

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DELANDO JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an application for a warrant to search a home for drugs must contain objective evidence of a nexus between the evidence sought and the residence to be searched, in order to permit a magistrate to find, at a minimum, in accordance with the Fourth Amendment, that the evidence will probably be found in the place to be searched.

2. Whether deliberate delay by drug investigation agents, exceeding eight months between controlled buys and the agents' application for a residential search warrant, lacking probable cause, objectively negates application of *Leon*'s good faith exception.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Delando Johnson ("Mr. Johnson") requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on August 14, 2023, which affirmed the judgment of the United States District Court for the Western District of Michigan, Southern Division.

INTRODUCTION

The privacy concerns raised in this petition are of great importance to Fourth Amendment jurisprudence, within the Sixth Circuit and across the nation. The Fourth Amendment's nexus principle which undergirds foundationally the amendment's requirement of probable cause to search a home, has traditionally demanded that such cause be established with evidence that is specific and concrete, not vague and generalized. *United States v. Carpenter*, 360 F.3d 591, 595; (6th Cir. 2004)(en banc).

However, a more generalized calculus is being applied to the probable cause analysis. Even without an evidential connection between the evidence sought to be seized, and Mr. Johnson's residence intended to be searched, the Sixth Circuit found its way to probable cause in support of the residential warrant request by "employing a healthy dose of common sense" that drug dealers *tend* to hide drugs in their residences.

This categorical conclusion, over what drug dealers *tend* to do, was relied on by the Sixth Circuit to fill a gaping hole in the government's warrant application. *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020).

Such generalized and factually unsupported statements, relating drug dealers' *tendencies* and such, did nothing to overcome the application's obvious shortcomings. In finding, on such bald averments, that the warrant application reflected a nexus between

the evidence sought and the home to be searched, the Sixth Circuit ignored and broke from fundamental principles historically governing probable cause determinations.

Mr. Johnson was charged with several crimes. He filed a motion to suppress the evidence derived from the Allen Street search. In its essence, Mr. Johnson's motion, and supporting brief, urged for suppression as there existed no conceptual, evidential, or temporal *nexus* between the evidence to be seized and the residence to be searched. (A 7, 90-92; A 8, 93-117).

At the conclusion of the hearing on Mr. Johnson's motion to suppress, the district court ruled from the bench, and denied the motion. (A 3, 15-74) Mr. Johnson filed a motion for reconsideration (A 5, 77-79) and brief in support. (A 6, 80-89). The district court entered a written order denying the motion for reconsideration. (A 4, 75-76).

The Sixth Circuit affirmed. Though it recognized the absence of any evidence of drug dealings "inside or near Allen Street," the Sixth Circuit nonetheless found its way to probable cause by "employing a healthy dose of common sense" that drug dealers tend to hide drugs in their residences. (A 1, 1-7).

Mr. Johnson submits to this Honorable Court that, whatever "common sense" may mean, it did not satisfy Fourth Amendment standards prohibiting governmental intrusions into private residences, when no articulable nexus exists, and no probable cause to support the warrant's application is reasonably established.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit appears at *United States v. Johnson*, 2023 WL 5206447. It is also attached at Appendix 1, pp. 1-7.

The judgment of the United States District Court for the Western District of Michigan, Southern Division, from *United States v Johnson*, No. 1:21-cr-34 (W.D. Mich. July 11, 2022), is unpublished and is attached at **Appendix 2**, pp. 8-14. The transcript of the hearing on Mr. Johnson's motion to suppress evidence, which includes the district court's decision from the bench denying the motion, is attached at **Appendix 3**, pp. 15-74.

The district court's order denying Mr. Johnson's motion for reconsideration of its order denying motion to suppress evidence, is attached at **Appendix 4**, pp. 75-76. Mr. Johnson's motion for reconsideration is attached at **Appendix 5**, pp. 77-79; and his brief in support of motion for reconsideration, attached at **Appendix 6**, pp. 80-89.

Mr. Johnson's motion to suppress evidence obtained as a result of an invalid search warrant, attached at **Appendix 7**, pp. 90-92; supporting brief, **Appendix 8**, pp. 93-117.

The criminal complaints which incorporated the agents' affidavits in support of search warrant for Allen Street and the arrest warrant for Mr. Johnson, attached at **Appendix 8**, pp. 119-134 and pp. 140-160, respectively. The magistrate's search warrant for the Allen Street residence is attached at **Appendix 8**, pp. 136-138; and the arrest warrant at **Appendix 8**, pp. 162-163.

JURISDICTION

The United States Court of Appeals decided this case on August 14, 2023. Mr. Johnson now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). He has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

This case involves interpretation and application of the United States Constitution, Amendment IV ("U.S. Const. Amend. IV"), and more particularly, the quantum of evidence needed in a residential search warrant application to satisfy the Fourth Amendment's nexus requirement, i.e., the evidential connection between the evidence sought and the residence to be searched.

STATEMENT OF THE CASE

- A. Federal jurisdiction has been proper since this case's inception, and this Court should exercise jurisdiction under Rule 10, subsections (a) and (c), to address the fundamental question, cutting to the core of Fourth Amendment privacy concerns, of whether an application for a residential search warrant met the probable cause threshold in describing three street level drug transactions, the latest of which took place over eight months before the warrant was applied for, with no connection to the residence sought to be searched.**

In accordance with this Honorable Court's Rules 14(1)(g)(ii) and 10(c), Mr. Johnson offers this statement of jurisdiction and suggestion of justifications for this Court's consideration of his case.

In its decision affirming the district court below, which denied Mr. Johnson's motion to suppress evidence derived from an unlawful search by warrant of 725 Allen Street, the Sixth Circuit glossed over a vital constitutional question which strikes at the core of the Fourth Amendment's prohibitions against unreasonable searches of residential dwelling houses.

On February 2, 2021, a federal court magistrate reviewed a drug task force officer's application for a warrant to search a house located at 725 Allen Street, Muskegon, Michigan ("Allen Street"). The task force had no evidence of any drug trafficking activity at Allen Street. There was no investigation conducted there; no surveillance efforts, no

evidence of suspicious pedestrian traffic, no confidential source information of drug sales emanating from Allen Street, not even an anonymous tip from a concerned neighbor.

Yet, the federal magistrate signed the search warrant. Allen Street was raided. Incriminating evidence was found. To be sure, Mr. Johnson had been investigated by the task force for drug dealing. But in order to discuss that investigative effort, and how it relates to the search warrant application for Allen Street, we need to go back in time, a bit over eight months before the search warrant was applied for and executed at Mr. Johnson's house; back to May 2020.

In May 2020 the Drug Enforcement Administration (DEA) and a local drug task force ("task force") investigated Mr. Johnson as a suspected drug dealer. The agents employed a confidential source ("CS-3") to purchase drugs from Mr. Johnson on three occasions in May 2020. Agents surveilled all three transactions.

An agent's affidavit reported that CS-3 bought 4 grams of heroin from Mr. Johnson on May 4, 2020, at "an intersection in the City of Muskegon." (A 8, 145-147). On May 11, 2020, CS-3 met Mr. Johnson in his vehicle at an apartment complex. CS-3 waited in the vehicle while Mr. Johnson briefly visited a nearby apartment building. After he returned CS-3 received 10 grams of heroin. (A 8, 147-148).

The last surveilled transaction took place on May 27, 2020. Much like the preceding meeting on May 11th, CS-3 and Mr. Johnson met at the same apartment building. Mr. Johnson obtained a package from an apartment. They then drove to a "different apartment building" where CS-3 obtained about 11 grams of heroin. (A 8, 148-150).

The total weight of drugs from the surveilled transactions in May 2020 was about

25 grams. The arrest warrant affidavit explains the detailed observations made by the surveillance team during all three May 2020 controlled buys. The task force knew precisely where each meeting took place, each vehicle entered, each apartment accessed for drugs, among other details. Notwithstanding this wealth of fresh information at that time, the task force took no action to arrest or search any person, or to search anything or any place.

After May 27, 2020, there were no further reports of activity relating to Mr. Johnson; no controlled purchases, no reported sales, no evidence of drugs at all. The task force simply turned its attention elsewhere.

The trail appeared to have gotten cold where Mr. Johnson was concerned. Or the task force simply ignored him, or forgot about him. In any event, the task force reported no further activity pertaining to Mr. Johnson throughout the balance of calendar year 2020.

Eight months later, on January 29, 2021, the task force submitted an application for an arrest warrant to a federal magistrate, based on the May 2020 controlled buys. (A 8, 140-160). The arrest warrant was signed January 29, 2021. (A 8, 162-163).

Four days later, February 2, 2021, the task force executed on the arrest warrant, and effected a traffic stop on Mr. Johnson's vehicle. The arresting agents found a digital scale in the center console of Mr. Johnson's vehicle.

Mr. Johnson was taken into custody. At the Muskegon Police Department agents discovered about 12.9 grams of drugs concealed in Mr. Johnson's pants, in his crotch. Later that day, February 2, 2021, an agent prepared an application for a warrant to search Allen Street, the residence Mr. Johnson exited from that morning before his arrest. (A 8,

119-134). The warrant was authorized. (A 8, 136-138).

The agent's belief that Mr. Johnson resided at Allen Street was based entirely on a cell phone invoice which the task force discovered at some point, dated November 17, 2020, in Mr. Johnson's name. The invoice listed Allen Street as a billing address. Based on this invoice alone, with no further investigative effort or inquiry, the task force concluded that Mr. Johnson must live at the Allen Street residence - "*Investigators knew that D. Johnson resided at the Subject Premises based on a November 17, 2020 cell phone bill using that address as a billing address.*" (A 8, 123, ¶8).

The search warrant was executed at Allen Street on February 2, 2021. It yielded contraband (A 8, 136-138). As a result Mr. Johnson was charged with 4 federal offenses under a superseding indictment, in addition to the three counts under the initial indictment based on the controlled buys in May 2020, eight months earlier.

Counts 1 through 3 of the indictment charged Mr. Johnson with drug distributions on May 4th, May 11th, and May 27th of 2020.

Counts 4 through 7 of the indictment charged Mr. Johnson with possessory offenses related to drugs and firearms which arose as a result of his arrest and the search of Allen Street on February 2, 2021.

Mr. Johnson filed a timely motion to suppress evidence obtained as a result of an unlawful search of Allen Street. Mr. Johnson's motion argued that the application presented to the federal magistrate for a residential search warrant on February 2, 2021, presented no proper cause to search the residence. It lacked any evidential or temporal nexus upon which the magistrate might find a fair probability that the evidence sought would be found there. It was based on generalizations, and hunches. An oral argument

hearing was held. Afterward, from the bench, the district court denied Mr. Johnson's motion to suppress evidence from the search at Allen Street. (A 3, 15-74, at 66-73)

Pursuant to a conditional plea agreement which preserved his statutory and constitutional claims of error, Mr. Johnson pleaded guilty to two offenses, "possession with intent to distribute controlled substances", contrary to 21 U.S.C. §841(a) and (b); and, "possession of a firearm in furtherance of drug trafficking", contrary to 18 U.S.C. §924(c)(1)(A), counts 5 and 6 respectively.

On July 8, 2022, Mr. Johnson was sentenced to a term of twenty years incarceration. (A 2, 8-14). He thereafter filed a timely appeal to the Sixth Circuit, which affirmed the district court's denial of Mr. Johnson's motion. (A 1, 1-8).

In its opinion, the Sixth Circuit recognized the absence of any evidence of drug dealings "inside or near Allen Street." However, the court wound its way to a probable cause inference by "employing a healthy dose of common sense". Mr. Johnson submits to this Honorable Court that, whatever "common sense" may mean, it violated Fourth Amendment standards here, which prohibit governmental intrusions into private residences without probable cause.

Most significantly, as to the fundamental requirement that the warrant's application enable the magistrate to find, from a fair reading within its four corners, that evidence of the investigated crimes would probably be found at Allen Street, the warrant's affidavit had nothing of substance to offer.

The search warrant affidavit incorporated by reference the information contained in the January 29, 2021, arrest warrant application. But the incorporation of the arrest

warrant affidavit into the search warrant application for Allen Street did nothing to fill the evidential void. (A 8, 119-134, at 123).

The arrest warrant application did not even mention 725 Allen Street, at all. It did describe in some detail the three surveilled drug transactions in May 2020. One of those transactions occurred in a vehicle; the other two in apartment units. These transactions and locations were surveilled by the task force. They knew precisely the vehicles and the apartments the drugs were recovered from and transacted in. They watched it happen. (A 8, 140-160). In May 2020, the evidence was fresh. But they took no action.

Instead the task force rested on their laurels from the May 2020 investigation, and let more than eight months go by. Even if, to make a point, the May 2020 controlled buys had anything to do with Allen Street – *which they did not* – the agents let the information get stale and no longer of any value in a Fourth Amendment sense:

"As for the information contained in paragraphs 2 through 8, there is no question but that this information is stale for purposes of establishing probable cause in its own right. All of the information is regarding drug transactions that took place, at the most recent, approximately six months prior to the date of the affidavit. Given the mobile and quickly consumable nature of narcotics, evidence of drug sales or purchases loses its freshness extremely quickly."

United States v Brooks, 594 F.3d 488, n.4 (2010).

The January 29, 2021, arrest warrant application provided no information of assistance to a February 2, 2021, search warrant application for a house at 725 Allen Street. In an effort to support her request for a cell phone search warrant, the TFO affiant did mention that Mr. Johnson “was in contact with” another alleged drug dealer “between October 26, 2020 and January 2, 2021” with his phone.

In other words, the TFO affiant merely reported evidence that Mr. Johnson’s phone- “the Subject Device”- was in contact with another alleged drug dealer’s phone.

But there was no averment of any drug transactions; no averment of any attempted drug transactions; not even an averment of any discussions of drugs during this time frame. The inclusion of this information in the affidavit demonstrated how insubstantial the investigation had been.

As of January 29, 2021, the only averment of Mr. Johnson's drug dealings was eight months in the past, during the May 2020 surveilled buys in a vehicle and two apartments. And neither warrant application, in its numerous paragraphs, connected any drug activity to Allen Street, at any time, not even by anonymous tip, confidential source, or otherwise.

The January 29, 2021, and February 2, 2021, arrest and search warrant applications provided no information of any kind approaching a Fourth Amendment nexus between the evidence sought to be seized and the residence, Allen Street, to be searched. (A 8, 119-134; A 8, 140-160).

The affiant's averments relating to probable cause in the February 2, 2021, residential search warrant affidavit were contained in three paragraphs. The "[i]nvestigators knew that D. Johnson resided at the Subject Premises based on a November 17, 2020 cell phone bill using that address as a billing residence." (A 8, 123, ¶8). More questions than conclusions arise from this statement. Where did the agent get the cell phone bill ? When ? What effort was made to corroborate the conclusion of residency based on a billing address alone? What surveillance was undertaken ? And so on. Other than a name and a billing address on a cell phone bill over two months old, no further information explained its relevance to the magistrate's probable cause determination.

The February 2, 2021, search warrant affidavit at paragraph 9 provided the only reference to Allen Street. Paragraph 9 stated:

"Shortly after 10:00 a.m. on February 2, 2021, D. JOHNSON exited the **Subject Premises** and entered into a white GMC Yukon XL with no other passengers. A fully marked police car initiated its lights and sirens and effected a traffic stop to arrest D. Johnson in the parking lot of a Muskegon area restaurant. After D. JOHNSON exited the vehicle, investigators conducted a pat down search of D. JOHNSON and noticed a bulge in his groin area. Investigators removed the object from his crotch, which field tested positive as approximately 7.2 grams of heroin and approximately 5.7 grams of cocaine base (crack). In the center console of the vehicle, investigators seized a digital scale with white residue."

(A 8, 123-124).

Between January 29, 2021 and February 2, 2021, the two applications for warrants, one to arrest Mr. Johnson and the other to search Allen Street, entirely failed to establish any cause, let alone probable cause, to search the house at 725 Allen Street.

B. An affidavit accompanying a residential search warrant request must objectively demonstrate the existence of probable cause to search a residence, by establishing a nexus between the evidence to be seized and the place to be searched. Factual averments must connect the subject residence to relevant evidence enabling a magistrate to reasonably determine a fair probability that the described evidence will be found in the place to be searched.

The Fourth Amendment provides:

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

In order "to establish probable cause for a search, an affidavit must show a likelihood of two things: first, that the items sought are 'sizeable by virtue of being connected with criminal activity'; and second, that the items will be found in the place to be searched." *United States v Church*, 823 F.3d 351, 355 (6th Cir. 2016)(quoting *Zurcher*

v. *Standford Daily*, 436 U.S. 547, 555 n.6, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

When the object of the search is contraband, the nexus between criminal activity and the item to be seized is automatic. *United States v Church*, 823 F.3d 351, 355 (6th Cir. 2016)(quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967)).

However an application by police to search a residence for illegal drugs must satisfy the "the second showing for a valid warrant: 'a fair probability' that the drugs 'will be found in a particular place.'" *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "There must, in other words, be a 'nexus between the place to be searched and the evidence sought.'" *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004 (en banc)).

In establishing a Fourth Amendment nexus the warrant must describe with particularity, not only the place to be searched and the things to be seized, but it must also "demonstrate the *nexus* that exists between the two.

In this regard, there must be a substantial basis for the conclusion that probable cause exists:

"The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.' U.S. Const. amend. IV. In determining whether an affidavit establishes probable cause, the task of the issuing magistrate 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. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

To justify a search, the circumstances must indicate why evidence of illegal activity will be found "in a particular place." There must, in other words, be a "nexus between the place to be searched and the evidence sought." *United States v. Van Shutters*, 163 F.3d 331, 336-37 (6th Cir. 1998). Lawson's affidavit

did not provide a substantial basis for the issuing judge's conclusion that probable cause existed to search the Carpenters' residence, because it failed to set forth sufficient facts that incriminating evidence would be found there, rather than in some other place." (emphasis added).

United States v Carpenter, 360 F.3d 591, at 594 (6th Cir. 2004)(en banc).

Precisely so in this case. The affidavits submitted on January 29, 2021 and February 2, 2021, provided no substantial basis, if one at all, to enable the magistrate to reasonably conclude that probable cause existed to search Allen street. The affidavits failed to set forth sufficient facts that incriminating evidence would be found there.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit improperly supplanted the Fourth Amendment's nexus requirement for establishing probable cause, with a casual inference – that drug dealers tend to store drugs in their homes- dangerously circumventing Fourth Amendment safeguards against unreasonable and arbitrary government intrusions into private residences when lacking probable cause. Review in this Court is needed to settle inconsistencies and debate among circuit courts over the quantum of evidence needed to satisfy the Fourth Amendment's nexus requirement when examining challenges to residential search warrants in drug trafficking cases.

To satisfy the nexus requirement, the facts in the affidavit must be specific and concrete, not "vague" or "generalized" in connecting the criminal activity to the residence to be searched. *United States v. Carpenter*, 360 F.3d 591, 595; (6th Cir. 2004)(en banc); *United States v. Davis*, 970 F.3d 650, 665-666 (6th Cir. 2020), citing *United States v. Hang Le-Thy Tran*, 433 F.3d 472, 482 (6th Cir. 2006); *United States v Brown*, 828 F.3d 375, 383 (6th Cir. 2016); *United States v Higgins*, 557 F.3d 381, 390 (6th Cir. 2009); *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc).

The status as a drug dealer alone is not enough to meet the Fourth Amendment's nexus requirement. *United States v Brown*, 828 F.3d 375, 383 (6th Cir. 2016). There must be other specific and concrete evidence connecting the drugs to the house, the place to

be searched. *United State v Reed*, 993 F.3d 441, 448 (6th Cir. 2021).

The question is whether the judicial officer had a substantial basis for finding that the affidavit established probable cause to believe that evidence of a crime would be found at the place the police seek to search. *United States v Greene*, 250 F.3d 471 (6th Cir. 2001); *United States v Davidson*, 936 F.2d 856 (6th Cir. 1991). In this regard, the judicial officer must not serve merely as a rubber stamp for the police. *United States v Leon*, 468 U.S. 897 (1984).

In concluding that the “affidavit met the requisite standard to support the warrant” and affirming the district court’s denial of Mr. Johnson’s motion to suppress, the Sixth Circuit acknowledged the obvious, that “*the affidavit does not describe drug transactions inside or near 725 Allen*”. (A 1, 1-7). From the Fourth Amendment’s perspective, this was an understatement.

The *only* drug transactions discussed in the warrant application at all were the controlled buys in May 2020, over eight months earlier. One of the deals occurred in a vehicle, the other two in apartment buildings elsewhere.

The house at 725 Allen was not even on the investigators’ radar screen in the context of those May 2020 transactions. And the task force did not bother to make an effort to determine where Mr. Johnson came from, or went to, on either side of any one of those deals.

The fact that the agents surveilled each one of the controlled buys in May 2020, captured great detail as to location, participants, and so on, then took no action while the information was fresh, is remarkable. Their delay over the nearly nine months that followed left the affiant, and the reviewing magistrate, reliant on mere generalized

conclusions and hunches, with no articulable nexus between evidence and the place to be searched.

- A. In reviewing constitutional challenges to residential search warrants, circuit decisions have been inconsistent in deciding the quantum of evidence needed to permit a reasonable determination that evidence of the crime will be found in the place sought to be searched.**

The Sixth Circuit found agreement with the district court's approval of the search warrant, partly by turning to a "*healthy dose of common sense*" to conclude that "the magistrate judge could find a fair probability that Johnson stored drugs, cash, and drug paraphernalia at his residence," citing, *United States v White*, 874 F.3d 490, 502 (6th Cir. 2017). However, the Sixth Circuit's inference was drawn on entirely insubstantial facts, and slackened too casually the moorings of fundamental privacy concerns embedded in the Fourth Amendment.

Moreover, and contrary to the Sixth Circuit's reference, *White*, *supra*, did not support its conclusion that a nexus was demonstrated.

The parties in *White* agreed that *probable cause was lacking* for the residential search warrant, even though, unlike the facts in Mr. Johnson's case, the application for the search warrant in *White* detailed an officer's observations of the defendant in *White* selling drugs in the driveway of his home. Additionally, the officers had a confidential tip of drug sales by the defendant in *White*, out of his home; and other factors.

The circuit court in *White* did not address the undisputed matter of the warrant's deficiencies. Instead the court went directly to the issue of the officer's good faith reliance on the warrant. *United States v Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Contrary to the evidence of drug sales at the defendant's residential premises in

United States v. White, *supra*, which the government acknowledged to be insufficient for probable cause purposes, the agent's affidavit in Mr. Johnson's case related absolutely no evidence of drug transactions at Allen Street.

Before a warrant to forcibly search a residence can be lawfully authorized the magistrate must be satisfied from a review of the application's factual averments of "a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Brooks*, 594 F.3d 488 (6th Cir. 2010). This requires "a nexus between the place to be searched and the evidence sought at the time the warrant is issued." *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006); *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc); *United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006).

In reviewing the sufficiency of a search warrant application the reviewing court should examine the "totality of circumstances" presented, "rather than engage in line-by-line scrutiny of the application's affidavit". *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008).

However, the reviewing court must also limit its "review of the sufficiency of the evidence supporting probable cause ...to the information presented in the four-corners of the affidavit." *United States v. Frazier*, 423 F.3d 526, 531 (2005).

No reasonable examination of the affidavit submitted to the magistrate for the search of 725 Allen on February 2, 2021, would support a conclusion that probable cause was established, whether the affidavit is reviewed on a line-by-line basis, or in its totality.

B. The Sixth Circuit acknowledged, then ignored, the absence of a connection between the residence to be searched and evidence to be seized, yet bridged the evidential gap with casual inferences from insubstantial facts, effectively sidelining the Fourth Amendment's nexus requirement.

