was Castile left home bound for Mills. But his route is not direct: he diverts his trip to stop for a few minute at Nicholson's residence. He then completes his journey to the Metro House lot and his "meet" with Mills.

Had he headed straight home, the first visit would have meant little. But, he does not do so. Once again, he detours to swing by Nicholson's residence. Dropping off cash from Mills (as the investigators believe) or dropping off drugs, as more likely was the case – it doesn't matter. What matters is that he completed a circuit – and in between doing so, he got drugs (or cash) and got cash (or drugs) in exchange.

In light of the indicia in the texts that Nicholson was overseeing inbound drug shipments, it was reasonable for the officers to conclude that he was at the head of the chain, and to make that representation to the issuing judge.

Moreover, the only premises known to be connected to Nicholson was his residence. He and Castile had not rendezvoused at some other venue; everything between them was at 603 Wayne St. That, plus the other facts known to the affiant and told to the judge provided him with a constitutionally adequate basis for concluding drugs and related items were to be found at Nicholson's home.

Case law supports this view of the affidavit and the lawfulness of the warrant and ensuing search and seizure of what the officers found there. Thus, in *U.S. v. Ellison*, 632 F.3d 347, 349 (6th Cir. 2011), where an informant had “observed someone come out of [the defendant’s] residence, engage in a drug transaction, and then return into the residence,” the Sixth Circuit upheld issuance of a search warrant.

That’s essentially what happened here: Castile went to the defendant’s residence, left after a short interlude, did a drug deal with Mills, and returned directly to the defendant’s residence. As in *Ellison*, “[t]hese incriminating actions are inextricably connected to the residence for which the search warrant was sought” and thus “the issuing judge could infer that there was a fair probability that drugs were being stored in the residence or that drug trafficking was taking place from the residence,” so that the judge could properly conclude “that a search of the residence would be likely to yield contraband or evidence of a crime.” *Id.* Such “showing of a fair probability,” the court concluded, “is all that is required to justify the issuance of a search warrant.” *Id.*; *accord U.S. v. Houser*, 752 F. App’x 223, 226 (6th Cir. 2018) (citing *Ellison, supra*).

3. Particularity

In his reply brief, Nicholson argues that the warrant fails to specify “the place to be searched with sufficient particularity.” (Doc. 75, PageID 315). Because Nicholson did not raise this issue in his motion to suppress, I would be justified in rejecting the argument on the basis of forfeiture and untimeliness. I believe it is more important, however, to adjudicate the issue on its merits, and to that end I will direct the government to file a sur-reply brief addressing the particularity argument within three weeks of the date of this order.

Conclusion

For the reasons set forth above, the affidavit stated probable cause to believe the defendant was a drug dealer and that it was quite likely that officers would find evidence of that activity at his residence.

It is, therefore, hereby

ORDERED THAT:

1. The defendant's motion to suppress (Doc. 64) be, and the same hereby is, denied as to the issues of probable cause and the nexus between defendant's criminal activity and his apartment. The motion to suppress is otherwise held in abeyance as to the issue of particularity.
2. Within three weeks of the date of this order, the government shall file a sur-reply addressing the particularity argument raised in the defendant's reply brief.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge

REGISTER OF ACTIONSCASE NO. 12-008886-02-FH**RELATED CASE INFORMATION****Related Cases**

12-008886-01-FH (Co Defendant)

PARTY INFORMATION**Attorneys**Appellate Attorney **McCarthy, Michael J.**Defendant **Collins, Andre Demetrius****Wyatt G. Harris**
Retained
(313) 549-7659(W)Plaintiff **State of Michigan****Attorney Unreported**
*Retained***David R. Cripps**
Retained
(313) 963-0210(W)**Kareem LaMount Johnson**
Retained
(517) 768-6883(W)**Wyatt G. Harris**
Court Appointed
(313) 549-7659(W)**Thomas J. Trzcinski**
(313) 224-8742(W)**CHARGE INFORMATION****Charges: Collins, Andre Demetrius**

1. Perjury - Inciting or Procuring, Courtproceeding (Conspiracy)
1. Conspiracy - Legal Act/illegal Manner
2. Witnesses - Bribing/intimidating/interferingcriminal Case Punishable By More Tha (Conspiracy)
3. Obstruction of Justice (Conspiracy)