In denying Mr. Johnson's motion for reconsideration of its order denying motion to suppress evidence, the district court reiterated its reliance on the categorical, generalized conclusion that drug dealers tend to hide drugs in their houses. (A 4, 75-76).

One of several problems with this statement, in this case, is that there was no evidence of any drug engagements at Allen Street. The statement over abstract drug dealers' tendencies, is a mere generalized and vague conclusion, and an impermissible one.

The nearly exclusive reliance on this categorical conclusion was evident in the district court's order denying Mr. Johnson's motion for reconsideration of the earlier bench ruling denying his motion to suppress:

"There must be a "nexus between the place to be searched and the evidence sought." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc). However, a magistrate issuing a search warrant "may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking." *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008). This reflects the reality that, "in the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998) (citation and alteration omitted)".

(A 4, 75-76).

The district court clearly relied on *Coleman*, in denying Mr. Johnson's motion to suppress. It relied on *Coleman* in its bench ruling following the hearing on Mr. Johnson's suppression motion, (A 3, 63, 70); and, in its written order denying motion for reconsideration. (A 4, 75-76). *United States v. Coleman*, 923 F.3d 450, 452-453 (6th Cir. 2019).

In affirming the district court's denial of Mr. Johnson's motion, the Sixth Circuit agreed with the inference relied upon, citing *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020). (A 1, 1-7). Such generalized pronouncements of such generalized and categorical conclusions go so far as to celebrate the existence of a Fourth Amendment nexus to a residence, here Allen Street, "even where there is absolutely no indication of any wrongdoing occurring there." *Sumlin*, *supra*, at 886.

The Sixth Circuit therefore agreed that it was reasonable under Fourth Amendment considerations for the magistrate to *infer* that the house Mr. Johnson exited from in the morning of February 2, 2021, would also contain drugs. *United States v. Coleman*, 923 F.3d 450, 457 (6th Cir. 2019); *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020), and *United States v. White*, 874 F.3d 490, 502 (6th Cir. 2017).

However, the courts' reliance on this line of cases is misplaced. The scope of the "inference" permitted to be drawn has become debated in the circuit courts, leading to irreconcilable results regarding the quantum of evidence needed to meet the Fourth Amendment's nexus requirement. The Sixth Circuit has "struggled to identify the quantum of evidence needed to connect drug trafficking by an individual to a probability that evidence will be found at the individual's residence." *United States v. Reed*, 993 F.3d 441, 444 (6th Cir. 2021).

This difficulty has resulted at times, as here, in a disconcerting dilution in analysis of the Fourth Amendment's nexus requirement. With the assertion of "broad propositions like: [I]n the case of drug dealers, evidence is likely to be found where dealers live," *Id.* at 448, citing, among others, *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020) (quoting *United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998)).

When applying this untenable conclusion, the reviewing magistrate shifts impermissibly away from requiring particularized facts, historically demanded in Fourth Amendment jurisprudence, in favor of generalized conclusions, untethered to any foundational facts. The nexus analysis suffers. Magistrates consequently move toward the status as a rubber stamp for law enforcement warrant applications.

In *Reed*, it was observed that the difficulty arises from two competing principles:

“Under the first principle, probable cause to arrest a suspect for a crime does not necessarily create probable cause to search the suspect’s home. So our cases, at times, say that officers need additional evidence of a ‘nexus’ between the drug dealing and the dealer’s home. *United States v. Brown*, 828 F.3d 375, 383-84 (6th Cir. 2016). Under the second principle, the probable-cause test allows officers to make common-sense conclusions about where people hide things. So our cases also say that evidence of a drug dealer’s ongoing drug activity can sometimes create this nexus to search the dealer’s home.” *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020).”

United States v Reed, 993 F.3d 441, 444 (6th Cir. 2021).

The categorical statement that a suspect’s status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in the suspected drug dealer’s home, is not only overly broad, generalized, and vague, it is not the law. *United States v Brown*, 828 F.3d 375, 383 (6th Cir. 2016); *United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005).

For a nexus the affidavit must “include facts that directly connect the residence with the suspected drug dealing activity.” *Brown*, 828 F.3d at 384. Significantly in this regard, *United States v Coleman* was the case principally relied upon to deny Mr. Johnson’s motion to suppress. However, contrary to the district and circuit courts’ review, *Coleman* did not hold that a magistrate may infer that drugs are likely to be found in the house of a suspected drug dealer, without more.

In *Coleman*, warrants were issued (1) permitting the tracking of the defendant's motor vehicle and, (2) permitting the search of his residence. A cooperating co-defendant identified Coleman as a source of drugs. Officers investigated and observed drug sales between Coleman and another suspect, involving two vehicles used by Coleman. The agents surveilled and observed Coleman in *multiple drug transactions*, some involving cooperating sources.

The agents obtained a tracking warrant for Coleman's vehicle. They installed the warrant and monitored Coleman's travels to his residence. They observed Coleman in additional drug transactions after leaving his house. GPS electronic tracking also corroborated Coleman's travel from his residence directly to the site of the drug transaction. Based on this wealth of information a search warrant was then obtained for Coleman's residence. *United States v Coleman*, 923 F.3d 450, 452-453 (6th Cir. 2019).

Indeed, what the officers did in *Coleman*, is precisely what the agents in this case could have done in May 2020 if they pursued search warrants then for the apartments and vehicles which served as the storage and transactional facilities for the drugs in the described controlled buys involving Mr. Johnson.

But the agents, having waited over eight months to seek a warrant for Allen Street, a place having nothing at all to do with any of those transactions, severs *Coleman* entirely in its legal analysis over probable cause and reasonable inferences properly drawn from substantial facts.

The distinguishing factors between *Coleman*, *supra*, and the Sixth Circuit's analysis in affirming the denial of Mr. Johnson's suppression motion, are remarkable. In this regard it can reasonably be argued that the holding in *Coleman* contradicts, more

than supports, the Sixth Circuit's decision affirming the denial of Mr. Johnson's suppression motion regarding Allen Street.

The Sixth Circuit in *Coleman*, rejected the defendant's challenge to the residential search warrant on probable cause grounds, stating:

"Here, the affidavit in support of the residential search warrant established that Coleman was an active drug trafficker, that the Springtree Lane address was Coleman's home, and that both of Coleman's vehicles were regularly parked there. According to the affidavit, agents had conducted three controlled buys from Coleman and observed him drive directly from his condo to the site of the most recent buy, less than two weeks before the warrant issued. This was sufficient to establish that Coleman was an active drug trafficker at the time the warrant issued and to provide a reasonable inference that he transported narcotics from his residence to the location of the cocaine sale. See, e.g., *United States v Bucio-Cabral*, 635 F.App'x 324 (6th Cir. 2016)(evidence defendant traveled to two addresses – one of which was home – prior to narcotics sales supported inference he was storing narcotics at one residence); *United States v Gunter*, 266 F. App'x 415, 419 (6th Cir. 2008) ('[T]he instant affidavit describes an incident where law enforcement agents observed Defendant visiting his residence right before he traveled to the site of a drug sale ... This evidence, combined with the affiant's statements that he has significant experience in narcotics investigations, is sufficient to establish a nexus between Defendant's illegal activities and his residence.'")

Coleman, *supra*, at 457-458 (emphasis added).

The analysis in *Coleman* supporting a probable cause determination, was based on numerous facts and factors not at all present in Mr. Johnson's case. In *Coleman*, the search warrant application was supported by an affidavit detailing active drug dealing, including multiple, surveilled drug transactions, observed by law enforcement agents to have originated at the defendant's residence, within two weeks of the application. It was within the context of this body of evidence that the categorical statement was made over an inference of likely evidence in a drug dealer's home.

In Mr. Johnson's case there were no reported drug transactions involving Allen

Street, at any time. The agents never surveilled any activity there, let alone a drug transaction. They only sat on Allen Street the morning of February 2nd 2021 to arrest Mr. Johnson on the arrest warrant.

Even if the May 2020 controlled drug transactions were not stale by eight months relative to the February 2021 search warrant application - *which they most assuredly were*- they provided no detail in any event supportive of a warrant to search the Allen Street residence. There were no facts, let alone "specific" and "concrete" facts, implicating 725 Allen Street in any drug transaction activity, at any time, not even during the May 2020 controlled buys.

The application for a search warrant for Mr. Johnson's house was so broad, it would permit a finding of probable cause to support a search of any residence, structure, or building, associated with a suspected drug dealer. So telling in this regard is the content of the affiant's statements in her application for the search warrant.

Special Agent Williamson included in her affidavit multiple generic and generalized paragraphs of information about drug traffickers, based upon her eight years as a law enforcement officer. Specifically relevant here, SA Williamson outlined that she knew that 'subjects involved in drug trafficking often use their residences, *or* the residences of friends, or family, or close associates, to store drugs and otherwise further their drug trafficking.' (A 8, 124, ¶12).

And this, of course, cuts to one of the central, constitutional principles Mr. Johnson emphasized before the district and circuit courts. The asserted knowledge of a government affiant that "subjects involved in drug trafficking" (a very broadly referenced community), often (i.e. but not always) use their residences, or the residences of friends,

or the residences of family, or the residences of close associates, to further their drug trafficking. These statements in the affidavit are as equally numerous as they are unhelpful to the task of the magistrate to evaluate facts supportive of the warrant's request. They encompass a great deal of speculative ground, and make Mr. Johnson's point over the affidavit's arbitrariness, and its complete lack of probable cause.

On the other hand, had this assertion by SA Williamson been made in a search warrant application back in May 2020 for one or both of the apartment units specifically identified by agents as the surveilled venue for the controlled buys, and identified as the place where the drugs were stored, the agent's description in her affidavit about what drug dealers "often" do with their drugs, and so on, would have had some factual context and meaning, with temporal evidential value.

But the general "boilerplate" assertions in February 2021, eight months later, relative to Allen Street which was not as much as mentioned during the drug transactions, had no more contextual relevance than if the agent had found drugs concealed in Mr. Johnson's pants after he walked out of a residence of one of his family members, or one of his friends, or one of his close associates, with nothing more.

The district and circuit courts thus stretched *United States v Coleman*, well beyond the law of its case, in concluding that a permissible inference may have been made by the magistrate in approving the warrant to search 725 Allen Street.

Likewise, in propounding the premise that "evidence is likely to be found where the dealers live", the Sixth Circuit followed suit and improperly relied on *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020).

In *Sumlin*, the defendant's ex-girlfriend's sister died of a drug overdose. Based on

information shared with investigators by the victim's sister, who was also defendant's ex-girlfriend, the victim was known to have purchased drugs from the defendant. The affidavit also related text messages between the defendant and the victim, early in the morning on the date of her overdose death, regarding her request for drugs.

Substantial evidence connected the defendant in *Sumlin* to the residence searched, as a long term resident. The timeline in the affidavit indicated Sumlin was at his residence during the text exchanges over drugs with the victim. On the date of her death, March 28, 2015, shortly after the text exchanges, the defendant's car was observed at the victim's house. After the victim's death was discovered, the evidence was compiled and further corroborative investigative work was done. The search warrant was approved 30 days later, April 27, 2015, and executed the next day.

Again, like in *Coleman*, when the investigative facts are contextually examined in *Sumlin*, there is some evidence to support the statement that the drug dealer, Sumlin, was operating out of his residence, with both a temporal and evidential nexus.

Unfortunately, the law of the case has been stripped of its facts, leading to categorical statements, such as "in the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020)(citing, *United States v Jones*, 159 F.3d 969, 975 (6th Cir. 1998)).

This is precisely what drove the Sixth Circuit's conclusion in Mr. Johnson's case when it observed that the affidavit "showed that Johnson lived at 725 Allen through the phone bill and surveillance, and "evidence is likely to be found where the dealers live." (citing, *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020).(A 1, p. 4).

The categorical statements made by the Sixth Circuit, and the district court as well,

that “in the case of drug dealers, evidence is likely to be found where the dealers live”, effectively tend to strip the meat off the bones of the Fourth Amendment’s fundamental underpinnings. The danger of reducing such a core principle to an insubstantial and generalized proposition is demonstrated by the Sixth Circuit’s application of it to Mr. Johnson’s case.¹

The Sixth Circuit suggested that a more relaxed standard of reviewing warrant applications suffices, with “a heavy dose of common sense”, rather than the imposition of “hyper technical” criticism, in the probable cause determination.

But hyper technical criticism aside, any objectively reasonable review of the task force officer’s affidavit demonstrates that it failed to establish, to any degree, probable

¹ In contrast, by way of example, in *United States v. May-Shaw*, 955 F.3d 563 (6th Cir. 2020), the Sixth Circuit affirmed a denial of a suppression motion relating to the execution of a search warrant on the defendant’s vehicles and apartment following 23 days of surveillance. The investigative efforts established direct evidence of several drug transactions, corroborated further by dog sniffing evidence and other factors. In *May-Shaw* the defendant argued that the long term surveillance and the subsequent use of the drug sniffing dog constituted unreasonable searches in violation of his Fourth Amendment privacy interests, not whether probable cause otherwise supported the warrant request. But this is precisely the point. Unlike the search warrant affidavit in Mr. Johnson’s case, the evidence in *May-Shaw* presented testimonial evidence in support of a warrant request which was recent in its information; abundant in its substance; and which attached directly to the places and things to be searched. Likewise, in this regard, *United States v. Trice*, 966 F.3d 506 (6th Cir. 2020), where the defendant argued unsuccessfully that the surreptitious placement of a disguised camera outside his apartment violated his reasonable expectation of privacy. In *Trice*, the Kalamazoo Valley Enforcement Team (KVET) conducted three controlled buys from the defendant, on July 10, 2018, July 19, 2018, and July 23, 2018. *Id.* at 510. The investigators observed the defendant arrive on foot to and from an apartment at the time of the controlled buys. Between the second and third controlled buy the investigators installed a camera which looked like a smoke alarm outside his apartment, and gained substantial footage of the defendant’s activities, including his actions surrounding the third controlled buy. All of this information, the surveilled controlled buys, the corroborating video footage, and other evidence supported the warrant for the apartment made shortly after these events. The contrast of the procedural facts in *Trice*, to the instant case, is a compelling one, and highlights the need for this Honorable Court’s review of conflicting decisions in the circuit courts on a significant constitutional question.

cause for the search of the Allen Street residence. The affidavit embodies at best, a good hunch.

In reviewing the affidavit presented to the magistrate on February 2, 2021, as a whole, each piece of evidence should be reviewed "as a factor in the totality of circumstances" in assessment of probable cause. *District of Columbia v. Wesby*, 538 U.S. ___, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018).

There were essentially five factors referred to in the Sixth Circuit's decision affirming the district court's denial of Mr. Johnson's motion to suppress:

Factor 1: The first factor related to Mr. Johnson's described three street level transactions. They were surveilled by officers. All three took place in May 2020, about 9 months before the search warrant for the Allen Street Residence was applied for. They each occurred either in a vehicle or in specifically identified apartment buildings.

The May 2020 investigation became more than stale in a Fourth Amendment sense, come February 2021. Regardless, even if it could be considered relevant on some point of consideration, the Allen Street residence played no role. In fact, there was no reference of any kind to the Allen Street Residence in the context of the three May 2020 street level transactions. None of the investigating agents even attempted to surveil Mr. Johnson to see where he went afterward; nor did they attempt to establish where he came from beforehand.

Factor 2: A November 2020 cell phone bill in Johnson's name, with the Allen Street Residence listed as the billing address. This billing statement, dated about 6 months following the May 2020 drug transactions and 3 months before the search warrant was applied for, represented the only evidence of Johnson's ties to the Allen Street Residence.

It may well have been some evidence of residency, but nothing more. Alone, it certainly did not relate in any material way to drug transactions at the Allen Street Residence. Evidence of the cell phone bill contributed nothing to the totality of factors pertaining to the nexus principle. .

In fact, when the affiant's evidence of the surveilled May 2020 drug transactions is considered, the more likely inference drawn is that any contraband in storage was more likely anywhere *but* at the Allen Street Residence.

Factor 3: The affiant's evidence that as recently as January 2nd 2021, Mr. Johnson had "continuing communication with drug dealers". Like factor 2, the cell phone bill, this factor merely indicated, with no particularities, that Mr. Johnson's phone – "subject device"- connected with the phone of a suspected drug dealer. Once again, even if so, such evidence posits nothing of evidential value regarding the likelihood of finding drugs at 725 Allen Street on February 2, 2021.

The reference to cell phone contacts was just that, a statement that there were contacts between the two phones. But no evidence of content of communications. No evidence of any drug discussions, drug possessions, drug transactions at all. Not even any mention of 725 Allen Street. This averment was entirely meaningless, on its own, and as a part of the totality of factors.

Factor 4: The Sixth Circuit's decision mentions "surveillance" of 725 Allen Street as a factor. But the undisputed evidence was that the agents only surveilled on the morning of February 2, 2021, to effect an arrest. The surveillance team saw Mr. Johnson leave the residence alone at about 10:00 a.m.

That was it. There was no further description at all, nobody coming or going, just

Mr. Johnson, empty handed, walking to his vehicle, entering, and driving away. While many cases involving probable cause issues involve evidence obtained from surveillance activities, surveillance in this case contributes nothing of evidential value to a probable cause determination.

Factor 5: And finally, after the Government arrested Mr. Johnson on the arrest warrant and took him to the Muskegon police station, some drugs were found hidden in his pants. The package was small enough that it entirely escaped the attention of the agents who arrested Mr. Johnson after the traffic stop. It was not discovered until he was continued in custody at police station.

Unlike factors 1 – 4, this factor at least relates some incriminating evidence. But it proves nothing as to the presence of drugs at the Allen Street Residence. None were observed. None were reported. And further, like the scale found in the car driven away by Mr. Johnson from the Allen Street Residence, the contraband in Mr. Johnson's clothing could have come from any number of alternative sources, including his car.

Speculation aside, the question of the Fourth Amendment's nexus requirement is not whether the individual is suspected of crime, but whether evidence of crime is going to be found in the place government wants to search. *United States v. Frazier*, 423 F.3d 526, 532-533 (6th Cir. 2005).

There must be "a nexus between the place to be searched and the evidence to be sought." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004)(en banc). "The critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford*

Daily, 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

The Sixth Circuit's decision in this case, when boiled down to its essential findings, rested on the averments in the affidavit that Mr. Johnson has been a drug dealer, and an inference can be drawn that "in the case of drug dealers, evidence is likely to be found where the dealers live". *Coleman*, *supra*, *Sumlin*, *supra*.

The Sixth Circuit's evaluation of the affidavit represents a significant departure from precedents governing probable cause determinations. The four corners of the affidavit must establish the requisite nexus. A finding of probable cause requires a "sufficient nexus between the place searched and the evidence sought." *United States v. Kenny*, 505 F.3d 458, 461 (6th Cir. 2007); *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004)..

The Sixth Circuit ignored the task of critically reviewing the affidavit to see if it established reasonable cause to believe that the specific things to be searched for and seized would be located on the property to which entry is sought, and not merely that the owner of the property has a criminal history, or is now suspected of crime. *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006). Other circuit panels have required far more than mere inference from the status of the suspect as a drug dealer.

Thus, the search warrant failed in *United States v Brown*, 828 F.3d 375 (6th Cir. 2016). Far from a "substantial basis" upon which to conclude that probable cause existed, there was no articulable basis at all. In *Brown*, *supra*, on March 8, 2011, the DEA placed recorded calls to a heroin dealer, Middleton, and arranged for the purchase of a half kilogram. The surveilled suspect vehicles were pulled over in a probable cause stop.

A fellow named Steven Patrick Woods was the driver and sole occupant of a

Chevrolet Silverado truck, containing heroin. A Yukon Denali occupied by Middleton, as driver, and Brown, as passenger, was also stopped. All 3 of the men were arrested for delivery of heroin. Cell phones were seized, two of which were attributed to the defendant, in *Brown*.

Further, the defendant in *Brown* had \$4,813 in cash. The next day, March 9, 2011, a search warrant was obtained for Middleton's residence. More heroin was found. The March 9th Middleton house search also turned up more evidence against the defendant in *Brown*, including a dog sniff alert on Brown's Yukon, which was seized.

Nine days later, March 17th, agents obtained a search warrant for the contents of the cell phones seized and found evidence of drug communications by Brown.

Based on all this evidence, on March 30th, 22 days following Brown's initial arrest, a search warrant affidavit and application for Brown's residence was submitted. The affiant swore that there was probable cause to believe that a search of Brown's residence would reveal "fruits or other evidence of a conspiracy to distribute heroin."

Like the affidavit in the instant case, the affidavit in *Brown* included an Attachment "A" depicting the residence and Attachment "B" describing particularly the things to be seized. The warrant was executed at Brown's residence and the government seized drugs, guns, paraphernalia, and cash. *Brown*, at 380.

Without a hearing, the district court denied the defendant's motion, in *Brown*, to suppress, after concluding that the affidavit established probable cause, that the

evidence in the affidavit was not stale, and that the *Leon* good-faith exception would apply even if probable cause was lacking. *Brown*, at 380.

The appeals court in *Brown*, reviewed the "nexus requirement" under the authority of its *en banc* ruling in *Carpenter*, emphasizing that the:

"connection between the residence and the evidence of criminal activity must be specific and concrete, not 'vague' or 'generalized.' If the affidavit does not present sufficient facts demonstrating why the police officer expects to find evidence in the residence rather than in some other place, a judge may not find probable cause to issue a search warrant. *Id.* And of course, whether an affidavit establishes a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented. See *Gates*, 462 U.S. at 238, 103 S. Ct. 2317; *Brown*, 732 F.3d at 573.

A number of our cases illustrate situations in which the nexus is too vague or generalized to support a search warrant. In *Carpenter*, the search warrant affidavit stated only that an officer conducting helicopter surveillance had observed numerous marijuana plants growing near the residence and a road that connected the residence to the plants. 360 F.3d at 593. Although the facts in the affidavit suggested some connection between the marijuana plants and the residence, we held that they were 'too vague, generalized, and insubstantial to establish probable cause.' *Id.* at 595. We have similarly concluded that a search warrant affidavit failed to establish the requisite nexus between the place to be searched and the evidence to sought where it stated no more than that the defendant resided at the address and was arrested there on a non-drug offense with a quantity of crack cocaine on his person. *United States v McPhearson*, 469 F.3d 518, 524-25 (6th Cir. 2006). We also found the nexus insufficient in a case where an informant actually identified the defendant's residence as the site of a drug operation. See *United States v Higgins*, 557 F.3d 381, 390 (6th Cir. 2009).

The police had not established the informant's reliability, we explained, and furthermore, the affidavit did not assert that the informant had been inside the defendant's apartment that he had ever seen drugs or other evidence inside the defendant's apartment or that he had seen any evidence of a crime other than the one that occurred when the defendant allegedly sold him drugs. *Id.* at 390." Without such an assertion we concluded the affidavit fails to establish the nexus between the place to be searched and the evidence sought. *Id.*" (emphasis added).

United States v Brown, 828 F.3d 375, 382 (6th Cir. 2016), citing *United States v Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004)(*en banc*).

The generalized and "broad proposition" that drugs and contraband would likely be found at 725 Allen Street because Mr. Johnson was a suspected drug dealer, largely convinced the district court that a sufficient nexus was established between the evidence sought and the place to be searched. *United States v Coleman*, 923 F.3d 450, 452-453 (6th Cir. 2019). The Sixth Circuit agreed for similar reasons. *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020).

In other circuit decisions, this line of reasoning has been rejected. *United States v Brown*, 828 F.3d 375, 383-384 (6th Cir. 2016); *United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005).

C. Deliberate delay by drug investigation agents, exceeding eight months between controlled buys and the agents' application for a residential search warrant, lacking probable cause, objectively negates application of *Leon*'s good faith exception.

The district court and the circuit court on appeal, having concluded that the application for a search warrant for Mr. Johnson's residence at 725 Allen Street was supported by probable cause, did not reach the question of whether the good faith exception, *United States v Leon*, 468 U.S. 897 (1984), should apply in the event probable cause was found lacking. This section briefly addresses that question.

In *United States v Leon*, 468 U.S. 897 (1984) a "good faith" exception was recognized and the court held that even if an affidavit is insufficient, the search can still be upheld if the police acted in good faith. In *Leon* the "Supreme Court established a new objective inquiry limiting suppression to circumstances in which the benefits of police deterrence outweigh the heavy costs of excluding 'inherently trustworthy tangible evidence' from the jury's consideration. *United States v Gilbert*,

952 F.3d 759, 763 (6th Cir. 2020).

However, the good-faith exception is inapplicable in four situations: (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a bare bones affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient. *United States v Leon*, 468 U.S. 897, 914-915, 923 (1984); *United States v. Hython* 443 F.3d 480, at 484 (6th Cir. 2006).

The good faith exception should not apply in favor of the warrant in this case. The good faith exception does not apply where a "reasonably trained officer would have known that [her] affidavit failed to establish probable cause and that [she] should not have applied for the warrant." *Malley v. Briggs*, 475 U.S. 335 (1986).

In *United States v. Hython*, *supra*, the 6th Circuit, in ruling that the search warrant was invalid on staleness grounds, identified numerous cases providing guidance in the analysis of when the 4th Amendment has been offended by the issuance or execution of a search warrant lacking the requisite foundation:

The parameters of objective reasonableness in the good-faith context have been explored primarily in relation to whether an affidavit established a sufficient nexus between illegal activity and a place to be searched. See *Carpenter*, 360 F.3d at 594 (affidavit describing marijuana field near residence fall[s] short of establishing required nexus between criminal activity and residence); *United States v. Laughton*, 409 F.3d 744, 751 (6th Cir.2005) (no modicum of evidence connected defendant,*485 criminal activity, and address to be searched); *United States v. Helton*, 314 F.3d 812, 821-23 (6th Cir.2003) (outgoing calls from house to known drug dealer did not create substantial basis to believe evidence could be found in house); *United States v. Van Shutters*, 163 F.3d 331, 337 (6th Cir.1998) (affidavit did not establish any connection between target of investigation and home to be searched); *United States v. Weaver*, 99 F.3d 1372, 1378-79 (6th Cir.1998) (boilerplate language in affidavit failed to provide particularized facts regarding alleged crime occurring on premises to be searched); *United States v. Leake*, 998 F.2d 1359, 1365 (6th Cir.1993) (minimal surveillance did not corroborate anonymous tip that narcotics could be found in basement of specific house); see also *United States v. Washington*, 380 F.3d at 248 (Moore, J., dissenting) (affidavit created only sparse and speculative connection between drug supplier and place to be searched). Although no bright-line rule dictates its outer limit, the zone in which the good-faith exception may be applied is bound on one end by the requirements of probable cause-once that standard is met, application of the exception is unnecessary. Therefore, the relationship between staleness and probable cause is a reasonable place to begin this analysis."

United States v. Hython 443 F.3d 480, at 484-485 (6th Cir. 2006).

Even more compellingly, the search warrant at issue here demonstrates abject failure of evidential, contextual, and circumstantial support in the supporting affidavit. It was so entirely deficient regarding "probable cause" and the related factor of "nexus" to the premises that all four of the factors rendering inapplicable the "good faith exception" are implicated, though only one need be found.

The affidavit was bare bones. It provided no substantial basis for a determination of probable cause to search Allen Street.

Further, it lacked so significantly in probable cause as to render official belief in its existence entirely unreasonable. This is particularly true when considering the

long delay of over eight months following the controlled buys before the agents took any action. The lack of investigative diligence should not be excused with unsupported inferences and generalizations over what drug dealers *tend to do*.

The magistrate should not fill in the evidential gaps with such generalized assumptions and abstract inferences when the agents do not have evidence of a nexus, or through their deliberate delays and lack of diligence lost whatever they once had.

Therefore, it cannot be plausibly maintained that the officers' reliance on the February 2, 2021, search warrant in this case was in good faith. *United States v. Leon*, 468 U.S. 897, 914-915, 923 (1984); *United States v. Gilbert*, 952 F.3d 759, 763 (6th Cir. 2020); *United States v. Hython*, 443 F.3d 480, at 484 (6th Cir. 2006).

That the evidence at 725 Allen Street should be suppressed, does not affect the government's evidence against Mr. Johnson relative to the May 2020 controlled buys. The government could have acted on its evidence when the circumstances were fresh. It chose not to. But there was no affirmative defense raised as to the charges which were based solely on the alleged May 2020 controlled buys.

Under the Leon good-faith standard, suppression should be limited to "circumstances in which the benefits of police deterrence outweigh the heavy costs of excluding inherently trustworthy tangible evidence from the jury's consideration. *United States v. White*, 874 F.3d 490, 496 (6th Cir. 2017) (quoting *United States v. Leon*, 468 U.S. 897, 907, 104 S.Ct. 3405, 82 Led.2d 677 (1984). The test is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's decision." *White*, *supra*; *United States v. Hodson*, 543 F.3d 286, 293

(6th Cir. 2008).

In this case the task force inexplicably delayed, over eight months, before deciding to attempt to take action in arresting Mr. Johnson. The agent was fully aware of the evidence she claimed to have from May 2020, and she knew what she did not have in February 2021. The entirety of the circumstances were within the agents' control. They cannot reasonably claim good faith on this procedural history, and substantive record.

CONCLUSION

Petitioner, Delando Johnson, respectfully requests this Honorable Court grant his petition for certiorari in order to settle the inconsistent interpretations of standards applicable in Fourth Amendment jurisprudence, particularly pertaining to drug investigations and applications for residential search warrants.

The procedural history in this case highlights the disparity among circuit courts regarding the role of the supporting affidavit, and the independent role of the reviewing magistrate in demanding concrete facts supportive of an objective probable cause determination. The search warrant for the Allen Street residence in this case lacked probable cause, and all evidence derived therefrom should have been suppressed. *Wong Sun v U.S.*, 371 U.S. 471, 485, 835 S.Ct. 407, 9 L.Ed 2d 441 (1963).

The trend in some circuit decisions, evinced in this case, to approve search warrant applications whose content merely presents generalized conclusions, in lieu of supportive facts, cannot serve to establish a nexus between the evidence to be seized and the residence to be searched. A more objective standard governing search warrant applications is needed to avoid the continued erosion of fundamental Fourth Amendment

safeguards against unreasonable, if not arbitrary, government intrusions.

Respectfully submitted,
Delando Johnson, Petitioner

Dated: November 9, 2023


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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DELANDO JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

APPENDIX

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 22-1621, *United States v. Johnson*
Originating Case No. : 1:21-cr-00034-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Laurie A Weitendorf
Opinions Deputy

cc: Ms. Ann E. Filkins

Enclosures

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0374n.06

Case No. 22-1621

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Before: SUTTON, Chief Judge; BOGGS and READLER, Circuit Judges.

SUTTON, Chief Judge. When officers arrested Delando Johnson, they found a digital scale, drugs, and cash. When officers searched his house, they found a gun, more drugs, and more cash. Johnson pleaded guilty to firearms and drug offenses. He challenges the denial of a motion to suppress the evidence found in his house and the application of a sentencing enhancement. We affirm.

In May 2020, Johnson sold heroin and fentanyl three times to an informant in Michigan. On January 29, 2021, a magistrate judge issued an arrest warrant for Johnson based on those sales. Four days later, officers surveilled Johnson's house, 725 Allen Avenue, in Muskegon, Michigan. After Johnson left the house, got in his car, and drove away, officers pulled him over and arrested him. Inside Johnson's car, officers found a digital scale covered with powdery residue and drug

No. 22-1621, *United States v. Johnson*

paraphernalia. They also uncovered a lot of cash in Johnson's pocket and heroin and crack cocaine concealed in his underwear.

Based on the evidence found on Johnson at his arrest, the surveillance conducted that day, a phone bill tying him to 725 Allen, and his drug sales to the informant, officers obtained a search warrant for 725 Allen. When officers executed the warrant, they discovered loaded rifle magazines, drugs, two digital scales, and a safe holding a gun, cash, and more drugs.

Federal charges followed. Johnson filed a motion to suppress the evidence found in 725 Allen arguing that an insufficient nexus connected the evidence sought and his home. After the district court denied the motion, Johnson pleaded guilty to possessing controlled substances with the intent to distribute them, in violation of 21 U.S.C. § 841, and possessing a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c)(1)(A)(i). At sentencing, the district court applied a sentencing enhancement for Johnson's prior "serious drug felon[ies]" in Michigan, increasing the mandatory minimum on the distribution charge from ten to fifteen years. 21 U.S.C. § 841(b)(1)(A). The court imposed a 240-month sentence. Johnson appeals.

Warrant. The Fourth Amendment demands that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Before issuing a warrant, a magistrate must decide whether "there is a fair probability that contraband or evidence of a crime will be found." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This requires a "nexus" between the place to be searched and the evidence to be seized. *United States v. Reed*, 993 F.3d 441, 447 (6th Cir. 2021). While status as a drug dealer alone does not establish this nexus, *United States v. Brown*, 828 F.3d 375, 383 (6th Cir. 2016), other evidence linking the drug dealing to the residence does, *Reed*, 993 F.3d at 448.

No. 22-1621, *United States v. Johnson*

The search-warrant affidavit in this instance set forth the following facts: (1) Johnson distributed heroin three times in May 2020; (2) a magistrate judge issued an arrest warrant for Johnson based on those sales; (3) Johnson had numerous prior drug convictions; (4) a phone bill linked Johnson to 725 Allen; (5) Johnson had ongoing contact with known drug dealers through January 2, 2021; (6) officers surveilled 725 Allen on the day of the search-warrant application and saw Johnson exit the house after 10:00 a.m., enter a car, and drive away; (7) when officers pulled Johnson over, they discovered drugs and cash on his person and a digital scale with white residue in his car; and (8) in the narcotics officer's training and experience, drug dealers "often use their residences" to stash drugs. R.41-1 ¶ 12.

All told, the affidavit met the requisite standard to support the warrant. It demonstrated Johnson's "ongoing drug trafficking" through the drug sales, ongoing contact with drug dealers, digital scale, cash, and drugs. *United States v. Gunter*, 551 F.3d 472, 481 (6th Cir. 2009) (repeated purchases of cocaine supported a nexus). It showed that Johnson lived at 725 Allen through the phone bill and surveillance, and "evidence is likely to be found where the dealers live." *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020) (quotation omitted). It supported an inference that Johnson had stored drugs and drug proceeds in his home because officers found drugs and cash concealed on his person directly after leaving 725 Allen. *See United States v. Coleman*, 923 F.3d 450, 457 (6th Cir. 2019). And it detailed the narcotics officer's training and experience, both of which pointed toward finding contraband in 725 Allen. *See United States v. Caicedo*, 85 F.3d 1184, 1193 (6th Cir. 1996).

Johnson counters that the affidavit's information was stale. The May 2020 controlled buys, it is true, by themselves might have failed to create a nexus by the time of the warrant. But the

No. 22-1621, *United States v. Johnson*

affidavit established the link to Johnson's residence with information from Johnson's February 2021 arrest just hours before officers applied for a search warrant.

That the affidavit does not describe drug transactions inside or near 725 Allen does not change things. Probable cause does not require that the crime occurred at the location of the search, only a fair probability that evidence of the crime will be found there. *See United States v. Williams*, 544 F.3d 683, 686–87 (6th Cir. 2008). “[E]mploying a healthy dose of common sense,” the magistrate judge could find a fair probability that Johnson stored drugs, cash, and drug paraphernalia at his residence. *United States v. White*, 874 F.3d 490, 502 (6th Cir. 2017).

Sentencing enhancement. At sentencing, the district court found that Johnson had “prior conviction[s]” for “serious drug felon[ies]” in Michigan, increasing the mandatory minimum on his distribution conviction from ten to fifteen years. 21 U.S.C. §§ 841(b)(1)(A), 851. A “serious drug felony” under § 841(b)(1)(A) covers the same ground as a “serious drug offense” under the Armed Career Criminal Act. *See* 21 U.S.C. § 802(57) (pointing to ACCA); 18 U.S.C. § 924(e)(2)(A) (defining “serious drug offense”). Both cover state and federal drug offenses involving “a controlled substance” as defined by the Controlled Substances Act. 18 U.S.C. § 924(e)(2)(A). But when a state statute covers more conduct than the Controlled Substances Act does, convictions under the state statute generally do not qualify as predicate offenses. *See United States v. Fields*, 53 F.4th 1027, 1043–44 (6th Cir. 2022).

Johnson incurred three convictions under Mich. Comp. Laws § 333.7401 in May 2015 for delivering crack cocaine. *See United States v. House*, 872 F.3d 748, 753–54 (6th Cir. 2017) (finding Mich. Comp. Laws § 333.7401 divisible); *United States v. Pittman*, 736 F. App'x 551, 554–55 (6th Cir. 2018) (finding Mich. Comp. Laws § 333.7401 divisible by substance). Though cocaine appears on the Controlled Substances Act’s drug schedules, 21 U.S.C. § 812, Sch. II(a)(4),

No. 22-1621, *United States v. Johnson*

Johnson says that does not resolve the matter. He argues that Michigan law sweeps more broadly than the federal Controlled Substance Act (1) mainly because Michigan's cocaine definition covers more substances than federal law, and (2) suggests briefly that Michigan banned a cocaine derivative, [123]ioflupane, at the time of his sentencing, while the federal law did not.

Both arguments fail. Start with Johnson's argument that Michigan defines cocaine more broadly than the federal government. Our circuit recently held that Michigan's definition of cocaine covers the same substances as the federal Controlled Substances Act but is no broader than that law. *United States v. Wilkes*, 2023 WL 5163389, ___ F.4th __, at *6–9 (6th Cir. 2023). Although *Wilkes* considered an enhancement for a prior “serious drug offense” under ACCA, its holding applies here with equal force because it settled the meaning of cocaine under the Controlled Substances Act. *See id.* *Wilkes* makes clear that Johnson's Michigan convictions are “serious drug felon[ies]” under 21 U.S.C. § 841(b)(1)(A).

That leaves Johnson's undeveloped [123]ioflupane argument. He merely notes in passing that the Controlled Substances Act does not criminalize this cocaine derivative. But he does so without elaboration. And he makes no response in either his opening brief or his reply to the district court's and the government's arguments that (1) the court should look to federal and state schedules at the time of his Michigan drug convictions and that (2) Michigan's drug schedules never really included [123]ioflupane because its distribution could not realistically be prosecuted. Johnson cannot present an “argument in the most skeletal way” and leave this court to “put flesh on its bones.” *Buetenmiller v. Macomb Cnty. Jail*, 53 F.4th 939, 946 (6th Cir. 2022) (quotation omitted). By failing to develop and preserve the argument, Johnson has forfeited it. *See United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006).

We affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1621

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DELANDO JOHNSON,

Defendant - Appellant.

Before: SUTTON, Chief Judge; BOGGS and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
Western District of Michigan

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

-VS-

DELANDO JOHNSON
a/k/a "Fox"

Case Number: 1:21-cr-34-01

USM Number: 28288-509

John M. Karafa
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to Counts Five and Six of the Second Superseding Indictment.
- pleaded nolo contendere to Count(s) _____, which was accepted by the court.
- was found guilty on Count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), (b)(1)(B)(vi), (b)(1)(C), and 802(57) Possession with Intent to Distribute Controlled Substances	February 2, 2021	Five
18 U.S.C. § 924(c)(1)(A)(i) Possession of a Firearm in Furtherance of Drug Trafficking	February 2, 2021	Six

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

- Counts 1-3, 4, and 7 are dismissed on the motion of the United States.

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

Date of Imposition of Sentence: July 8, 2022

Dated: July 11, 2022

/s/ Paul L. Maloney

Paul L. Maloney
United States District Judge

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 2

Defendant: DELANDO JOHNSON a/k/a "FOX"

Case Number: 1:21-cr-34-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **one hundred eighty (180) months on Count 5 and sixty (60) months on Count 6, to be served consecutively.**

- The court makes the following recommendations to the Bureau of Prisons:
 - That the defendant receives educational and vocational training opportunities.
 - That the defendant receives a substance abuse assessment and recommended treatment.
 - That the defendant is screened for participation in the 500-hour Residential Drug Abuse Program.
 - That the defendant receives a medical evaluation and recommended treatment.
 - That the defendant is designated to a facility close to Michigan.
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at _____ on _____
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2:00 P.M. on _____
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

United States Marshal

By: _____
Deputy United States Marshal

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 3

Defendant: DELANDO JOHNSON a/k/a "FOX"

Case Number: 1:21-cr-34-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **ten (10) years on Count 5 and five (5) years on Count 6, to run concurrently.**

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer.
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*
7. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

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

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 4

Defendant: DELANDO JOHNSON a/k/a "FOX"

Case Number: 1:21-cr-34-01

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 5

Defendant: DELANDO JOHNSON a/k/a "FOX"

Case Number: 1:21-cr-34-01

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and treatment of substance abuse, as directed by the probation officer, and follow the rules and regulations of that program until such time as you are released from the program by the probation officer and must pay at least a portion of the cost according to your ability, as determined by the probation officer.
2. You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office will share financial information with the U.S. Attorney's Office.
3. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when a reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
4. You must not possess or be the primary user of any cellular phone without prior permission from the probation officer. If given permission to use/possess a cellular phone, you must provide the number to the probation officer and the phone must be maintained in your name or another name approved in advance by the probation officer.
5. You must provide the probation officer with your monthly cellular and home telephone bills with each monthly report form and must report any cellular telephone you have used or own on each report form.

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 6

Defendant: DELANDO JOHNSON a/k/a "FOX"

Case Number: 1:21-cr-34-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>	<u>AVAA Assessment</u> [*]	<u>JVTA Assessment</u> ^{**}
\$200.00	-0-	-0-	-0-	-0-

- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such a determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss</u> ^{**}	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------------------	----------------------------	-------------------------------

TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
---------------	----------------	----------------

- Restitution amount ordered pursuant to plea agreement.
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine.
 - the interest requirement is waived for the restitution.
 - the interest requirement for the fine is modified as follows: _____
 - the interest requirement for the restitution is modified as follows: _____

^{*} Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

^{**} Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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

AO 245B (MIWD Rev. 12/16)- Judgment in a Criminal Case

Judgment - Page 7

Defendant: DELANDO JOHNSON a/k/a "FOX"

Case Number: 1:21-cr-34-01

SCHEDULE OF PAYMENTS

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

A Lump sum payment of \$200.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

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

C Payment in equal _____ installments of \$_____ over a period of _____, to commence _____ after the date of this judgment; or

D Payment in equal _____ installments of \$_____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

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

Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:
The property described in the Final Order of Forfeiture issued on May 17, 2022 (ECF No. 124).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

1 THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

CASE NO: 1:21-CR-34

7 DELANDO JOHNSON,

8 Defendant.

9 /

10 * * * *

11 HEARING ON MOTION TO SUPPRESS

12 * * * *

13

14

15 BEFORE: THE HONORABLE PAUL L. MALONEY
16 United States District Judge
17 Kalamazoo, Michigan
September 2, 2021

18

APPEARANCES:

19

APPEARING ON BEHALF OF THE PLAINTIFF:

20 STEPHANIE M. CAROWAN
21 Assistant United States Attorney
P.O. Box 208
22 Grand Rapids, Michigan 49501-0208

23

APPEARING ON BEHALF OF THE DEFENDANT:

24

JOHN M. KARAFKA
Gravis Law, PLLC
120 West Apple Avenue
25 Muskegon, Michigan 49440

I N D E X

2 DELANDO JOHNSON: Page
3 Direct Examination by Mr. Karafa 5
4 Cross Examination by Ms. Carowan 7

★ ★ ★ ★

Kalamazoo, Michigan

September 2, 2021

at approximately 1:41 p.m.

PROCEEDINGS

THE COURT: This is File Number 21-34; The United

01:41:16 15 States of America vs. Delando Johnson. This matter is

16 before the Court on the defendant's motion to suppress.

17 The record should reflect that Assistant United

18 States Attorney Stephanie Carowan represents the government.

19 Attorney John Karafa represents the defendant. The

01:41:31 20 defendant is present in person.

21 The Court is ready for argument. Mr. Karafa, you

22 || may proceed.

MR. KARAFA: Your Honor, thank you.

24 Your Honor, as a threshold matter, I was prepared

01:42:09 25 to present argument on the issue raised by the government of

1 legal standing, and I believe that there is a fair amount of
2 evidence that I could comment on in argument that legal
3 standing is established for a number of reasons. However,
4 nonetheless, what I would like to do firstly is to preempt
01:42:42 5 that issue altogether and move on to the more substantive
6 merits by tendering a statement by Mr. Johnson, that on
7 February 2, 2021, he was in possession and control of the
8 725 Allen house, at least he resided there on that date. In
9 accordance with the rule and the 1968 Supreme Court decision
01:43:08 10 in Simmons with the understanding from Miss Carowan that we
11 have an agreement that the law is that the -- any statement
12 made, as briefly as it may be, by Mr. Johnson in this
13 regard, on the issue of standing, cannot and will not be
14 used by the government in its case in chief, if this case
01:43:31 15 were to go to trial. I've talked to Mr. Johnson about that
16 issue, about the fact that any comments made in the context
17 of this affirmative defense motion on that particular issue
18 cannot be used against him in the government's case in chief
19 and cannot be used against him, frankly, even to impeach,
01:43:55 20 though that gets into a little bit more of a grey area fact
21 intensive and some other things. The first proposition that
22 it can't be used in the government's case in chief is an
23 absolute proposition. So with -- I would like to get
24 government counsel's agreement on that point, and then ask
01:44:15 25 Mr. Johnson briefly a question on that issue.

1 THE COURT: Miss Carowan, go ahead.

2 MS. CAROWAN: Thank you, your Honor.

3 I do think Mr. Karafa is correct on the law and
4 that defendant shouldn't have to be put in a choice to
01:44:28 5 choose between exercising his Fourth Amendment right at a
6 suppression hearing or exercising his Fifth Amendment right
7 to not self incriminate. I don't necessarily think a
8 proffered statement though is going to be sufficient. I
9 think the defendant has to actually testify as to the
01:44:42 10 substantive issue on standing. It's always been the
11 government's position that 725 Allen was Mr. Johnson's
12 residence. We simply raised the issue because Mr. Johnson
13 put it in conflict himself by his post arrest statements in
14 the case. I don't necessarily think we are going to tie up
01:44:58 15 on the issue of standing, but I do think that he has to
16 testify and actually make a statement.

17 THE COURT: All right. That's fine.

18 Is that agreeable, Mr. Karafa?

19 MR. KARAFA: It is, your Honor.

01:45:06 20 THE COURT: All right. Very good.

21 Mr. Johnson, do you want to step forward, sir, and
22 we will take some short testimony on this issue.

23 DELANDO JOHNSON,

24 was thereupon called as a witness herein, and after having
01:45:09 25 been first duly sworn to tell the truth, the whole truth and

1 nothing but the truth, was examined and testified as
2 follows:

3 COURT CLERK: Please be seated.

4 State your full name and spell your last name for
01:45:43 5 the record, please.

6 THE WITNESS: Delando Deshawn Johnson,
7 J-o-h-n-s-o-n.

8 THE COURT: Mr. Karafa, you may inquire.

9 MR. KARAFKA: Your Honor, thank you.

01:45:51 10 DIRECT EXAMINATION

11 BY MR. KARAFKA:

12 Q. Mr. Johnson, you and I have talked about this issue of
13 legal standing; is that right?

14 A. Yes, sir.

01:45:57 15 Q. And you understand the comments I just made on the
16 record and Miss Carowan, the government attorney, responded
17 to, had to do with this idea of legal standing and your
18 statements that may be made under oath in the context of
19 this hearing today, right?