Statute750425-B
750157A
7501227B
750505-A**Level**·
·
·
·**Date**03/07/2012
02/03/2012
03/07/2012
03/07/2012**EVENTS & ORDERS OF THE COURT****DISPOSITIONS**

03/22/2012 **Plea** (Judicial Officer: McDuffee, Renee R.)
 1. Perjury - Inciting or Procuring, Courtproceeding (Conspiracy)
 Defendant Stand Mute: Plea of Not Guilty Entered by Court

03/22/2012 **Plea** (Judicial Officer: McDuffee, Renee R.)
 2. Witnesses - Bribing/intimidating/interferingcriminal Case Punishable By More Tha (Conspiracy)
 Defendant Stand Mute: Plea of Not Guilty Entered by Court

03/22/2012 **Plea** (Judicial Officer: McDuffee, Renee R.)
 3. Obstruction of Justice (Conspiracy)
 Defendant Stand Mute: Plea of Not Guilty Entered by Court

11/04/2013 **Disposition** (Judicial Officer: Van Houten, Margaret M.)
 1. Perjury - Inciting or Procuring, Courtproceeding (Conspiracy)
 Dismissed
 2. Witnesses - Bribing/intimidating/interferingcriminal Case Punishable By More Tha (Conspiracy)
 Dismissed
 3. Obstruction of Justice (Conspiracy)
 Dismissed

11/04/2013 **Disposition** (Judicial Officer: Van Houten, Margaret M.)

1. Conspiracy - Legal Act/illegal Manner
Found Guilty by Jury

11/18/2013 **Sentence** (Judicial Officer: Van Houten, Margaret M.)
1. Conspiracy - Legal Act/illegal Manner

Fee Totals:
- Crime Victims Fee -
(FEL) \$130.00
Attorney Fees \$400.00
Court Costs \$600.00
Fee Totals \$1,130.00

State Confinement:
Agency: Michigan Department of Corrections
Effective 11/18/2013
Term: 10 Yr to 20 Yr

OTHER EVENTS AND HEARINGS

03/19/2012 **Recommendation for Warrant**
Warrant Signed

03/22/2012 **Interim Condition for Collins, Andre Demetrius**
- 10%
\$250,000.00

03/22/2012 **Arraignment on Warrant** (9:00 AM) (Judicial Officer McDuffee, Renee R.)
Parties Present
Result: Defendant Stands Mute; Plea Of Not Guilty Entered By Court

04/03/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
Adjourned at the Request of the Defense
04/30/2012 *Reset by Court to 04/03/2012*

04/03/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Miller, Cyenthia LaToye)
Parties Present
Result: Held

04/19/2012 **Motion for a Continuance Filed/Signed**
04/19/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
Adjourned at the Request of the Defense

04/19/2012 **Motion for Discovery Signed and Filed**
04/19/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Giles, Ronald)
Parties Present
Result: Held

04/20/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
D36 Scheduled Hearing Cancellation

04/20/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Holmes, Shannon)
Parties Present
Result: Held

04/30/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Judge, District Court)
Parties Present
Result: Held

05/04/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
Adjourned at the Request of the Defense

05/04/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Giles, Ronald)
Parties Present
Result: Held

05/08/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Giles, Ronald)
Parties Present
Result: In Progress

05/08/2012 **Motion to Assign Counsel Filed/Signed**
05/18/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
Adjourned at the Request of the Defense

05/18/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Giles, Ronald)
Parties Present
Result: Held

05/23/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
Adjourned:At The Request Of The Court

05/23/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Giles, Ronald)
Parties Present
Result: Held

05/24/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
Adjourned:At The Request Of The Court

05/24/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Giles, Ronald)
Parties Present
Result: Held

06/08/2012 **CANCELED Preliminary Examination** (9:00 AM) ()
Adjourned:At The Request Of The Court

06/08/2012 **Preliminary Examination** (9:00 AM) (Judicial Officer Giles, Ronald)
Parties Present
Result: Held