01:46:10 20 A. Yes, sir.

21 Q. And you understand that the statements you make today
22 in the context of this hearing with regard to the legal
23 standing issue will not be used against you in the event
24 this case were to go to trial? The government cannot use
01:46:23 25 your statements today against you to -- on the issue of

1 guilt with regard to the charged offenses, correct?

2 A. Yes, sir.

3 Q. All right. And I want to ask you, on February 2, of
4 2021, you were pulled over and arrested by law enforcement
01:46:39 5 agencies?

6 A. Yes, sir.

7 Q. And they took some things from you at the time they
8 pulled you over at a local restaurant off of Apple Avenue,
9 including your key ring; is that right?

01:46:51 10 A. Yes, sir.

11 Q. You had a house key on that key ring?

12 A. Yes, sir.

13 Q. That house key went to 725 Allen?

14 A. Yes, sir.

01:46:57 15 Q. Were you, in fact, residing at 725 Allen as a residence
16 of yours on February 2 of 2021?

17 A. Yes, sir.

18 Q. And, in fact, if the law enforcement agencies said that
19 they used your key to enter that house because it was
01:47:14 20 locked, is that consistent with your recollection?

21 A. Yes, sir.

22 Q. All right.

23 MR. KARAFA: I have no further questions, your
24 Honor. Thank you.

01:47:20 25 THE COURT: Miss Carowan, any inquiry?

1 MS. CAROWAN: Just briefly, your Honor.

2 CROSS EXAMINATION

3 BY MS. CAROWAN:

4 Q. Good afternoon, Mr. Johnson. I just have a few
01:47:30 5 questions.

6 You are currently being housed in Van Buren County
7 Jail; is that right?

8 A. Yes, ma'am.

9 Q. And you've been in custody since February of this year
01:47:40 10 when you were arrested by law enforcement?

11 A. Yes, ma'am.

12 Q. Now, to be fair, on February 2nd, you just told your
13 counsel that you were living at 725 Allen; is that right?

14 A. Yes, sir.

01:47:52 15 Q. And --

16 A. I mean, yes, ma'am.

17 Q. That's what you initially told officers when you were
18 arrested that day; isn't that right?

19 A. I believe so.

01:48:00 20 Q. But then you changed your story, didn't you?

21 A. Probably so.

22 Q. In fact, you told the officers on February 2nd, I don't
23 live at 725 Allen, I live with my mom at a different
24 address, didn't you?

01:48:14 25 A. Yes, ma'am.

1 Q. And then you, in fact, went one step further and told
2 law enforcement that you, in fact, were homeless on February
3 2nd; isn't that right?

4 A. Yes, ma'am.

01:48:22 5 Q. Trying to walk yourself away from the items that were
6 found in 725 Allen; is that right?

7 MR. KARAFA: Your Honor, object, only because I
8 believe it's getting a little far astray of the very narrow
9 issue before the Court on legal standing.

01:49:36 10 THE COURT: All right. I think we've got his
11 statements on the record, which I think takes care of this
12 narrow issue.

13 MS. CAROWAN: That was literally my last question,
14 so. Thank you, your Honor.

01:48:45 15 THE COURT: Thank you.

16 Any further questions, counsel?

17 MR. KARAFA: Nothing further, your Honor, other
18 than the fact that I've worked on this case long enough, or
19 looked at this issue long enough that I mentioned 725 Allen
01:48:57 20 on the record without making sure the record reflects we are
21 all talking about the same residence, and I think not to
22 split hairs, but Miss Carowan I'm sure agrees with me that
23 the 725 Allen, in Muskegon, Michigan, that is the subject of
24 this case. And beyond that I have nothing further to say.

01:49:12 25 THE COURT: All right. Thank you.

1 Mr. Johnson, you may step down, sir, with the
2 Court's thanks.

3 THE WITNESS: All right.

4 (At 1:49 p.m., witness excused from the witness
01:49:22 5 stand.)

6 THE COURT: Based on the record, I think that
7 satisfies the standing issue for purposes of this motion.
8 So, Mr Karafa, I'll take the remainder of your argument on
9 the issues raised in your motion, including your request for
01:49:37 10 a Franks hearing.

11 MR. KARAFA: Your Honor, thank you.

12 As indicated, your Honor, I've looked at this issue
13 long enough and I have a -- my summary of my argument in
14 front of me, and as I'm inclined to do, and this Court
01:49:52 15 probably well knows, I may venture from my script and just
16 start arguing the case from my recollection. But in any
17 event, the point being, if I go into details that the Court
18 does not want to hear any further or that the Court need not
19 hear because it fully is appreciative of those details and
01:50:12 20 by all means, I trust the Court will cut me off and have me
21 move on.

22 THE COURT: I rarely cut a defense counsel off, Mr.
23 Karafa so --

24 MR. KARAFA: Thank you, your Honor.

01:50:21 25 THE COURT: -- you may proceed as you wish.

1 MR. KARAFA: You may ask a tough question every
2 once in awhile.

3 THE COURT: Well, that's intentional.

4 MR. KARAFA: Yes, yes.

01:50:31 5 MS. CAROWAN: I think what he is implying is he
6 sometimes cuts us off, but he is not going to cut you off is
7 the implication.

8 MR. KARAFA: Your Honor, thank you.

9 On February 2nd of 2021, a search warrant was
01:50:45 10 obtained in this case, and the suppression motion is based
11 on several significant issues; one, the lack of probable
12 cause to support the issuance of a search warrant in the
13 first instance. And as part of that analysis, the failure
14 of the government to demonstrate any nexus of any
01:51:08 15 materiality to support the issuance of a search warrant.

16 The exhibits that I've attached to our motion include the
17 Exhibit 1, search warrant affidavit, which is dated February
18 2, 2021, which was the search warrant affidavit was
19 submitted to Magistrate Judge Ray Kent on that day. The
01:51:30 20 warrant issued 12:51 in the afternoon. Mr. Johnson had been
21 arrested by law enforcement.

22 The affidavit demonstrates that they were
23 surveilling his residence at 725 Allen, they saw him come
24 out of his residence about 10:00 o'clock in the morning.
01:51:49 25 They don't mention anything at all about what had happened

1 earlier in the day, and if anything, or even the day before,
2 or even the days and weeks before that. But they saw him
3 come out of 725 Allen, get into a vehicle, drive up the
4 road, pulled him over on a traffic stop, and effectuated an
01:52:09 5 arrest. And the arrest was effected based on the January
6 29, 2021, which was what, three days -- three or four days
7 before the search warrant affidavit, that arrest warrant was
8 issued by Magistrate Judge Phillip Green, and that arrest
9 warrant was incorporated -- the application for the arrest
01:52:32 10 warrant, and it's 40-some paragraphs, as I recall, it was
11 incorporated into the application for the search warrant on
12 February 2 of 2021. That is, the search warrant application
13 says essentially, we are incorporating the January 29 arrest
14 warrant application by reference, and if this Court has any
01:52:50 15 interest in speaking to Magistrate Judge Kent at the time of
16 hearing the details, let us know, but it's incorporated by
17 reference. And when you look at -- and that's attached as
18 Exhibit 2, that warrant is signed at 12:51 p.m., as well as
19 the return. And then as Exhibit 3 to my motion, I attach
01:53:10 20 the arrest warrant affidavit, which has 42 numbered
21 paragraphs, with subparagraphs, and it covers 20 pages. The
22 search warrant affidavit, in my Exhibit 1, is 12 pages, has
23 15 numbered paragraphs, with Paragraph 15 containing
24 Subparagraphs A through R.

01:53:31 25 And I go through the exercise in my brief, of

1 identifying each of these paragraphs at least in terms of
2 their conceptual relationships to one another. The
3 paragraph with the agent talking about her experience and
4 training, which I will jump forward to say, amounts to
01:53:59 5 largely the essence of the application as a boilerplate
6 affidavit.

7 In this case, the arrest warrant affidavit and the
8 search warrant affidavit both describe about the same thing.
9 The search warrant affidavit describes what the arrest
01:54:16 10 warrant affidavit described by reference, and that is, that
11 in May of 2020, eight, nine months, depends how you
12 calculate it, but at least eight months, nine months before
13 they knocked on Magistrate Judge Ray Kent's door and asked
14 for a search warrant for 725 Allen, almost nine months
01:54:37 15 before Mr. Johnson sold drugs, they allege, to a
16 confidential source, CS-3, on three occasions; on May 4, on
17 May 11, and on May 27, and that was it.

18 Now, the significant part of our motion at that
19 point argues that this information is stale. That is, a May
01:55:14 20 4th and May 11th and May 27 drug transaction, let's just
21 call it May 2020 drug transactions, as alleged in the arrest
22 warrant, and I'm not standing here arguing about the arrest
23 warrant sufficiency on the basis of the information that was
24 submitted to a Judge -- Magistrate Judge Phillip Green for
01:55:35 25 purposes of this motion, they did get an arrest warrant, and

1 it was based on the information that was contained in the
2 affidavit about these May 2020 transactions. And they did
3 -- the government did -- in its application for the arrest
4 warrant did go about explaining how those drug transactions
01:55:53 5 occurred. Law enforcement met up with CS-3. On each
6 occasion, CS-3 said I can get ahold of this person and
7 obtain some drugs, and they would meet with CS-3, you know,
8 pat him down, drive him to a location, watch him go
9 somewhere, watch the transactions take place. They see CS-3
01:56:21 10 come out from the location, pat him down and see what he has
11 on, him some drugs, six grams of this or six grams of that.
12 See that he doesn't have the marked bills anymore. And they
13 would note the transaction. And that happened three times
14 in May of 2020. So right off the bat, I submit
01:56:41 15 respectfully, that what happened in May of 2020 is
16 absolutely stale. It's eight or nine months before the
17 search warrant was obtained.

18 Now, and I make this significant point, I believe
19 quite significant, in my brief that even if the transactions
01:57:03 20 in May of 2020 were described as having occurred at 725
21 Allen Street, it still would be stale, we still would be
22 here arguing vehemently that these drug transactions
23 described from so long ago support no reasonable inference
24 or logical conclusion that there is going to be contraband
01:57:29 25 found in 725 Allen, eight or nine months later. But that's

1 not what the facts show in this case. We are not dealing
2 with drug transactions at 725 Allen. In fact, nowhere in
3 the search warrant application, and nowhere in the arrest
4 warrant application, which was incorporated by reference, in
01:57:56 5 its 40-some paragraphs is 725 Allen mentioned, mentioned by
6 implication even. It's not even addressed as Mr. Johnson
7 seen coming out of 725 Allen. And Mr. Johnson known to be a
8 person who frequents 725 Allen. 725 Allen is nonexistent in
9 those two applications for the arrest warrant on January 29,
01:58:25 10 2021, and for the search warrant on February 4 -- I'm sorry,
11 February 2, of 2021. So we don't have ancient drug
12 transaction history having occurred at the subject premises.
13 We have no relationship between them at all.

14 THE COURT: There is reference in the search
01:58:47 15 warrant affidavit to the subject premises surveillance on
16 February 2nd, correct?

17 MR. KARAFA: Yes.

18 THE COURT: That's Paragraph 8.

19 MR. KARAFA: February 2nd, of 2021, they surveilled
01:59:01 20 725 Allen. That's it. That's -- And they saw Mr. Johnson
21 come out of 725 Allen, if I recall correctly, about 10:00
22 o'clock in the morning. Doesn't make a hill of beans
23 difference to me as far as that's concerned. But they saw
24 him come out. They don't mention that he came out holding
01:59:20 25 anything or seeing him with a digital scale or anything

1 else. They later on arrest him find a digital scale in the
2 console of his car. But, of course, what I'm about to
3 comment on now is the May 2020, drug transactions where much
4 of the relationship between Mr. Johnson as alleged and the
01:59:39 5 CS-3 on those three occasions in May of 2020 were inside of
6 a car with a digital scale involved. On May 4th, the CS-3
7 -- I think it was May 4, one of those transactions, CS-3
8 said he started to weigh some of this out and Mr. Johnson
9 said, "I've got a child in the back seat, put that away."
02:00:00 10 So there is a digital scale in the car, even back in May of
11 2020. But when you get into the descriptions of what
12 happened in May of 2020, I want to get right into that now,
13 the you know, 251 days separated those-- the latest of those
14 transactions, May 27th of 2020 and February 2 of 2021. And
02:00:28 15 there is nothing in the warrant applications that give the
16 Court any insight as to what was happening in those
17 intervening 251 days at 725 Allen. Again, not even
18 mentioned.

19 So the first four paragraphs of the continuation of
02:00:48 20 the search warrant affidavit really merely recite the
21 affiant's background and the experience. The purpose of the
22 continuation to establish probable cause, a general
23 reference to the categories of information supporting the
24 affiant's statements and a continuation. Paragraphs 5
02:01:05 25 through 7 of the search warrant application talk about the

1 overview of the investigation. Makes reference to the
2 January 29, 2021, arrest warrant that was issued. And that
3 is incorporated by reference Paragraph 6 makes reference to
4 that.

02:01:20 5 In Paragraph 6 of the search warrant affidavit says
6 in May of 2020, a CI reported that Johnson distributed drugs
7 on three occasions. Information incorporated by reference
8 here.

9 And lastly, it makes a reference to Johnson's
02:01:34 10 criminal history in Paragraph 7. The balance of Paragraph 8
11 through 15 of the search warrant application are the ones
12 that are characterized the probable cause portion of the
13 search warrant affidavit.

14 But again, 12 -- Paragraphs 12 through 15, those
02:01:56 15 four paragraphs, again merely make reference to what I would
16 call boilerplate statements of the affiant's training and
17 experience and the awareness of a variety of things that
18 drug traffickers do, such as conceal drugs and paraphernalia
19 in their residences and there families' residences and their
02:02:17 20 friends' residences, which basically includes all of the
21 residences in western Michigan -- in the Western District of
22 Michigan. And so that really doesn't move the ball forward
23 much in terms of establishing any kind of arrow pointed at
24 725 Allen in the mind of the judicial officer to make a
02:02:40 25 finding that there was something going on particularly at

1 that location.

2 Paragraphs 8 through 11 informs the Court that at
3 7:14 in the morning on February 2, investigators maintained
4 surveillance. I think I earlier made reference to 10:00
02:02:55 o'clock in the morning. So 7:14 in the morning. And that
6 was in furtherance of their interests in executing the
7 arrest warrant issued three days earlier. They knew that
8 Defendant Johnson resided at the subject premises based on a
9 November 17, 2020 cell phone bill, etcetera. And beyond the
02:03:17 10 surveillance issue, there really wasn't anything else
11 described about the 725 Allen house.

12 They do describe in Paragraph 9 just shortly after
13 10:00 a.m., and that's where I got this 10:00 o'clock
14 reference from, D. Johnson exited the subject premises and
02:03:31 15 entered into a white GMC Yukon, no other passengers. A
16 fully marked police car initiated its lights and pulled him
17 over. He exited the vehicle. Investigators conducted a pat
18 down search, and noticed a bulge in his groin area.

19 Investigators removed the object from his crotch, which
02:03:48 20 field tested positive as approximately 7.2 grams of heroin
21 and approximately 5.7 grams of cocaine base in the center
22 console of the vehicle. Investigators seized the digital
23 scale.

24 Well, that is the sort of the heart and soul of the
02:04:04 25 government's case right there in terms of application for

1 search warrant. That's it. They saw him come out of this
2 house, that's never been mentioned in anything historically
3 at all before, and they pull him over and he's got drugs in
4 his crotch when they arrested him, and a scale in his car.
02:04:21 5 But that's not exactly what happened. The -- He didn't --
6 They did not -- We submitted the video as Exhibit 5, and
7 that shows that he was not, when he was pulled over in
8 parking lot of the Taco Bell restaurant off Apple Avenue in
9 the morning hours of February 2, he was not searched. There
02:04:40 10 is no reference to a bulge in his pocket or his pants, and
11 he was not searched for drugs at that point in time. That's
12 not true. The drugs were reportedly taken from him at MPD
13 sometime later, hour and a half or so later on. But that
14 is, when you encapsulate it, that's it.

02:05:01 15 THE COURT: Is there a dispute regarding whether
16 drugs were seized from the crotch area of your client on the
17 day in question?

18 MR. KARAFA: They were seized. I don't know
19 precisely how they were seized, but they were reportedly
02:05:25 20 seized from other reports and acknowledgements of law
21 enforcement from Mr. Johnson at MPD when he was tethered to
22 a wall.

23 THE COURT: All right. So if I understand your
24 answer, you are not asserting that the statement that a
02:05:43 25 quantity of drugs was seized from your client at some

1 location?

2 MR. KARAFA: Right. That is correct, your Honor.

3 THE COURT: You are not asserting that that did not
4 happen?

02:05:51 5 MR. KARAFA: Right. My understanding is that did
6 happen.

7 THE COURT: All right. Thank you.

8 MR. KARAFA: So I want to talk about the occasions
9 very briefly though importantly. The occasions of these
02:06:16 10 drug deals, because I made the averment in my brief that not
11 only does the search warrant application not support the
12 proposition that there was probable cause and/or a nexus
13 between drug dealing and this 725 Allen residence, but it
14 contradicts it. And the reason I say that is because when
02:06:41 15 you look at the historical evidence, which you have to
16 consider when, you know, taking a look at this and analyzing
17 it in a reasonable fashion, what took place in terms of drug
18 dealing that enables law enforcement to say, permit us to
19 have a warrant to kick in this door and search everything
02:07:02 20 inside this house, because we are going to find items in
21 there. What gives them that basis to think they can meet
22 the Fourth Amendment stringent requirements, when it comes
23 to residences in particular. I'm not talking about auto
24 exceptions here or exigent circumstances. They had the
02:07:23 25 place sealed. They were watching it. Nothing was going in,

1 nothing was going out. We are talking about residences.
2 Something that is jealousy guarded by the Fourth Amendment,
3 the founders of the Constitution, and everything, and all
4 courts since that time. So occasion one was on May 4, 2020.
02:07:38 5 The CS-3 sets up a drug deal by a cell phone call in the
6 presence of investigators, agreed to meet in a few hours.
7 At Paragraph 14, they describe the transaction. At 6:50 in
8 the afternoon surveillance team observed Johnson arrive in a
9 white car. CS-3 approaches. The vehicle departs. CS-3
02:07:58 10 says all went smoothly. He tried to weigh the drugs with a
11 scale, but Johnson said he had a child in the car, and that
12 was it. There was no surveillance of Johnson's vehicle
13 before or after this transaction. But that was it. That's
14 what occasion was on May 4, 2020, the first transaction.
02:08:19 15 They didn't bother -- There is nowhere in this warrant
16 application, nowhere in the story where they say after these
17 deals went down they followed Johnson around to see where he
18 went. See where he lived. See where he may be storing the
19 drugs. So that's what we are left without.
02:08:37 20 But let's see what we have in terms of what
21 affirmative evidence there is about where the drugs were, at
22 least in law enforcement's mind back in May of 2020.
23 On occasion two, on May 11, 2020, CS-3 sets up a
24 drug deal by cell phone in the presence of investigators.
02:08:55 25 Agreed to meet in location in Muskegon. That's how it's

1 described. Investigators drove CS-3 to an arranged meeting
2 spot. And CS-3 got into a white sedan. Surveillance
3 observed vehicle parked in front of apartment building.
4 Ahh, now we have an apartment building on May 11 of 2020.
02:09:15 5 Now we are getting somewhere.

6 Surveillance observed Johnson leave the vehicle and
7 go into the apartment located on ground level. Subsequently
8 returned to the vehicle where CS-3 was waiting. So CS-3
9 waited in the car, Johnson went into an apartment building.
02:09:29 10 Surveillance team watching him, comes out of the building,
11 meets back up with CS-3 in a car. Minutes later CS-3 exits
12 and is debriefed.

13 At Paragraph 19, drug transaction of 10.3 grams
14 heroin took place in vehicle. And Johnson said he had
02:09:42 15 larger quantities at another location. That's it. Again,
16 no surveillance of Johnson at any time thereafter to see
17 where he went or he came from.

18 Now, of course I may get some traction on my
19 complaint anyway, that I wouldn't be standing here -- or my
02:10:02 20 observation, I should say, I probably wouldn't be standing
21 here if they went on that evidence and got a search warrant
22 for that apartment building they saw Johnson go into and
23 come out of to get drugs and make the transaction in the
24 car. Because that may be a whole different story.

02:10:19 25 Now we have got some articulable basis fresh that

1 day that drugs are likely to be found in that premises. But
2 they didn't do that. And perhaps it's their right. Let's
3 suggest it is for purposes of this argument.

4 But then occasion three is on May 27 of 2020. CS-3
02:10:41 5 sets up another drug deal by cell phone. Same type of deal.
6 CS-3 reports he and Johnson agreed to meet at the same
7 apartment building they met on on May 11, a location in
8 Muskegon.

9 The investigators drove CS-3 to an arranged meeting
02:10:58 10 spot. Surveillance observed Johnson arrive in a black
11 Cadillac. Johnson observed going into the Apartment 1-D.
12 Now they specified an apartment location. They have
13 specified a building in the City of Muskegon that this drug
14 dealing target of the surveillance team is entering for the
02:11:18 15 second time in the same month.

16 So he returns after going into that apartment, back
17 to the parking lot. He observes Johnson and CS-3, and a
18 female in the Cadillac drive to a different apartment
19 building and park. Now they are going to a different
02:11:36 20 apartment building. Surveillance observed Johnson and CS-3
21 walk into an unidentified apartment. Minutes later CS-3
22 comes out and requests pick up.

23 At Paragraph 23, CS-3 debriefing revealed that
24 Johnson -- Paragraph 23. So now we are looking at, because
02:11:51 25 the search warrant affidavit only has 15 paragraphs, now we

1 are looking at the arrest warrant application -- I'm sorry,
2 yes, the arrest warrant application and affidavit, which
3 contains 40 paragraphs.

4 So at Paragraph 23, the CS-3 debriefing revealed
02:12:06 5 that Johnson went into the apartment at lower level, which
6 the affiant stated is consistent with Apartment 1-D. So the
7 affiant is saying, we thought it was 1-D, and now this is
8 the location that the CS-3 is reporting is consistent with
9 our observations that it's 1-D. And Johnson came out with a
02:12:21 10 bag. He got into a Cadillac and went to another apartment,
11 and Johnson and CS-3 went into that apartment identified as
12 3-C, another specified location. A younger white male was
13 inside 3-C. Johnson sat down the bag, weighed it out, 12
14 grams. CS-3 said bag was consistent with 600 grams that
02:12:40 15 Johnson reportedly mentioned earlier to him that he had
16 somewhere at some other location. Now they are in that
17 other location, Apartment C -- 3-C. Further, CS-3 overhears
18 conversation between Johnson and a white male which
19 indicated Johnson was storing money at the white male's
02:12:58 20 apartment.

21 So, in sum, we have got these the three
22 transactions in May of 2020, about nine months earlier, two
23 specifically identified apartments and two vehicles, where
24 drugs were reportedly stored and/or transacted, but no
02:13:09 25 arrests were made, no actions to obtain a search warrant,

1 not even an effort to surveil Johnson back to wherever he
2 may have come from or been living at the time -- where he
3 went, where he came.

4 So the presence of a digital scale found in the
02:13:28 5 vehicle on February 2 of '21 doesn't add much of anything to
6 any story line that would connect drug dealing and drugs or
7 paraphernalia even with 725 Allen.

8 All of the drug transactions that the law
9 enforcement agents made reference to in their affidavit to
02:13:48 10 this Honorable Court to get a search warrant all specified
11 other locations that might have been two miles away, might
12 have been 50 miles away from 725 Allen, who knows. 725
13 Allen is never even remotely mentioned, not a part of the
14 picture.