08/20/2012 **Preliminary Examination** (9:00 AM) ()
Result: Held

09/14/2012	Preliminary Examination (9:00 AM) (Judicial Officer Giles, Ronald)
	<u>Parties Present</u>
09/17/2012	Result: Held
	Preliminary Examination (9:00 AM) (Judicial Officer Judge, District Court)
	<u>Parties Present</u>
09/17/2012	Result: Held: Bound Over
	Bound Over
09/17/2012	Interim Condition for Collins, Andre Demetrius
	- 10%
	\$250,000.00
09/21/2012	Scheduled AOI
09/21/2012	Arraignment On Information (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
09/21/2012	Result: Defendant Stands Mute; Plea Of Not Guilty Entered By Court
	Calendar Conference (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
09/21/2012	Result: Held
	Disposition Conference (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
09/26/2012	Result: Held
	Order For Production Of Exam Transcript Signed and Filed
09/27/2012	Stenographers Certificate Filed
01/18/2013	Final Conference (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
	12/14/2012 Reset by Court to 01/03/2013
	01/03/2013 Reset by Court to 01/18/2013
01/18/2013	Result: Held
	Pre-Trial (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
01/18/2013	Result: Held
	Motion Hearing (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
	12/14/2012 Reset by Court to 01/03/2013
	01/03/2013 Reset by Court to 01/18/2013
01/18/2013	Result: Held
	Motion in Limine (Judicial Officer: Van Houten, Margaret M.)
02/04/2013	Jury Trial (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
02/05/2013	Result: Adjourned at the Request of the Defense
06/07/2013	Transcript Filed
	Pre-Trial (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
07/05/2013	Result: Held
07/19/2013	Motion
	Motion Hearing (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
07/19/2013	Result: Held
08/30/2013	Motion (Judicial Officer: Van Houten, Margaret M.)
	Motion Hearing (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
08/30/2013	Result: Adjourned at the Request of the Defense
09/30/2013	Pre-Trial (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
	09/19/2013 Reset by Court to 09/30/2013
09/30/2013	Result: Held
	Motion Hearing (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
	08/30/2013 Reset by Court to 09/30/2013
09/30/2013	Result: Held
10/07/2013	Motion (Judicial Officer: Van Houten, Margaret M.)
	Pre-Trial (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
10/08/2013	Result: Held
	Jury Trial (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
	10/07/2013 Reset by Court to 10/08/2013
10/09/2013	Result: Held
	Jury Trial in Progress (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
10/10/2013	Result: In Progress
	Jury Trial in Progress (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
	<u>Parties Present</u>
	Result: In Progress

10/15/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/16/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/17/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/21/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/22/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/22/2013 **Motion in Limine** (Judicial Officer: Van Houten, Margaret M.)

10/23/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/24/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Result: In Progress

10/28/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/29/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/29/2013 **Motion**

10/30/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

10/31/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

11/01/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

11/04/2013 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Parties Present
Result: In Progress

11/04/2013 **Refer to Probation For Pre-Sentence Report** (Judicial Officer: Van Houten, Margaret M.)

11/04/2013 **Order For DNA Sample - Signed and Filed** (Judicial Officer: Van Houten, Margaret M.)

11/04/2013 **Found Guilty By Jury**

11/18/2013 **Sentencing** (9:00 AM) (Judicial Officer Van Houten, Margaret M.)
Result: Sentenced

11/18/2013 **Sentenced to Prison Order Signed and Filed** (Judicial Officer: Van Houten, Margaret M.)