02:14:07 15 So nine months later, they surveil Johnson coming
16 out of this house at 10:00 in the morning, and they have an
17 arrest warrant for him based on those May 2020 transactions.
18 That's fine. They pull him over and arrest him. And they
19 eventually find some drugs on his person they say, and they
02:14:28 20 use that in part to apply for a search warrant, and they
21 used these drug deals from 2020 to support the request.

22 Now --

23 THE COURT: What effect in the analysis does the
24 fact that the affidavit contains an assertion that your
02:14:48 25 client used the 725 Allen address as his address for

1 purposes of a cell phone?

2 MR. KARAFA: Right. And the -- Again, I think
3 that it's a neutral factor. It establishes that they found
4 something that indicated he had an invoice sent to that
02:15:14 5 address.

6 THE COURT: The time context -- If I understand
7 what the affidavit says, the time context is November of
8 2020, which of course, would be approximately six months
9 after the May drug transactions.

02:15:31 10 I take your point that the three May drug
11 transactions were nine months before the -- approximately
12 nine months before the execution of the search warrant at
13 725 Allen, but Judge Kent had a statement that, in the
14 affidavit from the affiant, that your client used the 725
02:15:58 15 Allen address for purposes of the Verizon bill, and that is
16 supplemented by the surveillance on February 2nd where your
17 client is clearly seen, if I appreciate the affidavit,
18 clearly seen coming out of 725 Allen. So how do those two
19 statements in the search warrant affect your staleness --
02:16:27 20 affect your staleness argument in its totality?

21 MR. KARAFA: Your Honor, thank you.

22 And number one, again, they have to demonstrate the
23 particular things to be searched for and the particular
24 things to be seized and why there's probable cause to
02:16:40 25 believe they are going to be found in that residence on that

1 date. The fact that there is a cell phone bill in November
2 of 2020 does not move that ball forward at all. There is no
3 allegation of a drug transaction, and I don't want to keep
4 repeating myself and all of that.

02:16:53 5 This Court has seen case over case -- We tried a
6 case here in October or September 2019 where there was -- at
7 least I did, you know, where --

8 THE COURT: If you say I was there, I'm sure I was,
9 Mr. Karafa.

02:17:07 10 MR. KARAFIA: But, you know, at a minimum, there is
11 evidence of some comings and goings from a residence that
12 are at a minimum suspicious, and tacked onto those
13 suspicions are some comments from confidential informants
14 who are bound to be credible and reliable describing things
02:17:29 15 observed in the threshold of the doorway or inside of the
16 abode that demonstrates the presence of drugs. There is
17 none of that in this case at all. 725 Allen is not
18 mentioned in the context of a drug transaction at all
19 throughout the course of this case. So the cell phone bill

02:17:44 20 of November, 2020, doesn't move the ball forward whatsoever.
21 And the law enforcement affidavit gives the Court nothing
22 contextually as to how they got to 725 Allen that morning
23 anyway. It didn't say, oh, we have been watching, you know,
24 Johnson back and forth, coming and going from 725 Allen, and
02:18:02 25 we sat on it until he came out. Doesn't say anything.

1 There we were at 7:00 in the morning. I think some patrol
2 units were told to go sit on the place and pull him over
3 when he comes out. So I think that doesn't move the ball
4 over at all -- does not move the ball forward at all.

02:18:20 5 I want to make -- leaving facts for a moment and
6 getting to just a couple cases that I think are meaningful.
7 At least one of these is this Honorable Court's case that
8 went up on appeal, where this Court was affirmed.

9 The -- At the moment now, I've kind of strayed far
02:18:43 10 enough in my mind that I'm not sure if this is the case. I
11 think it's the next case I'm going to mention to
12 distinguish -- No, Judge Maloney's case I have, the
13 May-Shaw case, a fairly recent case. You know, in that
14 case, the search warrant was executed on the defendant's
02:19:01 15 vehicles and on his apartment following 23 days of
16 surveillance establishing direct evidence of several drug
17 transactions. This Honorable Court may have a recollection
18 of this case. It corroborated further by dog sniffing
19 evidence and other factors. In May-Shaw, the defendant
02:19:18 20 argued, and I cited this case in my brief, the defendant
21 argued that the long term surveillance and a subsequent use
22 of drug sniffing dogs constituted unreasonable searches, and
23 the Court disagreed. He argued it was in violation of
24 Fourth Amendment privacy interest, not whether probable
02:19:37 25 cause otherwise supported the warrant request.

1 And if I recall -- ah, yes, so but that's precisely
2 the point, in that case. The defendant was complaining not
3 so much on probable cause, he was conceding the fact there
4 was probable cause because there was an abundance of
02:19:58 5 evidence mounting from or arising from these tactics, the
6 drug sniffing dogs and the long term surveillances and that
7 sort of thing, which gave them probable cause. They had an
8 articulable basis to say, your Honor, I'm going to sign this
9 affidavit. Here's what we observed over the last 23 days.

02:20:17 10 Here's what our trained dog has found and told us will be
11 found if we can get into that premises. It's going to be
12 there. We know it's there. We have been watching it for 23
13 days, three weeks. And that -- And the Court was affirmed
14 on appeal.

02:20:33 15 But that's precisely the point. That's not what
16 happened in this case. There is no surveillance of 725
17 Allen. No drug transactions. Nothing going on. In fact,
18 you look at the search warrant affidavit in the picture of
19 725 Allen as an attachment to the search warrant affidavit
02:20:49 20 and it looks like an, I don't know, an adolescent white kid
21 sitting on the porch tying his shoes or something. That's
22 all there is, a picture of 725 Allen.

23 The case I thought was also interesting that I
24 thought I wanted to highlight, the Davis case, which I cited
02:21:26 25 in the brief, at 970 F.3d 650, a Sixth Circuit 2020 case.

1 And in Davis, there was a fellow named Jacob Castro-White
2 who died of a drug overdose. I think these guys were body
3 builders or something. Castro-White was a body builder, and
4 a substance abuser. In the investigation, the government
02:21:58 5 relied largely on evidence of cell phone communications and
6 cell-site data to link the Defendant Davis to the sale of a
7 fatal drug to decedent. The affidavit in that case for the
8 search warrant of defendant's home was submitted 36 days
9 after Castro-White, that is the decedent, after he died. He
02:22:18 10 suffered a fatal overdose. 36 days later, a month on a
11 couple days later. The affidavit relied in part on
12 information received from a cooperating informant. In fact,
13 it was a friend of the decedent who went over to the
14 defendant's house in Davis and purchased these drugs that
02:22:34 15 turned out to have fentanyl in them instead of the body
16 building stuff that they wanted or whatever it was.

17 The informant admitted to having gone over to
18 Davis's house on March 7, '16 with his friend to purchase
19 drugs, turned out to be fentanyl that killed the decedent.
02:22:51 20 Cell phone forensic evidence corroborated the informant's
21 information.

22 So there we have somebody dying, some evidence of a
23 drug overdose. We have an informant saying here's where it
24 took place, here is where the transaction took place. They
02:23:05 25 have cell phone data that corroborates it. And it's a month

1 after the death of the individual. In that case, the
2 affidavit included a chronology of evidence. And events
3 between March 7 of '16 and April 12 of '16 determined that
4 Russell Red Davis is trafficking in heroin from the
02:23:26 5 residence. And he moved to suppress on the basis of lack of
6 probable cause. And in that case, the government conceded
7 that the warrant was deficient, but argued that the
8 municipal magistrate took verbal information from the
9 affiant and there was a procedural issue that went down on
02:23:44 10 that case.

11 The Court relied on the government's brief alone
12 rather than the actual evidence at the evidentiary hearing.
13 The Sixth Circuit remanded it for the limited purpose of
14 conducting an evidentiary hearing on the probable cause
02:23:58 15 question. So even in that case, where there was, you know,
16 only some -- a month or so separating the events, there was
17 an acknowledgment by the government there was a lack of
18 probable cause and a lack of nexus. So --

19 THE COURT: Well, and that concession, I think,
02:24:20 20 probably eliminated the necessity for dealing with a
21 staleness issues, because having analyzed Davis, it doesn't
22 appear to be any analysis of a staleness issue in that
23 particular case, and I think it's because the government
24 conceded that the affidavit wasn't -- didn't establish the
02:24:41 25 probable -- didn't establish the link.

1 MR. KARAFA: Your Honor, I agree. I think it
2 largely was a procedural issue on that level, and I think
3 Miss Carowan's brief makes an observation along those lines.
4 But I think the significant point is, when we look at that
02:24:59 5 case, again, the distance in time between the event and the
6 affidavit and the evidence that they had, the freshness and
7 the significance of the evidence contrast the remarkably
8 with the case here with regard to 725 Allen.

9 Did the officers have -- As in so many of these
02:25:23 10 cases, do I believe in law enforcement hunches? Absolutely.
11 Law enforcement, these people do it day in and day out, they
12 develop a sense for things, and it starts to get a little
13 bit muddled, I think. They know if they kick down this
14 door, you know, three times out of five or four times out of
02:25:39 15 ten, whatever the ratio may be, they are going to find
16 something, because hunches mean something to them. That's
17 their business. That's not what the Constitution requires.
18 That's not what the Fourth Amendment requires.

19 And the main problem in this case is while they had
02:25:55 20 Mr. Johnson coming out of the home on February 2 and getting
21 into his vehicle and driving away with no other
22 circumstances surrounding that event, other than that,
23 nothing described, no transactions, they have to go back in
24 time to the previous year's calendar to find something, and
02:26:14 25 that did not involve 725 Allen in the slightest. Then you

1 pull him over on the arrest warrant, and you find he's got
2 this digital scale in his car. And eventually they found
3 some drugs on his person and say, ha, based on my training
4 and experience, I know drug dealers, you know, hide things
02:26:36 5 in their houses and all this sort of stuff, that establishes
6 a hunch at best, and mere suspicion is far from enough to
7 satisfy the Fourth Amendment requirements. There is a lack
8 of nexus between the events of May of 2020 and the affidavit
9 on February 2 of 2021, certainly for Constitutional
02:26:58 10 purposes.

11 I think that I've already in my argument covered
12 the probable cause basis and the nexus principles that have
13 to be demonstrated to support the search warrant
14 requirement. Suppression is warranted in this case, and
02:27:35 15 because it's such a clear violation of the Fourth Amendment,
16 and because the law enforcement team, and Mr. Johnson was
17 not all that they were targeting, they were looking at a
18 bunch of other people and that's how they would explain and
19 probably try to justify why they didn't do things back in
02:27:52 20 2020 and that sort of thing, they had bigger fish to fry or
21 other fish to fry and that sort of thing. But nonetheless,
22 that doesn't excuse the absence of evidence supporting this
23 warrant.

24 And it was the same, this is not a new law
02:28:09 25 enforcement agency, this is the same agency that was

1 involved back in May of 2020. So they knew what the
2 evidence was. They knew what the historical evidence was.
3 And they -- and that's all they had in February of 2021 was
4 what they had back in May of 2020. And there is a
02:28:28 5 disconnect there of time. There is a conceptual disconnect
6 because 925 -- I'm repeating myself I know, your Honor, 925
7 Allen (sic. 725) is never mentioned in the 2020 transaction,
8 so there is a conceptual disconnection. There is a temporal
9 disconnection. There is an absence of evidence to support
02:28:48 10 the Fourth Amendment standards entirely. So I believe that
11 the good faith exception doesn't apply because the
12 government submitted, what I believe the record
13 demonstrates, was a bare bones affidavit that did not
14 provide the magistrate judge with substantial basis for
02:29:18 15 determining probable cause. And that's one of the factors
16 in Leon that renders the good faith exception inapplicable.
17 In other factors, the officers' reliance on a warrant. That
18 is not objectively reasonable such as where the warrant is
19 facially deficient, and I respectfully submit this is
02:29:39 20 facially deficient. The disconnect is tremendously apparent
21 when you read through the affidavits in other various
22 paragraphs.

23 You know, and lastly, your Honor, on the issue of
24 staleness, the and I cited Hython, United States vs. Hython,
02:30:05 25 H-y-t-h-o-n, a Sixth Circuit case from 2006. Search warrant

1 was invalid in that case on staleness grounds. And Hython
2 identified numerous cases providing guidance and analysis
3 when the Fourth Amendment has been offended by the issuance
4 of a search warrant lacking requisite foundation.

02:30:24 5 The Carpenter case where an affidavit described
6 marijuana field right near the residence. That fell short
7 of establishing a required nexus between criminal activity
8 and the residence. The Lawton case, 2005, where there's no
9 modicum of evidence connected defendant and his criminal
02:30:41 10 activity to the place to be searched. The Helton case,
11 outgoing calls from the house known -- to a known drug
12 dealer did not create substantial basis to believe evidence
13 could be found in the house. And so on. There were -- The
14 bottom line is, there is, I believe I'm quoting from Hython,
02:31:03 15 it says, "Although no bright line rule dictates its outer
16 limit, the zone in which the good faith exception may be
17 applied is bound on one end by the requirements of probable
18 cause. Once that standard is met, application of the
19 exception is unnecessary. Therefore, the relationship
02:31:17 20 between staleness and probable cause is a reasonable place
21 to begin this analysis."

22 In this case, there is no probable cause to support
23 the proposition that there was a substantial basis to
24 conclude that there was going to be the contraband described
02:31:32 25 in the affidavit in 725 Allen. There was at most a hunch.

1 But the evidence that supported the articulated stated
2 belief that evidence would be found in there was ancient
3 history, separated contextually, conceptually, and
4 temporally from the February 2, 2021, issuance of the search
02:32:00 5 warrant.

6 And with all due respect, the evidence found in 725
7 Allen, I believe, must be suppressed.

8 Thank you.

9 THE COURT: Thank you, counsel.

02:32:11 10 Miss Carowan.

11 MS. CAROWAN: Thank you, your Honor.

12 Lot to take in, but I'll try to take it in
13 sequence.

14 Your Honor, the officers here did exactly what we
02:32:25 15 want law enforcement officers to do. They had information
16 that Mr. Johnson was dealing drugs. They had information
17 that he was living at 725 Allen. They had recent
18 information that he had just left that residence with drugs
19 in his underwear, on his person. And from all of that
02:32:46 20 evidence, they went and got a search warrant. They asked
21 Judge Kent to review the probable cause statement and to
22 make a probable cause determination. Ultimately, Judge Kent
23 did that. So we have here a valid warrant.

24 Your Honor is very aware I am sure of the standards
02:33:05 25 of probable cause. Certainly a warrant is the preferred

1 method for searching. And in this particular case, the two
2 things that have to be established by the warrant are that a
3 crime has been committed, and that there is a fair
4 probability that evidence of that crime is going to be found
5 in the location to be searched.

6 And again, you look at the affidavit in its
7 totality, not just Paragraph 1 or just Paragraph 2, no
8 line-by-line scrutiny, but a totality of the circumstances.
9 And as I'm sure your Honor is aware, great deference is owed
02:33:37 10 to Magistrate Judge Kent, who ultimately found the probable
11 cause in this. We are not in a particular situation where
12 we are conducting de novo review, we certainly are not
13 asking your Honor to step into the shoes of Judge Kent and
14 review his work from the beginning.

02:33:53 15 So let's look at the particular warrant at issue
16 here. You start with the probable cause that a crime has
17 been committed. That Mr. Johnson was a drug trafficker.

18 Now, first of all, you have the three controlled
19 buys that were conducted with Mr. Johnson in May of 2020.
02:34:11 20 They used a confidential source for those buys. Mr. Karafa
21 did make some mention in his briefing of the fact that, you
22 know, confidential informants or information made by a
23 confidential informants are perhaps not as weighty as other
24 statements in an affidavit. But the fact of the matter is,
02:34:31 25 is that we weren't just relying on the confidential source

1 here. You had information from law enforcement themselves.
2 The calls to Mr. Johnson were made in the presence of law
3 enforcement. Law enforcement conducted surveillance around
4 all of those deals. And on May 11th, law enforcement was
02:34:46 5 actually close enough to Mr. Johnson to identify him as the
6 person who delivered the drugs themselves, not relying on
7 the CS.

8 Now, if we just had those three deals, we wouldn't
9 be here arguing about probable cause at 725 Allen. But
02:35:04 10 that's not all that Magistrate Judge Kent had here. He had
11 Mr. Johnson's criminal history, which involves numerous
12 convictions for drug dealing and firearms offenses. As your
13 Honor is well aware, drugs and guns go together.

14 THE COURT: Well, that shows that he has a history
02:35:20 15 of drug dealing, it doesn't say anything about 725 Allen,
16 does it?

17 MS. CAROWAN: It does not, no. And they are
18 separate inquiries, and I'm going talk a little about the
19 nexus argument that Mr. Karafa raised, but this is just
02:35:33 20 information that they had that a crime was being committed.
21 Certainly that's relevant for the magistrate judge to look
22 at. And they had information that it wasn't just May of
23 2020. Mr. Johnson continued to use the cell phone that he
24 set up the deals with in May of 2020. He continued using
02:35:49 25 that cell phone to contact other known drug traffickers in

1 the investigation, up until January of 2021, just weeks
2 before the arrest warrant at issue was signed.

3 And then you have the issues and the events of
4 February 2nd itself. On that day, Mr. Johnson was stopped
02:36:09 5 with two phones. Again, two phones indicative in some
6 instances of drug trafficking, particularly here, because
7 one of them was one of the ones that he had used to call the
8 CS to set up the drug deals back in May. There was also a
9 scale found in the car. The Sixth Circuit's been pretty
02:36:29 10 clear that finding a scale in the kitchen is very different
11 than finding a scale in somebody's car. And in this
12 particular case, they found a digital scale in his car that
13 had white residue on it, which is indicative of drug
14 trafficking.

02:36:43 15 Mr. Karafa made some points there were different
16 cars that Mr. Johnson used back in May of 2020 than the
17 Denali that he was driving in February of 2021. I would
18 submit the inference is, you know, when you get out of one
19 car and you get into another car or get a new car, where do
02:37:00 20 you store your personal items in between those two things,
21 in your house.

22 But that's again not all, because Mr. Johnson had
23 drugs on his person. He had a scale, which you use to weigh
24 out drugs, that is an instrumentality of drug trafficking,
02:37:16 25 not of drug use, and he had drugs on his person.

1 So those are all of the things that they knew going
2 into presenting this warrant to Judge Kent that established
3 that a crime was being committed.

4 So then the second level of inquiry is whether that
02:37:32 5 crime -- there is a nexus between that crime and 725 Allen.
6 Defense counsel wrote, "All they had in February, 2021, was
7 an arrest warrant for Mr. Johnson based on the May 2020
8 transactions and his departure from the Allen Street house
9 on the morning of February 2nd, 2021." If that were all
02:37:53 10 that they had, we wouldn't be here. There wouldn't have
11 been PC, but that's not all that the agents had on February
12 2nd, and that's not all that they included in the affidavit
13 to Judge Kent. They had information that Mr. Johnson was,
14 in fact, living at 725 Allen during a time that I would
02:38:15 15 point out he was continuing to call those other drugs
16 traffickers based on his phone toll analysis, he was living
17 at 725 Allen. Drug trafficking, particularly drug
18 trafficking conspiracies, for example, are continuing
19 offenses.

02:38:29 20 Then on February 2nd itself, they started
21 conducting surveillance outside of 725 Allen, which makes a
22 lot of sense. If you're looking to arrest someone early in
23 the morning, you are going to start at what you believe to
24 be their residence. They start conducting surveillance
02:38:46 25 around 7:00 a.m. and conduct constant surveillance of 725

1 Allen for approximately three hours before they see Mr.
2 Johnson walk outside, alone, get into a vehicle by himself,
3 and start to drive down the road. They then effectuate a
4 traffic stop. Between leaving 725 Allen and the traffic
02:39:06 5 stop, Mr. Johnson doesn't meet with anybody, he doesn't see
6 anyone else, he doesn't stop, he doesn't go inside, he
7 doesn't change clothes, he doesn't do anything, other than
8 drive to the scene of what ultimately is the traffic stop.

9 In the traffic stop, they find the scale in the
02:39:22 10 car, they find money on his person, which we acknowledge is
11 not in the warrant itself, but they find drugs hidden on his
12 person. And again, they find it on his person. I submit
13 this is a different case if they had found drugs in the back
14 seat of the car or they found it in the center console.

02:39:39 15 They found the drugs in his underwear. I certainly think
16 that raises the inference he had the drugs on him when he
17 left 725 Allen. And certainly an inference like that based
18 on the facts outlined in the affidavit was something that
19 Judge Kent was allowed to rely on.

02:39:57 20 We distinguish several of the cases that Mr. Karafa
21 cited in our brief, the Davis case being one of them.
22 Again, this is not just an issue about the May 2020 buys.
23 This isn't an issue of 36 days passed or 28 days passed or
24 eight months past. Officers had information from hours
02:40:19 25 before, from that morning at 725 Allen. And that was the

1 information that was included in the affidavit to Judge
2 Kent. This is sufficient as a reasonable basis to find
3 probable cause, which is what Judge Kent found here. They
4 had fair probability that Mr. Johnson was a drug dealer,
02:40:39 5 drugs, scale, and those things, multiple cell phones. And
6 fair probability that the evidence of that would be found at
7 725 Allen. All of those things, your Honor, combined under
8 the totality of the circumstances analysis to establish
9 probable cause on the four corners of the warrant.

02:40:56 10 I will argue slightly in the alternative -- it
11 always feels a little odd to argue against yourself to some
12 extent, but should the Court not find that there is probable
13 cause, this affidavit is still saved by the good faith
14 exception under Leon. Excluding evidence, and there is a
02:41:13 15 significant amount of evidence that was found at 725 Allen,
16 290 grams of meth, loaded firearm, multiple digital scales,
17 \$6,000 in cash. There is a lot of evidence that we are
18 talking about. It's a pretty extraordinary remedy, and it's
19 designed to deter law enforcement misconduct. It's not
02:41:33 20 designed to deter magistrate judges from making perhaps bad
21 decisions. It's a different analysis. And the exclusionary
22 rule does not apply where the evidence was discovered
23 pursuant to a search warrant that was issued in good faith,
24 even if that warrant subsequently held to be deficient. As
02:41:53 25 I said, doing so punishes law enforcement.

1 So Leon outlines several situations in which, I
2 think four in total, that in which good faith would not be
3 applied. Mr. Karafa has raised two of those. The first is
4 that this constitutes a bare bones affidavit. That somehow
02:42:12 5 this is just a hunch by law enforcement that there was going
6 to be drugs at 725 Allen, and so they should have known not
7 to rely on this issued warrant in good faith. This is not a
8 bare bones affidavit, your Honor, this is 12 pages of
9 information. It incorporates a complaint with an additional
02:42:30 10 20 pages of information and specific information. It's not
11 based simply on stale information as Mr. Karafa claims, but
12 includes information obtained within hours of the warrant,
13 including that the defendant had drugs on his person.

14 This isn't Hython either that Mr. Karafa stated.
02:42:50 15 In that particular issue, the Sixth Circuit had issue with
16 the fact that the controlled buy that happened out of the
17 house, there was no date for it in the warrant, so there was
18 no temporal connection between the location and the buy.
19 Here, there absolutely is. The affidavit outlines that that
02:43:09 20 morning they saw Mr. Johnson leave 725 Allen and ultimately
21 found drugs on his person that morning.