01/31/2014 **Order For Production Of Trial And Sentence Transcript**

01/31/2014 **Stenographer Certificate Required**

01/31/2014 **Order For Production Of Trial Transcript**
Vol./Book 2 335 pages

01/31/2014 **Stenographer Certificate Required**

01/31/2014 **Order For Production Of Trial Transcript**
Vol./Book 1 162 pages

01/31/2014 **Stenographer Certificate Required**

01/31/2014 **Appointment for Claim of Appeal (Circuit)**

01/31/2014 **Stenographers Certificate Filed**

02/03/2014 **Order For Production Of Trial Transcript**
Vol./Book 1 121 pages

02/03/2014 **Stenographer Certificate Required**

02/04/2014 **Stenographers Certificate Filed**

02/04/2014 **Stenographers Certificate Filed**

02/06/2014 **Order For Production Of Transcript**

02/06/2014 **Stenographer Certificate Required**

02/06/2014 **Order For Production Of Transcript**

02/06/2014 **Stenographer Certificate Required**

02/06/2014 **Stenographers Certificate Filed**

02/06/2014 **Stenographers Certificate Filed**

02/10/2014 **Stenographers Certificate Filed**

03/04/2014 **Notice of Transcript Filed**
Vol./Book 1 21 pages

03/27/2014 **Notice of Transcript Filed**
Vol./Book 2 335 pages

04/14/2014 **Notice of Transcript Filed**
Vol./Book 3 42 pages

04/14/2014 **Notice of Transcript Filed**
Vol./Book 1 162 pages

07/10/2014 **Notice of Transcript Filed**
Vol./Book 1 56 pages

07/22/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 121 pages
07/22/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 47 pages
07/23/2014	<u>Notice of Transcript Filed</u> Vol./Book 2 317 pages
08/06/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 225 pages
08/14/2014	<u>Notice of Transcript Filed</u> Vol./Book 2 92 pages
09/08/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 177 pages
09/12/2014	<u>Notice of Transcript Filed</u> Vol./Book 2 84 pages
09/12/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 21 pages
09/17/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 176 pages
09/24/2014	<u>Notice of Transcript Filed</u> Vol./Book 3 375 pages
10/02/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 222 pages
10/16/2014	<u>Notice of Transcript Filed</u> Vol./Book 2 382 pages
10/16/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 216 pages
10/20/2014	<u>Notice of Transcript Filed</u> Vol./Book 1 265 pages
02/23/2016	Appellate Court Decision; Affirms Lower Court

FINANCIAL INFORMATION

Defendant Collins, Andre Demetrius		
Total Financial Assessment		1,398.00
Total Payments and Credits		1,198.00
Balance Due as of 04/21/2022		200.00
11/18/2013 Transaction Assessment		
11/26/2013 Transaction Assessment		1,130.00
01/22/2014 Transaction Assessment		68.00
02/22/2017 Mail Payment	Receipt # 2017-17228	200.00
10/07/2020 Mail Payment	Receipt # 2020-71240	(103.09)
02/22/2021 Mail Payment	Receipt # 2021-16241	(51.81)
05/20/2021 Mail Payment	Receipt # 2021-38051	(2.68)
05/27/2021 Mail Payment	Receipt # 2021-40913	(0.01)
11/19/2021 Mail Payment	Receipt # 2021-95080	(141.74)
11/19/2021 Mail Payment	Receipt # 2021-95083	(119.50)
02/10/2022 Mail Payment	Receipt # 2022-10489	(68.86)
		(710.31)

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0001n.06

Case Nos. 20-4050/4259

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff - Appellee,)
v.)
EUGENE NICHOLSON (20-4050);)
PATRICK BROWN (20-4259),)
Defendants - Appellants.)

FILED
Jan 03, 2022
DEBORAH S. HUNT, Clerk

Before: GIBBONS, READLER, and MURPHY, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Eugene Nicholson and Patrick Brown pled guilty to participation in the same drug conspiracy. Nicholson argues the district court erred in denying his motion to suppress evidence obtained pursuant to a search warrant. Brown argues he was denied effective assistance of counsel. Due to the distinct nature of the relevant facts and claims of each appellant, we address each case individually. We affirm the district court's denial of Nicholson's motion to suppress. We dismiss Brown's appeal without prejudice.

I

A

Nicholson's residence at 603 Wayne Street, Sandusky, Ohio, was searched pursuant to a warrant on August 24, 2018. The affidavit submitted in support of the warrant detailed observations of multiple suspected drug transactions between Daryl Castile and Siron Mills in and

Case Nos. 20-4050/4259, *United States v. Nicholson, et al.*

around Castile's Chevrolet Tahoe in the parking lot of Metro Housing beginning in March 2018 that coincided with a series of suspicious text messages between Mills, Castile, and an unknown person, later determined to be Nicholson. On June 10, 2018, officers conducted a traffic stop of a vehicle driven by Mills two days after a meeting with Castile, leading to the seizure of around 1000 grams of cocaine. Detective Ronald Brotherton and Special Agent Kenneth Meier surveilled and investigated the text messages and Metro Housing parking lot meetings until August 2, 2018 before Meier, pursuant to a search warrant, applied a GPS tracking device on Castile's Tahoe. The GPS tracker revealed that Castile's vehicle visited 603 Wayne Street, which Meier determined to be Nicholson's residence, four times over a twelve-day period, typically staying for brief periods.

On August 22, 2018, visits to 603 Wayne Street preceded and followed a suspicious meeting between Mills and Castile in the Metro Housing parking lot. At 3:46 p.m., Castile's Tahoe arrived at 603 Wayne Street and parked near a Ford F-150 registered to and used by Nicholson. At 4:45 p.m., Castile "walk[ed] from the porch of 603 Wayne Street," drove away in the Tahoe, and parked in the Metro Housing parking lot. DE 64-1, Aff., Page ID 251. Mills walked toward the Metro Housing parking lot and up to the passenger side of the Tahoe. Two minutes later, Mills walked away and the Tahoe "travel[ed] directly back to 603 Wayne Street." *Id.* Meier observed Castile exit the Tahoe, walk towards Nicholson's residence, and sit in a chair on the porch next to Nicholson. Castile departed the residence via his Tahoe at approximately 4:59 p.m. Based on his "training, experience and knowledge of th[e] case," Meier believed that Castile obtained heroin and/or cocaine from Nicholson at Nicholson's residence, drove his Tahoe to the Metro Housing parking lot, and "provided Mills the drugs in exchange for US Currency." *Id.* at 252. Once "Castile completed the transaction with Mills," Meier believed Castile returned to Nicholson's

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residence “to provide Nicholson the proceeds of the drug deal he had just completed with Mills.” *Id.*

Given the officers’ observations and beliefs and the three men’s prior convictions for participation in the same drug conspiracy to distribute and possess cocaine, a Sandusky Municipal Court judge determined there was probable cause to search Nicholson’s residence at 603 Wayne Street. Inside, officers found marijuana, creatine, a heat sealer with plastic bags, plastic gloves, a small silver pressing device, and a hydraulic press.

A federal grand jury indicted Nicholson, Brown, and six others, including Mills and Castile, for conspiracy to possess with the intent to distribute and distribution of controlled substances in violation of 21 U.S.C. § 846. After the district court denied Nicholson’s motion to suppress evidence, he entered a conditional guilty plea.

B

Nicholson appeals the district court’s denial of his motion to suppress evidence seized from his residence pursuant to the search warrant, arguing the warrant lacked probable cause.¹ We “review de novo the [district] court’s legal conclusion that the affidavit provided probable cause” for the search warrant. *United States v. Brown*, 732 F.3d 569, 572 (6th Cir. 2013). In doing so, “we ‘give great deference’ to the [issuing judge’s] conclusion that probable cause existed to issue the warrant.” *United States v. Miller*, 850 F. App’x 370, 373 (6th Cir. 2021) (quoting *Brown*, 732 F.3d at 572–73). “[T]he duty of a reviewing court is simply to ensure that the [issuing judge] had

¹ Nicholson also argues the warrant did not satisfy the particularity requirement of the Fourth Amendment. Nicholson first raised this argument in his reply brief for his motion to suppress, and the district court ordered supplemental briefing on the issue. Nicholson entered his conditional guilty plea before the district court ruled on the issue of particularity. His plea agreement expressly waived his right to appeal except for the issue of “[w]hether the search warrant authorizing the search of Defendant’s apartment was supported by probable cause and provided a nexus between the place to be searched and the things to be seized?” DE 121, Plea Agreement, Page ID 671. Before signing his plea agreement, the district court explained at his change of plea hearing that Nicholson’s right to appeal would be severely limited by the agreement, and Nicholson stated that he understood. Nicholson did not preserve the issue of particularity for appeal, so we do not discuss it further.

Case Nos. 20-4050/4259, *United States v. Nicholson, et al.*

a substantial basis for concluding that probable cause existed.” *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) (quotation marks and alterations omitted); *see also United States v. Leake*, 998 F.2d 1359, 1363 (6th Cir. 1993). The issuing judge’s determination of probable cause will not be set aside “unless we conclude that it was ‘arbitrarily exercised.’” *United States v. Woods*, 858 F. App’x 868, 869 (6th Cir. 2021) (quoting *Leake*, 998 F.2d at 1363).