22 The level of detail in these -- in the affidavits,
23 including a complaint affidavit is not bare bones. This
24 isn't just a hunch. They had buys. They had surveillance.
02:43:28 25 They had a scale. They had two phones, drugs on his person,

1 and you have the agent's training and experience. And yes,
2 again, if that was just all we had, maybe Mr. Karafa would
3 have a point, but that's not all we have. But certainly
4 this agent's training and experience are relevant. She has
02:43:47 5 numerous years as a DEA agent, she's conducted numerous
6 investigations, and understands drug trafficking. She
7 explained to Judge Kent in the affidavit that drug
8 traffickers typically keep their drug wares at their house,
9 which makes perfect sense. If you have a commodity that's
02:44:04 10 worth a lot of money, that you can't call the police if
11 somebody steals from you, you keep it in a place where you
12 can keep it safe. And what is safer than your house.
13 Ultimately it's not a bare bones affidavit.

14 The last claim that Mr. Karafa raised in his
02:44:19 15 briefing, though I don't know that he touched on it a ton
16 today before the Court, he raises a Franks question. I
17 would submit that we are not to the level of a Franks
18 hearing in this particular case.

19 A Franks hearing, your Honor, requires a very high
02:44:35 20 burden, a threshold showing by the defendant, a substantial
21 preliminary showing, I think, is the actual wording from the
22 caselaw. The burden is on the defendant to show allegations
23 of deliberate falsehood or reckless disregard for the truth,
24 and has to come with some sort of offer of proof. As your
02:44:55 25 Honor pointed out to Mr. Karafa this afternoon, there is no

1 dispute that the drugs were found on Mr. Johnson, on the day
2 of his arrest, on February 2nd. There is an inference in
3 the affidavit that that was found at the scene of the search
4 of the traffic stop rather than at the police station, but
02:45:14 5 the facts are the same, that those are the drugs, and those
6 are the quantities that were found on Mr. Johnson. There
7 was no attempt here to mislead the Court, to misrepresent
8 anything.

9 Mr. Karafa has not met his burden on a Franks
02:45:29 10 hearing. I would ask your Honor not to find that one is
11 necessary this afternoon, and I would ask your Honor to find
12 that ultimately this is a warrant that was supported by
13 probable cause.

14 Thank you.

02:45:41 15 THE COURT: Mr. Karafa, go ahead, sir.

16 MR. KARAFKA: Thank you, your Honor.

17 Your Honor, I believe that much of what the
18 government is somewhat left with, somewhat desperately, are
19 these bootstrapped arguments. Look at the cache of stuff we
02:45:56 20 found in this house, guns and drugs. Okay. That is
21 meaningless. We put that aside. In a Fourth Amendment
22 analysis that's meaningless.

23 The bootstrapped argument about the agents, which
24 covers a lot of ground in both of these affidavits, the
02:46:11 25 application for the search warrant, the application for the

1 arrest warrant, the experience of the agents. Your Honor
2 sees this in every single search warrant. Every magistrate
3 judge sees it, every federal judge sees it, every state
4 judge sees it, the experience of the agents. Sometimes the
02:46:25 5 agents say, you know, my training and experience tells me we
6 are going to find all of these things and they don't find
7 anything, or they find one of the 25 things they say they
8 were going to find.

9 Miss Carowan makes reference to the -- so I state
02:46:40 10 these somewhat self serving, interesting, and perhaps
11 necessary to include in the warrants, as government counsel
12 does with all of their search warrant applications, it makes
13 sense to list all of these attributes of law enforcement
14 agencies experience, because it kind of beefs up things, it
02:47:04 15 sounds like, but it really again looking in -- looking in a
16 vacuum does nothing to move the ball forward on establishing
17 that we are going to find something in this particular
18 residence, unless there's evidence of it.

19 So then we get Mr. Carowan's argument that they
02:47:18 20 find drugs on Mr. Johnson on the day of the event and the
21 scale in the car. Again, his criminal history is a
22 bootstrapped argument. He is a drug dealer in the past, he
23 is a drug dealer in May of 2020, and he dealt out of his
24 cars. He dealt out of his apartments. And in their
02:47:37 25 training and experience, he conceals things in perhaps his

1 residence or perhaps friends' residence or family members'
2 residence, who knows. But we know in those apartments, they
3 have nothing to do with 725 Allen.

4 THE COURT: Isn't it reasonable to have the
02:47:52 5 judicial officer conclude that the finding of the scale with
6 a white powdery substance on it is some indication that --
7 some indication -- it's one of the laundry list of things
8 associated with drug dealing, isn't it?

9 MR. KARAFA: Some indication, that's right, your
02:48:09 10 Honor, I agree. Some indication. Far from substantial
11 evidence in support of a probable cause determination.

12 And the communications are in Paragraph 27 of the
13 arrest warrant, which was included under the caption
14 probable cause to search the subject device. They were
02:48:26 15 trying to say, well, let's get hold of this phone, we are
16 going to find some good stuff on his phone, and they say
17 that Mr. Johnson has also continued to use the subject
18 device to communicate with other drug traffickers in the
19 Muskegon area, including Wilkerson. Specifically between
02:48:42 20 October 26, 2020, and January 2, 2021, the subject device
21 was in contact with the phone Wilkerson used to arrange his
22 own drugs deals on 14 separate occasions. Finally, toll
23 records show that he continues to use the subject device. I
24 don't mind mentioning that right on the record. That's what
02:49:00 25 they have. That moves the ball forward not at all on 725

1 Allen. Again, no mention of 725 Allen.

2 So again, there is nothing that -- there really is,
3 not to sound too cliche, an absence of meat and potatoes in
4 this stew here, in the government's probable cause analysis.

02:49:23 5 Is there enough for a hunch or law enforcement sitting
6 around the coffee house saying, yeah, if we kick that door,
7 we are probably going to find some stuff, sure. Let's give
8 them that. But, again, when you look at the actual
9 procedural history of this case and the procedural evidence
02:49:39 10 that is articulated in these paragraphs, it's separated in
11 time, separated conceptually, and it's stale on the vine day
12 after day for 251 days with no mention of 725 Allen at all,
13 other than seeing him come out that morning and finding some
14 drugs in his crotch.

02:50:01 15 Again, they have established he's got a history of
16 drug dealing. But again, it does nothing to demonstrate
17 kicking in 725 Allen is going to find where he keeps them.

18 And I would add on the good faith exception, that I
19 just mentioned the last two, but certainly the argument on
02:50:25 20 the other factors under Leon, if the issuing magistrate was
21 misled by information, judge Kent was. Was it material?
22 That maybe is arguable. Why did it happen? I don't know,
23 it was perhaps --

24 THE COURT: What difference does it make in terms
02:50:45 25 of whether Judge Kent was misled that the drugs were found

1 on the defendant at the jail as opposed to the parking lot?

2 MR. KARAFA: Your Honor, I would concede that Judge
3 Kent sitting there if he asked the question, wasn't this --
4 I heard actually the drugs were found on Mr. Johnson at the
02:51:07 5 jail, not in the car at the time, and if that fact was
6 straightened out for Judge Kent, it wouldn't have changed
7 his analysis at all.

8 THE COURT: I mean I'm limited by what is in the
9 warrant.

02:51:17 10 MR. KARAFA: Right.

11 THE COURT: The warrant is ambiguous as to -- as to
12 where the search was conducted that extracted the controlled
13 substances from your client. But do you think that makes a
14 difference on the issue of whether Judge Kent was misled,
02:51:41 15 because that is the standard for purposes of a Franks
16 hearing.

17 MR. KARAFA: Yes.

18 THE COURT: Does that make a difference that rises
19 to the level of a reckless disregard? I mean the inference
02:51:54 20 is, perhaps based on the -- based on the language of the
21 affidavit that the search was conducted in the parking lot
22 as opposed to the jail, but come back to my original
23 question: Is it material -- If it's conceded the drugs
24 were found on your client's person, is it material that they
02:52:16 25 were found at the jail as opposed to the parking lot in

1 determining whether you're entitled to a Franks hearing or
2 not?

3 MR. KARAFA: Your Honor, I don't believe so. I
4 think -- I say that based on the information that I've
02:52:32 5 looked at this thing, I've talked to government counsel,
6 I've looked at the records, and perhaps if we have testimony
7 one day on the whole matter we are going to find out
8 something, a shade of a bit different, but I don't think we
9 are going to, that the DEA agent was in Grand Rapids working
02:52:51 10 on the warrant and communicating with WEMET officers in
11 Muskegon and over the telephone, something was said about
12 finding drugs on him, it was assumed they probably found it
13 when they pulled him over and arrested him. That's what
14 usually happens, or something like that. I mean that's
02:53:07 15 probably what happened. So I don't think that's a material
16 distinction.

17 THE COURT: Is that the sole inaccuracy upon which
18 your original request for a Franks hearing was based?

19 MR. KARAFA: That was the significant thing that
02:53:21 20 was initially discovered and we were concerned about, yes,
21 your Honor.

22 THE COURT: All right. Let me give you an
23 opportunity, Mr. Karafa, to comment on the Coleman case,
24 which the government has cited to me, this is at 923 F.3d,
02:53:37 25 which talks about the notion that a magistrate issuing a

1 warrant, I mean, for a drug traffickers use their homes to
2 store drugs and otherwise furnish -- further their drug
3 trafficking activities. I'll give you the chance to comment
4 on that case. Go ahead.

02:53:57 5 MR. KARAFA: Your Honor, yes, I -- and I am not
6 recalling specifically the holding or the procedural facts
7 in that case. But with respect to that principle that the
8 courts have found and have given some deference to the idea
9 that drug traffickers have been known to conceal drugs in
02:54:21 10 their homes. Again, I go back to the affidavit in this
11 case, which says, and I can look for it, but it says in the
12 homes of -- in their residences or their friends or their
13 families, and that's part of a list of a number of other
14 things that are said, and that's what I say, those averments
02:54:41 15 by the affiant in a vacuum are neutral with regard to the
16 probable cause equation. It just doesn't help the calculus
17 at all in terms of establishing probable cause. So there
18 needs to be something that attaches contextually, some
19 evidence to that idea that drug dealers do -- you know, if
02:55:05 20 we had a confidential source told us in the affidavit, the
21 officer said, the confidential source told us that he was
22 with Delando Johnson when he went into 725 Allen, and he
23 grabbed a bag and came out. The confidential source has
24 been reliable in the past. He is credible. We have reason
02:55:22 25 to believe, because drug dealers do conceal things in their

1 house, and we have evidence that, in fact, he brought drugs
2 out of his house on this occasion. But there is nothing in
3 this application that attaches any contextual piece of
4 evidence to that bald assertion that, yes, drug dealers
02:55:40 5 typically do all of these things; use cell phones, use drug
6 paraphernalia, use baggies, digital scales, they hide things
7 in cookie jars, all of these things that historically is
8 true in a vacuum. But again, means nothing unless you
9 attach it contextually to some piece of evidence in the
02:55:59 10 historical, procedural set of facts. And that's what we
11 don't have in this case where 725 Allen is concerned. We
12 have got apartment 1-D and 3-C and two cars, nine months
13 ago.

14 Thank you.

02:56:12 15 THE COURT: Thank you, counsel.

16 Miss Carowan, anything else?

17 MS. CAROWAN: Just very briefly, your Honor.

18 Your Honor mentioned that digital scale with Mr.
19 Karafa, and I think that the terminology that both of you
02:56:24 20 referred to is it does not raise some inference of drug
21 trafficking, especially given the white residue that was on
22 it. And in response, I think Mr. Karafa said, "Well, that's
23 not substantial." I just want to be clear, that's not the
24 standard for probable cause. It doesn't have to be
02:56:39 25 substantial. It doesn't have to be beyond a reasonable

1 doubt. It has to be more than a hunch, but it just has to
2 be a fair probability, based on the totality of the
3 circumstances. And based on the totality of the
4 circumstances here, there was a fair probability that
02:56:56 5 officers were going to find evidence of drug trafficking at
6 725 Allen. Because of that, the warrant was supported by
7 probable cause, and we would ask the Court to find as such.

8 Thank you.

9 THE COURT: All right. Thank you.

02:57:08 10 The Court's had the benefit of the submissions by
11 defense counsel on behalf of the defendant as well as the
12 government's answer. The Court's had the benefit of the
13 affidavits for the search warrant and the remainder of the
14 record. I thank both counsel for the quality of their
02:57:31 15 submissions to the Court on this issue. It's obviously very
16 important, and the Court is ready to resolve the motion on
17 the record here this afternoon.

18 The issue of standing was originally raised by the
19 government. That issue has been taken care of based on the
02:57:53 20 regard that was made here this afternoon with Mr. Johnson's
21 testimony under the ambit of the statements of counsel made
22 before we swore Mr. Johnson in.

23 The Court is satisfied that Mr. Johnson has
24 standing to challenge the warrant that was issued by Judge
02:58:13 25 Kent on February 2nd, 2021. It's this Court's

1 responsibility to evaluate whether the warrant is supported
2 by probable cause. Obviously this is the warrant for 725
3 Allen, which has been the subject of the argument here this
4 afternoon.

02:58:33 5 Probable cause is a fluid concept turning on the
6 assessment of probabilities and particular factual contexts,
7 not readily or even usefully reduced to a set of neat legal
8 rules. That's Illinois vs. Gates, at 462 U.S. 213 at 232, a
9 1983 United States Supreme Court case.

02:58:56 10 Probable cause exists when under the totality of
11 the circumstances there is a fair probability that evidence
12 of a crime will be found in a particular case. That's
13 Gates, as well as Greene, G-r-e-e-n-e, 250 F.3d 471, as well
14 as Laughton, L-a-u-g-h-t-o-n, 409 F.3d 747, explaining there
02:59:22 15 must be a nexus between the place to be searched and the
16 evidence sought.

17 A judicial officer's determination of probable
18 cause is to be afforded great deference by a reviewing
19 court, and in this case, that is this judge. That's Leon,
02:59:38 20 468 U.S. 897 at Page 914, a 1984 United States Supreme Court
21 case. And of course, defense counsel has strongly argued
22 that the affidavit for the search warrant did not establish
23 a strong enough nexus to 725 Allen to support the issuance
24 of the search warrant in this case.

03:00:06 25 The proper standard for this Court's review is

1 whether the judicial officer, in this case, Judge Kent, had
2 a substantial basis for finding that the affidavit
3 established probable cause that the evidence would be found
4 at the place cited. That's again Leon. Reviewing courts
03:00:24 5 should examine the affidavit supporting the application in a
6 common sense way rather than hyper technical manner. And
7 then, of course, the government indicates that if the Court
8 agrees with the defendant, that there isn't sufficient
9 probable cause for the issuance of the search warrant, they
03:00:47 10 would argue good faith exception.

11 In terms of the probable cause analysis here, Mr.
12 Karafa on behalf of Mr. Johnson indicates that much of the
13 information in the affidavit was stale at the time that the
14 search warrant as issued in February of 2021 pointing to the
03:01:12 15 three events which occurred in May of 2020, in which the
16 affidavit recites three controlled buys from the defendant
17 by a confidential informant on May 4, May 11, and May 27.
18 Mr. Karafa is quite correct, that there is no connection
19 between those controlled buys and 725 Allen. That if indeed
03:01:43 20 that was all that was in the affidavit, the affidavit
21 information would indeed be stale for purposes of the
22 issuance of a search warrant in February of 2021, and Miss
23 Carowan, in all candor, concedes that issue.

24 However, in the Court's judgment, there is
03:02:05 25 sufficient additional information, other than the -- or in

1 addition to, I should say, the May 2020 controlled buys of
2 controlled substances from the defendant.

3 The next piece of information, which connects the
4 defendant -- or actually the first piece that connects the
03:02:29 5 defendant to the place to be searched, 725 Allen, is the
6 November, 2020, phone bill using -- in which the defendant,
7 according to the affidavit, used 725 Allen as his billing
8 address. In addition to that, we have the surveillance in
9 the early morning hours of February 2nd, 2021, the
03:02:53 10 surveillance, according to the affidavit, was multiple
11 number of hours of 725 Allen in which at some point in time
12 around 10:00 a.m., Mr. Johnson exits the residence of 725
13 Allen, gets into a vehicle, and is subject to a traffic stop
14 based on the arrest warrant that had been secured for him
03:03:20 15 for the May 2020 buys. He is -- A traffic stop is
16 executed, and Mr. Johnson is arrested on the warrant.
17 Drugs, drug scale is recovered from the vehicle that Mr.
18 Johnson was driving. That is a tool of the trade of drug
19 dealers. And is certainly a factor for the Court to
03:03:51 20 consider in whether there was probable cause to support the
21 warrant for 725 Allen.

22 The next piece of information that's contained in
23 the affidavit is the seizure of a substantial quantity of
24 controlled substances from Mr. Johnson after he was arrested
03:04:10 25 on the date in question, that date being in February.

1 The inference to be drawn here, which I believe is
2 a fair inference and, of course, reasonable inferences may
3 be relied on by the magistrate judge in issuing the search
4 warrant. The reasonable inference is, is that the drugs
03:04:30 5 found on Mr. Johnson's person, when he was arrested, right
6 after leaving 725 Allen, there is a strong inference tieing
7 those drugs to 725 Allen, and the prospect that there are
8 perhaps more indicia of drug trading, including controlled
9 substances located at 725 Allen. The inference can be
03:05:02 10 clearly drawn that Mr. Johnson put those drugs on his person
11 at 725 Allen. Our circuit has clearly indicated in the
12 Hawthorne case, at 443 F.3d that such inferences can be
13 appropriately drawn.

14 In addition to that, the Court has the United
03:05:25 15 States vs. Coleman case, which clearly indicates that a
16 magistrate issuing a search warrant may infer the drug
17 traffickers use their homes to store drugs and otherwise
18 further their drug trafficking. This reflects the reality
19 that evidence is likely to be found where drug dealers live.
03:05:46 20 That's 923 F.3d 450 at 457, a 2019 circuit court case.

21 The defendant cites me to the Davis case for
22 purposes of his support for the staleness issue. The
23 distinguishing feature in the Davis case, as the Court reads
24 it, was the government conceded that the affidavit did not
03:06:11 25 establish probable cause linking Davis to the place to be

1 searched, which I think basically cut off any significant
2 discussion of the staleness issue in the Davis case. So I
3 don't believe the Davis case is supportive of the
4 defendant's position.

03:06:31 5 In addition, there are other -- there are some
6 other key facts here. The affidavit also contained evidence
7 of the defendant's continuing communication with drug
8 dealers as recently as January 2nd. And, of course, then we
9 have the drugs found on his person as well as the digital
03:06:52 10 scale, which was merely hours before the search of 725 Allen
11 to support the notion that the drug scales indicia of drug
12 trafficking, the Court cites the Bell case at 516 F.3d 432.

13 So accordingly, in the Court's judgment, based on
14 the standard that the Court must use for purposes of
03:07:17 15 evaluating probable cause, as well as the inferences made by
16 -- appropriate inferences as the magistrate judge could have
17 made based on the affidavit, the Court finds that the
18 affidavit supported the probable cause for the search of 725
19 Allen.

03:07:37 20 Lastly, as far as the initial request for a Franks
21 hearing. As Mr. Karafa, in all candor conceded, the only
22 allegation of a potentially inaccurate statement was the
23 location where the drugs were found on Mr. Johnson's person.
24 They were, I gather, in fact, found at the jail. A
03:08:05 25 reasonable reading of the affidavit could of -- one could

1 conclude that the drugs were found on Mr. Johnson's person
2 while stopped in the parking lot at the Taco Bell, but Mr.
3 Karafa concedes the materiality of that difference is not
4 indicative of the standard for the necessity of a Franks
03:08:32 5 hearing. So the request for a Franks hearing is denied.

6 The motion to suppress is also denied.

7 The next step in this case is a final pretrial
8 conference on September 22nd. Jury trial is set for
9 September 28. To say that the schedule is fluid for
03:08:55 10 September 28 would be an understatement at this point in
11 time, but as far as criminal cases are concerned, this is
12 the oldest case. So to the extent that the Court is
13 available for a trial that week, this case is the oldest
14 one, so the Court's general practice is to try the oldest
03:09:21 15 case on the docket.

16 So for now, and of course, Ms. Redmond will be in
17 constant communication with you regarding the Court's
18 calendar, but for now, the case is set for trial on
19 September 28.

03:09:34 20 Anything further on this record for today, Miss
21 Carowan?

22 MS. CAROWAN: No, your Honor. Thank you.

23 THE COURT: Mr. Karafa?

24 MR. KARAFKA: Your Honor, nothing further. Thank
03:09:41 25 you for your time and consideration.

1 THE COURT: You are welcome, sir.

2 Defendant is remanded to the custody of the marshal
3 for -- to await further proceedings.

4 Thank you.

03:09:50 5 MS. CAROWAN: Thank you, your Honor.

6 COURT CLERK: All rise, please.

7 Court is adjourned.

8 (At 3:10 p.m., proceedings concluded.)

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5 C E R T I F I C A T E
67 I, Kathleen S. Thomas, Official Court Reporter for the
8 United States District Court for the Western District of
9 Michigan, appointed pursuant to the provisions of Title 28,
10 United States Code, Section 753, do hereby certify that the
11 foregoing is a true and correct transcript of proceedings
12 had in the within-entitled and numbered cause on the date
13 hereinbefore set forth; and I do further certify that the
14 foregoing transcript has been prepared by me or under my
15 direction.16
17
18 /s/
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Kathleen S. Thomas, CSR-1300, RPR
U.S. District Court Reporter
410 West Michigan
Kalamazoo, Michigan 49007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	No. 1:21-cr-34
v.)	
)	Honorable Paul L. Maloney
DELANDO JOHNSON,)	
Defendant.)	
)	

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant Delando Johnson filed a motion for reconsideration of the order denying defendant's motion to suppress (ECF No. 52). Defendant filed this motion in an attempt to distinguish his case from *United States v. Coleman*, 923 F.3d 450, 457 (6th Cir. 2019), which held that when considering whether to grant a search warrant, magistrate judges may infer that alleged drug dealers conceal drugs and related items in their residential premises. In *Coleman*, like in Defendant's case, the government conducted controlled drug purchases. *See id.* at 452-54. But unlike Defendant's case, the defendant in *Coleman* went directly from his home to the location of the controlled purchases, and this evidence formed the basis of a search warrant for the defendant's residence. *See id.* Defendant Johnson argues that because about nine months had passed in between the controlled drug buys in his case and the execution of his arrest warrant, and because his controlled drug buys had no nexus to the 725 Allen Street home, his case is unlike *Coleman*. Thus, he argues that the Court erred in relying on *Coleman* to uphold the search warrant for the 725 Allen Street home. Although the facts in *Coleman* are not identical to the facts in the present matter, the statement of the law in *Coleman* applies to this case:

There must be a “nexus between the place to be searched and the evidence sought.” *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc). However, a magistrate issuing a search warrant “may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking.” *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008). This reflects the reality that, “in the case of drug dealers, evidence is likely to be found where the dealers live.” *United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998) (citation and alteration omitted).

Id. at 457.

During the motion to suppress hearing conducted on September 2, 2021, the Court heard Defendant’s argument that the nexus between the 725 Allen Street home and the controlled drug purchases was weak. Yet, there were multiple pieces of circumstantial evidence linking Defendant to the 725 Allen Street home, including the fact that during the execution of Defendant’s arrest warrant—which was issued after the controlled drug buys occurred—drugs were found on his person after he had immediately left the 725 Allen Street home. And as the Sixth Circuit stated, “a magistrate issuing a search warrant ‘may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking.’” *Id.* (quoting *Williams*, 544 F.3d at 687). The magistrate judge did not err in issuing a search warrant for the 725 Allen Street home, and the evidence seized during the execution of that search warrant did not violate Defendant’s Fourth Amendment rights. Accordingly,

IT IS HEREBY ORDERED that Defendant’s motion for reconsideration on the order denying defendant’s motion to suppress evidence (ECF No. 52) is **DENIED**.

IT IS SO ORDERED.

Date: September 21, 2021

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:21-cr-34

vs.

DELANDO JOHNSON,

HON. PAUL L. MALONEY
United States District Judge

Defendant.