The Fourth Amendment prohibits the issuance of warrants without “probable cause, supported by Oath or affirmation.” U.S. Const. amend. IV. Using a “totality-of-the-circumstances analysis,” the issuing judge’s task “is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238. “[T]he affidavit supporting the search warrant must demonstrate a nexus between the evidence sought and the place to be searched. The connection between the residence and the evidence of criminal activity must be specific and concrete, not ‘vague’ or ‘generalized.’” *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016) (quoting *United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004) (en banc)). For cases involving drug trafficking, “our cases leave no doubt that probable cause may exist if the evidence provided to [an issuing judge] directly connects the residence with the suspected drug dealing activity.” *Miller*, 850 F. App’x at 373 (quotation marks and alterations omitted).

Here, the affidavit provides probable cause for the warrant because it sufficiently details the bases for the affiant’s belief that evidence of drug trafficking would be found in Nicholson’s home. It connects months of suspected drug transactions between Mills and Castile in the Metro Housing parking lot, including the observation of “a large amount of cash” on Mills’s person and the seizure of 1000 grams of cocaine from a vehicle driven by Mills, to text messages between

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Mills, Castile, and Nicholson. DE 64-1, Aff., Page ID 240–48. It details Castile’s frequent visits to Nicholson’s home, two of which occurred before and after a suspected drug transaction with Mills, which formed the officers’ belief that Castile obtained drugs from Nicholson, delivered the drugs to Mills in exchange for money, and then gave the money to Nicholson. While officers never observed drugs at Nicholson’s home, “we have permitted judges to infer a fair probability of finding evidence in a residence even though the affidavit did not state that such evidence had been observed directly.” *Brown*, 828 F.3d at 383. Because the evidence in this affidavit directly connects Nicholson’s residence with suspected drug dealing, the judge had a substantial basis for finding probable cause. *See id.* at 384; *Gates*, 462 U.S. at 238. We therefore affirm the denial of Nicholson’s motion to suppress.

II

A

On May 18, 2018, District Judge Jeffrey Helmick granted an application for a wiretap on Brown’s telephone based on Meier’s investigation into suspected drug activity. Meier’s affidavit relied in large part on information from a confidential source, CS#1, who had provided credible and reliable information since April 2017. Information provided by CS#1 contained in the affidavit “ha[d] been corroborated to the extent possible by independent investigation of law enforcement, including but not limited to, consensually monitored telephone calls between CS#1 and Patrick Brown, surveillance, and controlled purchases of drugs.” DE 111-2, Aff., Page ID 564–65. The affidavit detailed seven controlled buys of cocaine between CS#1 and Brown and another buy with pending lab results. The affidavit also included information from another confidential source, physical surveillance, and pen register records and toll analyses of the target telephones.

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In September 2018, Meier applied for a search warrant for location information on Brown's cell phone. In his affidavit, Meier explained that, as of May 24, 2018, CS#1 was "no longer being used as a [confidential source] in this investigation due to information that he/she purchased cocaine from Brown at times other than those done at the direction of [law enforcement] and the belief that this [confidential source] is using the cocaine he/she purchased on these other occasion(s)." DE 111-1, Aff., Page ID 517. In October 2018, search warrants were executed at Brown's mother's residence and Brown's residence. The searches resulted in the discovery of firearms, digital scales with residue, a narcotics press with residue, large amounts of cash, cell phones, and more than 100 grams of cocaine.

As noted, a federal grand jury indicted Brown, Nicholson, and six others for conspiracy to possess with the intent to distribute and distribution of controlled substances in violation of 21 U.S.C. § 846. The grand jury also charged Brown with three counts of distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and three counts of possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1).

During discovery, Brown's counsel filed, and the district court granted, multiple motions to extend the time to file pre-trial and dispositive motions. In the first motion, counsel claimed he could not open several discs obtained as part of discovery and that he "was recently tied down in preparing for two trials." DE 66, Mot. for Extension, Page ID 257. In the second motion, counsel again claimed he could not open several discs and stated that he "need[ed] more time with the Defendant concerning obtaining a negotiated plea." DE 74, Mot. for Extension, Page ID 308. After the district court granted another extension motion, counsel filed a motion to suppress challenging the sufficiency of the May and September affidavits and warrants. The government filed a motion to reconsider the court's latest extension of the motion filing deadline due to the

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number of extensions already granted. The district court held a telephonic pretrial conference in which defense counsel failed to appear. At this conference, the district court denied Brown's motion to suppress as untimely and denied the government's reconsideration motion as moot. Shortly after, Brown's case was transferred to a different district judge.

Brown subsequently pled guilty to participation in the drug conspiracy pursuant to a plea agreement where the government agreed to dismiss the six other counts against Brown. The agreement stated that Brown "has no objection to and, agrees that he cannot oppose by law, the forfeiture of" multiple firearms and boxes of ammunition. DE 134, Plea Agreement, Page ID 720–21. Brown also "agree[d] that he has no right in the forfeited properties and he does not object in any way to their being forfeited and, by signing this agreement, he stipulates to this fact." *Id.* at 721. A two-level enhancement for possession of a dangerous weapon was recommended in Brown's Presentence Investigation Report. Brown objected to the weapons enhancement in his sentencing memorandum, arguing there was no evidence that he possessed the guns at issue and that he specifically included provisions in his plea agreement disclaiming an interest in the guns to prevent application of the enhancement. Brown's counsel raised the same objection at Brown's sentencing hearing. The district court overruled Brown's objection and applied the two-level weapons enhancement. The court used a final offense level of 33 and a criminal history category of IV to determine a guidelines range of 188 to 235 months. Brown was sentenced to 170 months' imprisonment, a downward variance of 18 months.

B

On direct appeal, Brown argues he was denied effective assistance of counsel because his trial counsel failed to timely file a suppression motion and incompetently advised him of his plea agreement and its consequences for sentencing. As a mixed question of law and fact, we review

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ineffective assistance of counsel claims de novo. *United States v. Pryor*, 842 F. App'x 1023, 1024 (6th Cir. 2021) (per curiam).

This court is not “best suited to assess” facts related to ineffective assistance of counsel claims raised for the first time on direct appeal. *Massaro v. United States*, 538 U.S. 500, 504 (2003). “This is so even if the record contains some indication of deficiencies in counsel’s performance.” *Id.* Thus, “[a]s a general rule, a defendant may not raise ineffective assistance of counsel claims for the first time on direct appeal, since there has not been an opportunity to develop and include in the record evidence bearing on the merits of the allegations.” *United States v. Wunder*, 919 F.2d 34, 37 (6th Cir. 1990) (per curiam). The “preferred mode for raising a claim of ineffective assistance of counsel” is a petition under 28 U.S.C. § 2255. *United States v. Ferguson*, 669 F.3d 756, 762 (6th Cir. 2012).

In “rare exceptions,” we will decide the issue on direct appeal when “the record is adequate to assess the merits of defendant’s allegations.” *United States v. Bradley*, 400 F.3d 459, 462 (6th Cir. 2005) (quoting *Wunder*, 919 F.2d at 37). For example, in *United States v. Lewis*, we found “sufficient factual development in the record” when counsel failed to file a timely suppression motion and “the district court *clearly* indicated how it would have ruled on the suppression motion had it been timely filed.”² 605 F.3d 395, 400 (6th Cir. 2010) (emphasis added); *see Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”). The district court here did not issue a written opinion for its decision to deny Brown’s motion to suppress as untimely and did not address the motion’s merits. Thus, the record

² Lewis did not “present[] this alleged error as a distinct ineffectiveness claim,” making it dependent on another alleged error that was not sufficiently developed in the record. *Lewis*, 605 F.3d at 400–01. We therefore declined to directly review Lewis’s claim. *Id.* at 401.

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does not reflect how the district court would have ruled on the suppression motion had it been timely filed. The proper resolution of whether the untimely filing prejudiced Brown is best suited for the district court on collateral review. *See United States v. Straughter*, 950 F.2d 1223, 1234–35 (6th Cir. 1991). Absent a developed factual record, we cannot evaluate Brown’s ineffective assistance claim as to the suppression motion on direct review.

Brown’s sentencing memorandum indicates that by disclaiming his interest and rights in the weapons in his plea agreement, Brown believed the weapons enhancement would not apply. The record does not, however, indicate whether Brown would have proceeded to trial had he known that the weapons enhancement would apply regardless of the plea agreement language. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (“[I]n order to satisfy the ‘prejudice’ requirement” when the defendant has pled guilty, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”). The record is therefore insufficiently developed for us to review the merits of Brown’s ineffective assistance of counsel claim as to his weapons enhancement on direct review.

III

We affirm the district court’s denial of Nicholson’s motion to suppress. We dismiss Brown’s appeal without prejudice for him to raise his claim in a proceeding pursuant to 28 U.S.C. § 2255.