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**DEFENDANT DELANDO JOHNSON'S MOTION FOR RECONSIDERATION OF
ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

Now Comes Defendant, Delando Johnson, and pursuant to LCrR 47.3, states in support of this motion:

1. Defendant Johnson is a sole defendant on a seven count Indictment returned and filed February 24, 2021. (ECF No. 14; PageID.46-53, the "Indictment").
2. The Indictment, under Counts 1 through 3, alleges that Defendant Johnson distributed drugs on three (3) occasions in May 2020, to wit: Count 1 - May 4, 2020, heroin/fentanyl; Count 2 – May 11, 2020, heroin; and Count 3 - May 27, 2020, heroin/fentanyl.
3. The Indictment, under Counts 4-7, also charges Defendant Johnson with possessory offenses on February 2, 2021, to wit: Count 4 – Possession

With Intent to Distribute ("PWID") "controlled substances seized from his person"; Count 5 – PWID controlled substances; Count 6 – Possession of a Firearm in Furtherance of Drug Trafficking; and, Count 7 – Felon in Possession of a Firearm.

4. Counts 5-7 of the Indictment are immediately reliant on evidence seized by government agents in a search of a residential dwelling house located at 725 Allen Street, City of Muskegon.
5. On May 26, 2021, Defendant Johnson filed a "*Motion To Suppress Evidence Obtained As A Result of an Invalid Search Warrant*" (ECF No. 35, PageID.171-173) and *Brief In Support* (ECF No. 36, PageID.174-198).
6. On June 22, 2021, the Government filed its "*Response In Opposition to Defendant's Motion to Suppress*" (ECF No. 41, PageID.208-226).
7. On September 2, 2021, an oral argument hearing was held before this Honorable Court, and at its conclusion the Court denied Defendant Johnson's motion for reasons stated from the bench on the record. (ECF No. 48, PageID.285-286, Minutes).
8. On September 3, 2021, this Court entered its written "*Order Denying Defendant's Motion to Suppress Evidence ...*". (ECF No. 49, PageID.287).
9. During the motion hearing on September 2, 2021, this Honorable Court relied in meaningful part on *United States v Coleman*, 923 F.3d 450 (6th Cir. 2019) for the general proposition that a magistrate judge may infer that contraband may be found in a drug dealer's residence, when considering the sufficiency of an affidavit submitted in support of the

request for a search warrant for residential premises.

10. It is respectfully submitted that a closer review of *Coleman, supra*, demonstrates its materially distinguishable features relative to the instant matter.
11. The holding in *Coleman, supra* supports Defendant Johnson's motion to suppress evidence from the February 2, 2021 search of 725 Allen.
12. Therefore, Defendant Delando Johnson requests that this Honorable Court reconsider its September 2, 2021, decision on the merits and its written Order on September 3, 2021, and grant Defendant Johnson's motion to suppress the evidence obtained from the residential premises on February 2, 2021, for the reasons abundantly presented in support of Defendant's motion.

WHEREFORE, Defendant, Delando Johnson, respectfully requests this Honorable Court reconsider its ruling announced from the bench on September 2, 2021, and its written order entered September 3, 2021, and make findings of fact and conclusions of law that the search warrant for 725 Allen, City of Muskegon, was legally and constitutionally deficient and the fruits of the unlawful search must be suppressed.

Respectfully Submitted,

Dated: September 15, 2021

/s/ John M. Karafa
John M. Karafa
Attorney for Def. Delando Johnson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:21-cr-34

vs.

DELANDO JOHNSON,

HON. PAUL L. MALONEY
United States District Judge

Defendant.

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**BRIEF IN SUPPORT OF DEFENDANT DELANDO JOHNSON'S MOTION FOR
RECONSIDERATION OF ORDER DENYING DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE**

**I. THIS COURT MAY RECONSIDER ITS EARLIER RULING ON
DEFENDANT'S SUPPRESSON MOTION**

Pursuant to Crim.R. 41(h) a "defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides. "

Rule 12 provides that a motion to suppress evidence must be made prior to trial when the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits. Crim.R.12(b)(3)(C). Further, Rule 47 applies to pretrial motions. Crim.R.12(b)(1).

A pretrial motion must be made in writing and state the grounds on which it is based and the relief sought. Crim.R.47(a)(b).

In accordance with both his right and obligation under these rules, on May 26, 2021, Defendant Johnson filed his pre-trial motion to suppress evidence derived directly as the fruits of a search warrant, issued for 725 Allen Street in the City of Muskegon, on the affidavit of a government agent on February 2, 2021. (*Motion*, ECF No. 35, PageID.171-173; *Brief*, ECF No. 36, PageID.174-198).

The government replied in written opposition. (ECF No. 41, PageID.208-226).

On September 2, 2021, a hearing was held on the merits. At the conclusion of the hearing, this Court announced its decision to deny Defendant Johnson's suppression motion and stated its reasons in support. (Minutes, ECF No. 48, PageID.285). A written order was entered the next day. (ECF No. 49, PageID.287).

Defendant Johnson now moves this Court for reconsideration of its earlier decision on the merits. LCrR 47.3 permits Defendant Johnson's request of this Court to reconsider its decision, providing:

"47.3 Motions for reconsideration"

- (a) **Grounds** – Generally, and without restricting the discretion of the court, motions for reconsideration which merely present the same issues ruled upon by the court shall not be granted. The movant shall not only demonstrate a palpable defect by which the court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof.
- (b) **Response to motions for reconsideration** – No answer to a motion for reconsideration will be allowed unless requested by the court, but a motion for reconsideration will ordinarily not be granted in the absence of such request. Any oral argument on a motion for reconsideration is reserved to the discretion of the court."

The government, in part, supported its opposition to Defendant Johnson's suppression motion with the argument that, when reviewing an agent's affidavit

submitted in support of a request for a warrant authorizing the forcible entry into residential premises to search for evidence of crime, a magistrate judge may infer that drug dealers conceal drugs and related items in their residential premises. The government, in this regard, relied in material part, on the authority of *United States v Coleman*, 923 F.3d 450 (6th Cir. 2019). In denying Defendant Johnson's motion, this Court also cited *Coleman*, *supra*, for the stated proposition. 1

It was undisputed that an arrest warrant had been issued for Defendant Johnson by a magistrate judge on January 29, 2021. This was only 4 days before the issuance of the search warrant for the residential premises at 725 Allen Street. The arrest warrant was issued on the sworn evidence of a government agent that Johnson had engaged in three, surveilled, controlled drug sales May 2020. Indeed, Defendant Johnson highlighted this procedural history in his suppression motion.2

A significant element supporting Defendant Johnson's motion was the lack of nexus between the May 2020 drug transactions and the 725 Allen residence. This distance, in both time and location, between the May 2020 controlled buys which were observed and essentially supervised by government agents, and the February 2, 2021,

1 During oral argument, at one point Your Honor inquired of defense counsel whether there was agreement with the government's authority in the "Coleman case" on the proposition that the magistrate judge may infer that contraband will be found in a drug trafficker's residence, a material consideration in the Court's ultimate analysis.

2 The *Arrest Warrant Affidavit* was submitted to Magistrate Judge Phillip Green on January 29, 2021, in support of a criminal complaint, an arrest warrant, and a search warrant for a cell phone. (ECF No. 1, PageID.1, *Application*; ECF No. 1-1, PageID.2-21, *Continuation of Complaint*, Case No. 1:21-mj-43). Defendant Johnson attached the "Application" and the "Continuation of Complaint" as Exhibit 3 in support of his motion to suppress, referred to the items collectively as the "Arrest Warrant Affidavit". (ECF No. 36, PageID.179, *Brief In Support*).. Judge Green issued the "Arrest Warrant" on the same day, January 29, 2021. (ECF No. 2, PageID.22, Case No. 1:21-mj-43), attached as Exhibit 4 to Defendant Johnson's Motion to Suppress. (ECF No. 36, PageID.180, *Brief In Support*)..

search warrant application, went to the heart of Defendant Johnson's 4th Amendment claim that probable cause did not support issuance of the warrant.

By contrast, all 3 occurrences in May 2020 took place at specifically identified locations, a vaguely referenced Muskegon street location on the first occasion and two identified, described, and surveilled apartments on the next two occasions. But no action was taken to arrest, or to obtain search warrants for those premises while the information was fresh.

In fact, no effort was even made to surveil Defendant Johnson after any one of the controlled buys to see where he went. And in the context of these controlled buys involving apartments and vehicles, there was no mention, by implication or otherwise, of the 725 Allen Street residence.

By the sworn testimony of the government affiant the 725 Allen Street residence was no more factually, conceptually, or temporally related to the surveilled May 2020 transactions than any one of the thousands of other residential structures located in the greater Muskegon area.

At the hearing, it is undersigned counsel's recollection that the government and this Honorable Court essentially acknowledged as much. That is to say, it was conceded by the government, should the record reflect this to be not too strong a term, that if the May 2020 controlled buys was all there was, the application would be deficient, and the search warrant unlawful.

But, the Government argued, and this Honorable Court found, there was more to it, including the November 2020 cell phone bill; the agent affiant's statements over Defendant Johnson's reported January 2021 uses of his cell phone to discuss drug

deals or something to that effect; the drugs found on Johnson following his arrest on February 2, 2021, and the scale found in his car. Based on this additional information, the Court agreed with the government's position and concluded, on authority of *United States v Coleman*, 923 F.3d 450 (6th Cir. 2019), the magistrate judge could properly employ an inference that contraband would probably be found in the residence.³

Defendant Johnson respectfully submits that *Coleman*, *supra*, is significantly distinguishable, and the law of its case does not resurrect the deficiencies in the search warrant affidavit in the instant case.

The defendant in *Coleman*, *supra*, appealed the district court's denial of his motion to suppress evidence seized following the issuance of warrants (1) permitting the tracking of his motor vehicle and (2) permitting the search of his residence.

The procedural facts in *Coleman* may be summarized as follows:

1. On March 9, 2017, agents began investigating a drug dealer, Powell;
2. At some point unspecified point following the commencement of the investigation of Powell, a cooperating defendant identified Ronald Coleman

³ "SA Williamson also included in her affidavit multiple paragraphs of information about drug traffickers that she knew based upon her eight years as a law enforcement officer. Specifically relevant here, SA Williamson outlined that she knew that 'subjects involved in drug trafficking often use their residences or the residences of friends, family, or close associates to store drugs and otherwise further their drug trafficking.' (Government Brief, ECF No. 41, PageID.212-213)(citing to Government Ex. 1, ¶ 12. And this, of course, cuts to one of the central points Defendant Johnson emphasized in a constitutional sense. The asserted knowledge of a government affiant that "*subjects involved in drug trafficking*" (a very broadly referenced community), often (*i.e. but not always*) use their residences, *or* the residences of friends, *or* the residences of family, *or* the residences of close associates, to further their drug trafficking, encompasses a great deal of speculative ground. This assertion would have not suffered from arbitrariness had it been made in May 2020 in the context of surveilled and supervised controlled buys and a search warrant was sought for either one of the apartment units within which the drugs were reportedly obtained from and transacted with the confidential source in. The agent affiant would have been able to make these assertions of what drug dealers "often" do in the factual and temporal context of actual transactions in May 2020, to support the constitutional principle of probable cause. But these general "boilerplate" assertions in February 2021, relative to the 725 Allen Street residence, had no more contextual relevance than if the agent had found drugs on Defendant Johnson after he was seen merely exiting a residence of one of his family members, or one of his friends, or one of his close associates.

as a source of Powell's drugs;

3. Officers investigated Coleman and observed suspected drug sales between Coleman and Powell, involving the use of two vehicles used by Coleman, a Trailblazer and a Buick Enclave;
4. On April 7, 2017, observed Coleman arrive at Powell's house, get out of the Enclave, enter the house, and leave three minutes later;
5. Four days later, April 11, 2017, Coleman arrived at Powell's house again, this time in the Trailblazer, and sold drugs to drugs to the cooperating defendant;
6. An agent then checked Coleman's history and found past felony convictions for drug crimes;
7. The agent discovered that the Enclave and Trailblazer vehicles involved in the surveilled drug transactions were registered to Coleman's father, a fact the agent stated in his experience was a frequent thing drug dealers do, use vehicles registered in others' names to conceal their identity;
8. The agent advanced these facts in an affidavit in support of a request to a federal magistrate judge for the issuance of tracking warrants for the vehicles on the belief that further evidence of narcotics distribution would be obtained, and the warrants were issued;
9. On April 20, 2017, tracking devices were attached to Coleman's vehicles;
10. On May 4th 2017 Coleman sold drugs to Powell;
11. On May 10th 2017 agents observed Coleman leave his residence, enter the Enclave, get out of the Enclave at Powell's house;

12. The GPS tracking data from the Enclave further informed that Coleman went directly from his residence to Powell's house;
13. On May 23, 2017, based on this procedural evidence, the agents applied for and obtained a search warrant for Coleman's residence;
14. On May 31, 2017 agents executed the search warrant.

Coleman, *supra*, at 452-453.

Firstly, the defendant in *Coleman*, argued that the tracking device warrant for the Enclave was lacking probable cause. The Court disagreed, citing, among other things, the facts that, prior to the issuance of the warrant a confidential informant identified Coleman as "a current drug supplier" to Powell; agents had been investigating four drug sales at Powell's residence, one of which involved Coleman dropping off cocaine; Coleman was observed arriving in the Enclave at Powell's residence where he remained for only minutes before leaving; Coleman's two prior convictions for manufacture/delivery of drugs; a LEIN check on the Enclave showing it registered to Coleman's father. *Id.* at 454.4

Next, the defendant in *Coleman*, argued that there was insufficient probable cause to support issuance of the search warrant for his residence. The 6th Circuit in *Coleman* first reviewed some basic principles:

"The job of a magistrate judge presented with a search warrant application is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit ..., there is a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v Brown*, 828 F.3d 375, 381 (6th Cir. 2016) ... There must be a 'nexus between the place to be searched and the evidence sought.' *United States v.*

⁴ In the instant case, the agents did not make an effort, despite their surveilled and supervised controlled buys in May 2020, to obtain a tracking warrant on Defendant Johnson's vehicles. Indeed, did not even attempt to surveil his comings and goings surrounding the May 2020 transactions.

Carpenter, 360 F.3d 591, 594 (6th Cir. 2004)(en banc). However, a magistrate issuing a search warrant 'may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking.' *United States v Williams*, 544 F.3d 683, 687 (6th Cir. 2008). This reflects the reality that, 'in the case of drug dealers, evidence is likely to be found where the dealers live.' *United States v Jones*, 159 F.3d 969, 975 (6th Cir. 1998)"

Coleman, *supra*, at 457.

Applying these principles to the procedural facts, the 6th Circuit in *Coleman* rejected the defendant's challenge to the residential search warrant on probable cause grounds:

"Here, the affidavit in support of the residential search warrant established that Coleman was an active drug trafficker, that the Springtree Lane address was Coleman's home, and that both of Coleman's vehicles were regularly parked there. According to the affidavit, agents had conducted three controlled buys from Coleman and observed him drive directly from his condo to the site of the most recent buy, less than two weeks before the warrant issued. This was sufficient to establish that Coleman was an active drug trafficker at the time the warrant issued and to provide a reasonable inference that he transported narcotics from his residence to the location of the cocaine sale. See, e.g., United States v Bucio-Cabral, 635 F.App'x 324 (6th Cir. 2016)(evidence defendant traveled to two addresses – one of which was home – prior to narcotics sales supported inference he was storing narcotics at one residence); United States v Gunter, 266 F. App'x 415, 419 (6th Cir. 2008) ('[T]he instant affidavit describes an incident where law enforcement agents observed Defendant visiting his residence right before he traveled to the site of a drug sale ... This evidence, combined with the affiant's statements that he has significant experience in narcotics investigations, is sufficient to establish a nexus between Defendant's illegal activities and his residence.'")

Coleman, *supra*, at 457-458.

The holding in *Coleman* is therefore, where a search warrant application is supported by an affidavit detailing active drug dealing, including multiple, surveilled drug transactions, observed by law enforcement agents to have originated at the defendant's residence, within two weeks of the application, when combined with the affiant's asserted belief on the basis of experience and training, the magistrate judge may

reasonably infer the continued existence of contraband in the surveilled drug dealer's residence.

Thus, in *Coleman* and its referenced cases, the facts included direct evidence of active drug dealing; surveillance of the drug dealers going to and from their residences directly in the course of the drug transactions; the surveilled transactions were recent- in *Coleman* "less than two weeks"; and these material facts, "when combined with the affiant's statements that he has significant experience in narcotics investigations" may be "sufficient to establish a nexus between the Defendant's illegal activities and his residence." *Id.* at 457-458.

Precisely not so in the instant case. There were no reported or supervised drug transactions involving the 725 Allen Street residence at any time. The agents never surveilled any activity at 725 Allen Street, let alone a drug transaction. They only sat on 725 Allen Street the morning of February 2nd 2021 to effect Johnson's arrest on a warrant issued on the May 2020 transactions.

Unlike the highlighted facts in *Coleman* and cited cases which gave the affiant's affidavit some thrust toward a probable cause determination, here there was no evidence or recent drug transactions involving Defendant Johnson.

Further, and more pointedly, there was no averment of facts at all, let alone a specificity of facts, surrounding the described transactions in May 2020, 8 to 9 months earlier, which linked the 725 Allen Street house any transactions.

In sharp and material contrast to the procedural facts in *United States v Coleman*, 923 F.3d 450 (6th Cir. 2019), which necessarily form the law of the case, the investigated facts advanced by the affiant's affidavit in the instant case merely

speculated that 725 Allen would contain contraband. There were no facts similar to those in *Coleman*, *supra*. Nothing of significance that, "when combined with" the officer's asserted training and experience, would support the issuance of the warrant.

Essentially, there was only the officer's asserted training and experience to move the ball forward toward a probable cause determination. This, standing alone, cannot conceivably meet the safeguards contemplated in the 4th Amendment's warrant requirements..

Therefore, Defendant, Delando Johnson, respectfully requests that this Honorable Court make a determination on reconsideration that the search of the Allen Street House on February 2, 2021, violated the Fourth Amendment, and that all evidence seized and derived therefrom must be suppressed from admission in any further proceedings in this case, including trial.

Respectfully Submitted,

Dated: September 15, 2021

/s/ John M. Karafa
John M. Karafa
Attorney for Defendant Johnson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

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**DEFENDANT DELANDO JOHNSON'S MOTION TO SUPPRESS EVIDENCE
OBTAINED AS A RESULT OF AN INVALID SEARCH WARRANT,
AND FOR A FRANKS' HEARING**

Now Comes Defendant, Delando Johnson, and in support of this motion before this Honorable Court for the entry of an order suppressing evidence, states:

1. Defendant Johnson is a sole defendant on a seven count Indictment returned and filed February 24, 2021. (ECF No. 14; PageID.46-53, the "Indictment").
2. The Indictment's allegations pertain to alleged transactions and occurrences separated by approximately eight months between May 2020 and February 2021.
3. The Indictment, under Counts 1 through 3, alleges that Defendant Johnson distributed drugs on three (3) occasions in May 2020, to wit:

Count 1 - May 4, 2020, heroin/fentanyl; Count 2 – May 11, 2020, heroin; and Count 3 - May 27, 2020, heroin/fentanyl.

4. The Indictment, under Counts 4-7, also charges Defendant Johnson with possessory offenses on February 2, 2021, to wit: Count 4 – Possession With Intent to Distribute (“PWID”) “controlled substances seized from his person”; Count 5 – PWID controlled substances; Count 6 – Possession of a Firearm in Furtherance of Drug Trafficking; and, Count 7 – Felon in Possession of a Firearm.
5. Counts 5-7 of the Indictment are immediately reliant on evidence seized by law enforcement during a search of a residential dwelling house located at 725 Allen Street, City of Muskegon.
6. The evidence seized from within the 725 Allen Street residence was obtained unlawfully, in violation of constitutional safeguards prohibiting unreasonable searches and seizures. U.S. Const. amend. IV; amend. XIV.
7. The government agent’s affidavit which was submitted in support of the application for a warrant to search 725 Allen Street residence was deficient, in that it failed to establish probable cause to justify the issuance of a warrant to search 725 Allen Street residence.
8. Further, the search warrant affidavit is demonstrably devoid of an articulable nexus between the Government’s alleged evidence of Defendant Johnson’s drug dealing activity in May 2020 and the premises sought to be searched on February 2, 2021, rendering the issuance of the warrant unlawful.

9. Additionally, based on immediate knowledge and belief the search warrant application and affidavit mis-represented facts which were submitted to the Magistrate Judge in support of the request for the issuance of the search warrant.
10. For no less than these reasons, Defendant Delando Johnson requests the entry of an order suppressing the evidence seized at the 725 Allen Street residence on February 2, 2021, as well as all evidence, in whatever form, subsequently seized, and derived from the unlawful search.
11. Defendant requests a Franks Hearing. *Franks v Delaware*, 438 U.S. 154 (1978).
12. In support of this motion Defendant relies upon all evidence of record, his accompanying Brief In Support, further evidence revealed in the course of a hearing on the issues presented, and argument thereon.

WHEREFORE, Defendant, Delando Johnson, respectfully requests this Honorable Court enter an order suppressing all evidence seized from 725 Allen Street residence by law enforcement officers on the objectively deficient warrant, as well as all further evidence derived therefrom as fruit of the poisonous tree, *Wong Sun v. U.S.*, 371 U.S. 471, 485 (1963), and grant to Defendant Johnson any further relief to which he is entitled under the Constitution and Statutes applicable in this action.

Respectfully Submitted,

Dated: May 26, 2021

/s/ John M. Karafa
John M. Karafa
Attorney for Def. Delando Johnson

United States District Court
Western District of Michigan
Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

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vs.

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United States District Judge

Defendant.

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**BRIEF IN SUPPORT OF DEFENDANT DELANDO JOHNSON'S MOTION TO
SUPPRESS EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL SEARCH OF
RESIDENTIAL PREMISES**

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I. PRELIMINARY STATEMENT REGARDING DEFENDANT JOHNSON'S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY OBTAINED IN, AND DERIVED FROM, THE SEARCH OF 725 ALLEN STREET HOUSE

On Tuesday, February 2, 2021, Drug Enforcement Administration (DEA) Special Agent, Heather Williamson (hereafter at times the "Affiant"), of the Grand Rapids District Office, submitted an Application and Affidavit for a Warrant by Telephone or Other Reliable Electronic Means for the issuance of a search warrant to permit the Government to enter and search a residence (Case No. 1:21-mj-64; ECF No. 1, PageID.1, Application; ECF No. 1-1, PageID.2-13, Continuation; ECF No. 1-2, PageID.14, Attachment A describing premises; ECF No. 1-3, PageID.15-16, Attachment B enumerating things to be seized).¹

The entirety of this submission will be referred to herein as the "Search Warrant Affidavit". (Exhibit 1- Search Warrant Affidavit).

Magistrate Judge Ray Kent signed the warrant at 12:51 p.m. A Return to Search Warrant was subsequently filed. (Exhibit 2- Warrant & Return, ECF No. 2, PageID.17-

¹ The Application reflects the "telephone" procedure and its compliance with Fed. R. Crim. P. 4.1. The Rule provides in relevant part that **(a) In General**. A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons. **(b) Procedures**. If a magistrate judge decides to proceed under this rule, the following procedures apply: **(1) Taking Testimony Under Oath**. The judge must place under oath- and may examine- the applicant and any person on whose testimony the application is based. **(2) Creating a Record of the Testimony and Exhibits**. **(A) Testimony Limited To Attestation**. If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit. **(B) Additional Testimony or Exhibits**. If the judge considers additional testimony or exhibits, the judge must: (i) have the testimony recorded verbatim by an electronic recording device, by a court reporter, or in writing; (ii) have any recording or reporter's notes transcribed, have the transcription certified as accurate, and file it; (iii) sign any other written record, certify its accuracy, and file it; and (iv) make sure that the exhibits are filed." From all appearances the Magistrate Judge proceeded in accordance with 4.1(b)(2)(A) only.

18).

The residential structure the Government aspired to enter and search pursuant to its warrant request was a single family dwelling house located at, and described as, "725 Allen Avenue, Muskegon, Michigan" (hereafter referred to as the "Allen Street House").

Defendant Johnson respectfully submits that the Search Warrant Affidavit failed entirely to establish any nexus between Defendant Johnson's alleged drug distributions described by law enforcement and the Allen Street House. Indeed, it is reasonably, alternatively propounded that the record not only fails to support the warrant request, but contradicts it.

Moreover, the affidavit failed equally entirely to establish probable cause to search the Allen Street House. In this regard, a review of the agent's affidavit leaves one turning back through the pages to re-read it to see where the supporting information may have been missed the first time through. But it is not there. Nothing beyond speculation or suspicion, perhaps at most a hunch, supported the government's request for a search warrant for the Allen Street House.

And no material information was added for the benefit of the Magistrate by statements contained in an earlier affidavit on January 29, 2021, in support of a criminal complaint, an Arrest Warrant, and a search warrant for a cell phone, against Defendant Johnson. (Case No. 1:21-mj-43; ECF No. 1, PageID.1, Application; ECF No. 1-1, PageID.2-21, Continuation of Complaint). The entirety of this submission will be referred to herein as the "Arrest Warrant Affidavit". (Exhibit 3- Arrest Warrant Affidavit).

The Arrest Warrant Affidavit is addressed in the instant motion because "the facts

stated in that" document were "*incorporated by reference*" in the Search Warrant Affidavit. (ECF No. 1-1, PageID.5, Exhibit 1- Search Warrant Affidavit, at ¶6) The Arrest Warrant Affidavit largely contains the same or similar information presented in the Search Warrant Affidavit, but certainly nothing more in the way of information material to the issue of probable cause.

Magistrate Judge Phillip Green signed the Arrest Warrant for Defendant, Delando Johnson, on January 29, 2021. (Exhibit 4- Arrest Warrant entered in Case No. 1:21-mj-43, ECF No. 2, PageID.22).

Both affidavits, the Arrest Warrant Affidavit and the Search Warrant Affidavit, describe alleged distributions of drugs by Defendant Johnson to a confidential source, referred to as "CS3". The alleged transactions reportedly took place on three occasions, May 4th, May 11th, and May 27th of 2020. As such, the transactions upon which the Search Warrant Affidavit were based occurred at least eight months before the February 2, 2021, Application for a Warrant was submitted for the Allen Street House.

The information was therefore eight months stale. That alone renders the Search Warrant Affidavit fatally deficient. But staleness, sufficient in itself, is only one point among equal and likely more significant factors, rendering the warrant unlawful.

Not one of the three May 2020 drug transactions described in the Search Warrant Affidavit involved the Allen Street House. Indeed, the house was not even mentioned in any of the 42 paragraphs of the Arrest Warrant Affidavit which described the aged procedural history underlying the May 2020 transactions.

On the other hand, the Arrest Warrant Affidavit did describe a number of other locations, vehicles, and structures where the surveilled transactions took place,

including street intersections, automobiles, and at least two residential apartment units where the drugs were reportedly obtained and sold. But again, not a word of the Allen Street House.

Had the Search Warrant Affidavit been submitted back in May 2020 for the apartments reportedly involved in the surveilled controlled buys, perhaps the issuance of a warrant for those locations would not have met with disagreement under a 4th Amendment analysis.

But the government did not arrest Mr. Johnson then. And, the government did not elect to pursue a search of the places where its agents claimed to have observed drug transactions taking place. So here we are concerned only with the Allen Street House, searched over 8 months after the fact. No cause existed for permitting the Government's forceful intrusion into its locked and secured premises.

Even if there was some mention of the Allen Street House during the described transactions in May 2020, that would have been aged if not ancient history, too old, rotten, and stale for purposes of satisfying the 4th Amendment's safeguards against unreasonable searches and seizures. This is particularly so when it comes to the 4th Amendment's and the Founders' heightened concerns over unreasonable and overzealous intrusions by the Government into *private residences*.

It is respectfully submitted that a the government's February 2, 2021, Search Warrant Affidavit for a private residence, separated by 251 days from the latest of three alleged transactions upon which the affidavit relied, was objectively, intrinsically unreasonable.

It was unreasonable because of the substantial period of time which separated

the events. But more than that, according to the affidavit submitted to the Magistrate Judge the aged events had nothing to do with the Allen Street House. There was neither a temporal nor a conceptual connection. There was no foundation upon which to construct a "probable cause" determination..

All these factors considered in their totality establish the absence of probable cause in support of the issuance of the warrant to search the Allen Street House. The affidavit was "bare bones", if that, rendering it objectively unreasonable for purposes of reliance. *United States v Gilbert*, 952 F3d 759 (6th Cir. 2020); *United States v McPhearson*, 469 F.3d 518, 526 (6th Cir. 2006). As demonstrated below, no exception excuses the violation, and Defendant Johnson is entitled to suppression of the evidence.

Stated differently, perhaps more appropriately, given the time frame, the locations otherwise described, and the complete absence of mention of the Allen Street House in the transactions, the Search Warrant Affidavit contradicted the proposition that contraband, on February 2, 2021, would probably be found in the Allen Street House.

On this record, the Government should not have been permitted by warrant to forcefully enter the Allen Street House and rummage through its interior and its contents. The warrant and the search unlawfully contravened constitutional safeguards.

Moreover, the agents involved were aware of the procedural history and the absence of any connection between the May 2020 surveilled controlled buys and the Allen Street House. All they had in February 2021 was an arrest warrant for Mr. Johnson based on the May 2020 transactions, and his departure from the Allen Street House on the morning of February 2, 2021. There was no good faith reliance on the

warrant.

Additionally, the affiant misrepresented material facts about the seizure of drugs from Mr. Johnson at his arrest on the arrest warrant at a Muskegon area restaurant parking lot. The evidence obtained and derived from the search at the Allen Street House must be suppressed.

II. PROCEDURAL HISTORY AND STATEMENT OF MATERIAL POINTS RELATING TO SEARCH WARRANT APPLICATION AND SUPPORTING AFFIDAVIT

The Government's Search Warrant Affidavit for the Allen Street House was presented to Magistrate Judge Ray Kent on February 2, 2021. It was attested to by telephone. (Exhibit 1- Search Warrant Affidavit).

The Continuation contained a total of 15 paragraphs, with sub-parts. A review of the totality of the information provided to the Magistrate for authorization to search the Allen Street House demonstrates conspicuously the absence of sufficient information to support the decision to issue the search warrant.

The first 4 paragraphs of the Continuation, under the caption "Introduction", merely recite general background information: the affiant's experience as a Government agent (¶¶ 1-2), the purpose of the Continuation, of "establishing probable cause" (¶3), and a general reference to the categories of information supporting the affiant's statements in the Continuation (¶4).

Paragraphs 5-7 provided the Magistrate Judge with an "Overview of Investigation". It thus informed that three days earlier, on January 29, 2021, an arrest warrant had been issued pursuant to a criminal complaint which charged Defendant Johnson with drug offenses (¶ 5). It further informed that in May 2020 a confidential

informant reported that Defendant Johnson distributed drugs on three occasions, information which was "*incorporated by reference here*" (¶ 6). And lastly, the overview recited Defendant Johnson's criminal history. (¶ 7).

The balance of paragraphs in the Continuation, ¶¶ 8-15, set forth information characterized as "**III Probable Cause**". However, of these 8 'probable cause' paragraphs, those numbered 12-15 merely contain boilerplate, iterated recitations of the affiant's training and experience and thus her "aware[ness] of" a variety of things that drug traffickers often do, and that sort of thing. (Exhibit 1- ECF No. 1-1, PageID.6-13).

The gravamen of the Continuation is therefore found in ¶¶ 8-11. Paragraph 8 informs the Magistrate that at 7:14 am on February 2, 2021, investigators maintained surveillance of the subject premises in furtherance of their interest in executing the Arrest Warrant issued three days earlier. It further advises the Magistrate, somewhat curiously, that they "knew that D. Johnson resided at the subject premises based on a November 17, 2020 cell phone bill using that address as a billing residence." (Exhibit 1- Search Warrant Affidavit, ECF No. 1-1, PageID.5).²

Beyond the surveillance of Mr. Johnson during the morning of February 2, 2021, for the purpose of executing on an arrest warrant, the Search Warrant Affidavit's Paragraph 9 provided the only information to the Magistrate about any activity at and about the Allen Street House. In this regard, Paragraph 9 stated:

"Shortly after 10:00 a.m. on February 2, 2021, D. JOHNSON exited the **Subject Premises** and entered into a white GMC Yukon XL with no other passengers. A fully marked police car initiated its lights and sirens and effected a traffic stop to

² The evidential item of a 2 months old vendor's bill reflecting, in the investigators' minds, that the person whose name on the bill must be living at the stated billing address, demonstrates some very casual, selective, investigative conclusions.

arrest D. Johnson in the parking lot of a Muskegon area restaurant. After D. JOHNSON exited the vehicle, investigators conducted a pat down search of D. JOHNSON and noticed a bulge in his groin area. Investigators removed the object from his crotch, which field tested positive as approximately 7.2 grams of heroin and approximately 5.7 grams of cocaine base (crack). In the center console are of the vehicle, investigators seized a digital scale with white residue."

(Exhibit 1- ECF No. 1-1, PageID.5-6).

Paragraph 9 of the Search Warrant Affidavit provided no material information satisfying constitutional requirements for the issuance of a search warrant for residential premises. It informs the Magistrate of the Government's observations of Defendant Johnson exiting the Allen Street House after 10:00 a.m., but no other information which contextually explains or even hints at the significance of this information relative to the warrant request.

Essentially, law enforcement was there to arrest Defendant Johnson on the Arrest Warrant issued on January 29, 2021. They followed him and pulled him over and arrested him on the warrant. Then they found a digital scale in the vehicle's console. But that certainly demonstrates no connection to the Allen Street House. The digital scale in the vehicle was described by the Confidential Source in the May 2020 transactions, when they visited numerous apartments and other places, not the Allen Street House.

Lastly, Paragraph 9 states that arresting officers conducted a pat down search of Defendant Johnson when he exited the vehicle after being pulled over in the restaurant parking lot. They found drugs which were removed from his crotch. However, this appears to have been a misrepresentation of facts. A video of the arrest shows no discovery of drugs on Defendant Johnson in the restaurant parking lot after he was pulled over on the Arrest Warrant.

III. LEGAL ARGUMENT & ANALYSES IN SUPPORT OF DEFENDANT JOHNSON'S MOTION FOR SUPPRESSION OF EVIDENCE

a. The Search Warrant Affidavit Failed To Demonstrate Any Cause, Let Alone Probable Cause, and Its Deficiency, So Apparent On Its Face, Resulted In An Unreasonable Search Of the Allen Street House and Unlawful Seizures

A fundamental tenet of the Fourth Amendment is that citizens are to be protected against unlawful government intrusions, and in this instance, against unreasonable searches and seizures. *Knox County Educ. Ass'n v. Knox County Bd. Of Educ.*, 158 F.3d 361 (6th Cir. 1998). In order to be reasonable, a search must be undertaken pursuant to a warrant issued on a showing of probable cause. *Skinner v Railway Labor Executives' Ass'n*. 489 U.S. 602 (1989). The question is whether the judicial officer had a substantial basis for finding that the affidavit established probable cause to believe that evidence of a crime would be found at the place the police seek to search. *United States v Greene*, 250 F.3d 471 (6th Cir. 2001); *United States v Davidson*, 936 F.2d 856 (6th Cir. 1991).

In this regard, the judicial officer must not serve merely as a rubber stamp for the police. *United States v Leon*, 468 U.S. 897 (1984); *Aguilar v Texas*, 378 U.S. 108 (1964).

In order for an affidavit to establish probable cause it must contain a sufficient nexus between the evidence sought and the place to be searched. *United States v. Davis*, 970 F.3d 650, 665-666 (6th Cir. 2020), citing *United States v. Hang Le-Thy Tran*, 433 F.3d 472, 482 (6th Cir. 2006); *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004 (en banc)).

In *Davis*, *supra*, a fellow named Jacob Castro-White died of a drug overdose. Castro-White was a body builder and substance abuser. In the ensuing investigation the government relied largely on evidence of cell phone communications and cell-site data to link the defendant, Davis, to the sale of the fatal drug to the decedent.

The affidavit requesting a search warrant for the defendant's home in *Davis*, to obtain his cell phone, was submitted on April 12, 2016, 36 days after Castro-White's ("decedent") fatal overdose. *Davis*, *Id.* at 663. The affidavit relied in part on information received from a cooperating informant, Karaplis, a friend of decedent's.

According to the informant, Karaplis, he and the decedent went to Davis's home on March 7, 2016, and purchased what they thought to be heroin. It turned out to be fentanyl. It killed decedent, but Karaplis survived. Cell phone forensic evidence, including cell-site data, corroborated informant Karaplis's statements.

The investigator's affidavit included the chronology of evidence and events between March 7, 2016 and April 12, 2016 from which the investigator "determined that Russell 'Red' Davis is trafficking in heroin from the residence at 1832 Garden Avenue ..." The warrant was issued. *Davis*, at 663-664. The defendant in *Davis*, *supra*, moved to suppress evidence seized in the search on the basis that the warrant lacked probable cause.

In *Davis*, the government conceded that the warrant was deficient but argued that the municipal magistrate took verbal information from the affiant before issuing the search warrant. The government was reportedly prepared to present the testimonial evidence of the magistrate at the suppression hearing, but the district court, in lieu of an evidentiary hearing, relied on the government's brief alone in denying the defendant's

motion to suppress.

The 6th Circuit remanded “for the limited purpose of conducting an evidentiary hearing on this probable-cause question.” *United States v. Davis*, 970 F.3d 650, at 666 (6th Cir. 2020), citing *United States v. Beals* 698 F.3d 248, 268 (6th Cir. 2012), 28 U.S.C. §2106.3

In the instant case, the Search Warrant Affidavit for the Allen Street House is far less factually supportive in its “probable cause” basis than the admittedly “deficient” warrant reviewed in *United States v Davis*. At least in *Davis*, the evidential information was fresh, only 37 days between the charged offense conduct at the subject premises and the search.

And in *Davis* the investigator had an informant directly involved in the fatal purchase, with cell site evidence corroborating the testimonial evidence of the informant linking the evidence to be sought with the place to be searched. But this was still insufficient to support a probable cause finding, at least on that record, And “that record” was far more substantial than *this record*.

In contradistinction here, the information is not 37 days old; it is over eight months old. Moreover, none of the evidence relating to the May 2020 drug transactions connected, even remotely, the Allen Street House to those alleged transactions. The affiant’s information rather described a number of apartments which the confidential

3 Section 2106 provides that “The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” Following the evidentiary hearing before the district court “[E]ither party may then appeal, as appropriate, from the district court’s resolution.” *Davis*, *supra*, at 666, citing *United States v Beals*, 698 F.3d 248, at 268 (6th Cir. 2012); 18 U.S.C. §3731;

source reportedly entered, made observations, had communications, and from which alleged drug deals took place. But that does not move the ball forward to the goal line of probable cause to search, out of the blue, the Allen Street House, eight months later.

The search of the Allen Street House on February 2, 2021, following the arrest of Defendant Johnson on an arrest warrant, was supported, at best, by a mere suspicion.⁴

b. The Search Warrant Affidavit Failed Entirely To Demonstrate a Nexus Between the Evidence Sought and the Allen Street House, Resulting in an Unlawful Search and Seizure Requiring Suppression of Seized Evidence

When an affidavit is based heavily on information obtained from informants, courts consider the basis of the informant's knowledge, the reliability of the informant, and corroborative evidence possessed by the government. *Illinois v Gates*, 462 U.S. 213 (1983).

28 U.S.C. §1291.

⁴ In contrast, by way of example, in *United States v. May-Shaw*, 955 F.3d 563 (6th Cir. 2020), this Honorable Court was affirmed in its determination that no Fourth Amendment violations occurred when a search warrant was executed on the defendant's vehicles and apartment following 23 days of surveillance establishing direct evidence of several drug transactions, corroborated further by dog sniffing evidence and other factors. In *May-Shaw* the defendant argued that the long term surveillance and the subsequent use of the drug sniffing dog constituted unreasonable searches in violation of his Fourth Amendment privacy interests, not whether probable cause otherwise supported the warrant request. But this is precisely the point. Unlike the Search Warrant Affidavit in the instant case, the evidence in *May-Shaw* presented testimonial evidence in support of a warrant which was recent in its information; abundant in its substance; and which attached directly to the places and things to be searched. Likewise, in this regard, *United States v. Trice*, 966 F.3d 506 (6th Cir. 2020), where the defendant argued unsuccessfully that the surreptitious placement of a disguised camera outside his apartment violated his reasonable expectation of privacy. In *Trice*, the Kalamazoo Valley Enforcement Team (KVET) conducted three controlled buys from the defendant, on July 10, 2018, July 19, 2018, and July 23, 2018. Id. at 510. The investigators observed the defendant arrive on foot to and from an apartment at the time of the controlled buys. Between the second and third controlled buy the investigators installed a camera which looked like a smoke alarm outside his apartment, and gained substantial footage of the defendant's activities, including his actions surrounding the third controlled buy. All of this information, the surveilled controlled buys, the corroborating video footage, and other evidence supported the warrant for the apartment made shortly after these events. The contrast of the procedural facts in *Trice*, to the instant case, is a compelling one, and highlights the merit of Defendant Johnson's motion to suppress the evidence gained and derived from the unlawful search at the Allen Street House.

A search warrant affidavit must identify the place to be searched, the objects or types of evidence sought, and a nexus between the two - that is, it must state why the affiant believes that the evidence will likely be found in that place. *United States v Van Shutters*, 163 F.3d 331 (6th Cir. 1998).

Defendant Johnson in the instant motion emphasizes that the Search Warrant Affidavit presented no factual support for the warrant request. It completely failed to meet the requirement of demonstrating to the reviewing judicial officer probable cause to believe that contraband will be found in the described premises at the time the warrant was requested.

The Affidavit's description of alleged drug transactions having taken place the previous year, eight months earlier, without any further particularized information, utterly failed to establish for the benefit of the judicial officer a nexus between those alleged events and the likely discovery of contraband in the premises. It was a hunch at best.

The Fourth Amendment requires that a warrant describe with particularity the place to be searched and the things to be seized, but also, fundamentally requires that the affidavit "demonstrate a *nexus* between the evidence sought and the place to be searched". In this regard, there must be a substantial basis for the conclusion that probable cause exists:

"The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.' U.S. Const. amend. IV. In determining whether an affidavit establishes probable cause, the task of the issuing magistrate 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. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

To justify a search, the circumstances must indicate why evidence of illegal activity will be found "in a particular place." There must, in other words, be a "nexus between the place to be searched and the evidence sought." *United States v. Van Shutters*, 163 F.3d 331, 336-37 (6th Cir. 1998). Lawson's affidavit did not provide a substantial basis for the issuing judge's conclusion that probable cause existed to search the Carpenters' residence, because it failed to set forth sufficient facts that incriminating evidence would be found there, rather than in some other place." (emphasis added).

United States v Carpenter, 360 F.3d 591, at 594 (6th Cir. 2004)(en banc).

Precisely so in the instant case before this Honorable Court. No less than the deficiency in Captain Lawson's affidavit in *Carpenter*, *supra*, in failing to establish a nexus between the particular items to be seized and the place to be searched, the Search Warrant Affidavit in the instant case clearly failed to do so. *United States v Brown*, 828 F.3d 375 (6th Cir. 2016). Far from a "substantial basis" upon which to conclude that probable cause existed, there was no articulable basis at all.

In *Brown*, the affidavit was much like the one presented here. It "proceeded in four parts: standard recitations regarding drug crimes; facts related to the investigation ...; facts related to the arrest of Middleton, Brown, and a third alleged heroin trafficker, Steven Patrick Woods; and additional facts pertaining to Brown specifically." *Id*, at 378.

In *Brown*, *supra*, on March 8, 2011, the DEA placed recorded calls to a heroin dealer, Middleton, and arranged for the purchase of a half kilogram. The surveilled suspect vehicles were pulled over in a probable cause stop.

A fellow named Steven Patrick Woods was the driver and sole occupant of a Chevrolet Silverado truck, containing heroin. A Yukon Denali occupied by Middleton, as driver, and Brown, as passenger, was also stopped. All 3 of the men were arrested for

delivery of heroin. Cell phones were seized, two of which were attributed to the defendant, in *Brown*.

Further, the defendant in *Brown* had \$4,813 in cash. The next day, March 9, 2011, a search warrant was obtained for Middleton's residence. More heroin was found.

The March 9th Middleton house search also turned up more evidence against the defendant in *Brown*, including a dog sniff alert on Brown's Yukon, which was seized.

Nine days later, March 17th, agents obtained a search warrant for the contents of the cell phones seized and found evidence of drug communications by Brown.

Based on all this evidence, on March 30th, 22 days following Brown's initial arrest, a search warrant affidavit and application for Brown's residence was submitted. The affiant swore that there was probable cause to believe that a search of Brown's residence would reveal "fruits or other evidence of a conspiracy to distribute heroin."

Like the affidavit in the instant case, the affidavit in *Brown* included an Attachment "A" depicting the residence and Attachment "B" describing particularly the things to be seized. The warrant was executed at Brown's residence and the government seized drugs, guns, paraphernalia, and cash. *Brown*, at 380.

Without a hearing, the district court denied the defendant's motion, in *Brown*, to suppress, after concluding that the affidavit established probable cause, that the evidence in the affidavit was not stale, and that the *Leon* good-faith exception would apply even if probable cause was lacking. *Brown*, at 380.

The appeals court in *Brown*, reviewed the "Nexus Requirement" under the authority of its *en banc* ruling in *Carpenter*, emphasizing that the:

"connection between the residence and the evidence of criminal activity must be

specific and concrete, not 'vague' or 'generalized.' If the affidavit does not present sufficient facts demonstrating why the police officer expects to find evidence in the residence rather than in some other place, a judge may not find probable cause to issue a search warrant. *Id.* And of course, whether an affidavit establishes a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented. See *Gates*, 462 U.S. at 238, 103 S. Ct. 2317; *Brown*, 732 F.3d at 573.

A number of our cases illustrate situations in which the nexus is too vague or generalized to support a search warrant. In *Carpenter*, the search warrant affidavit stated only that an officer conducting helicopter surveillance had observed numerous marijuana plants growing near the residence and a road that connected the residence to the plants. 360 F.3d at 593. Although the facts in the affidavit suggested some connection between the marijuana plants and the residence, we held that they were 'too vague, generalized, and insubstantial to establish probable cause.' *Id.* at 595. We have similarly concluded that a search warrant affidavit failed to establish the requisite nexus between the place to be searched and the evidence to sought where it stated no more than that the defendant resided at the address and was arrested there on a non-drug offense with a quantity of crack cocaine on his person. *United States v McPhearson*, 469 F.3d 518, 524-25 (6th Cir. 2006). We also found the nexus insufficient in a case where an informant actually identified the defendant's residence as the site of a drug operation. See *United States v Higgins*, 557 F.3d 381, 390 (6th Cir. 2009). The police had not established the informant's reliability, we explained, and furthermore, the affidavit did not assert that the informant had been inside the defendant's apartment, that he had ever seen drugs or other evidence inside the defendant's apartment, or that he had seen any evidence of a crime other than the one that occurred when the defendant allegedly sold him drugs. *Id.* at 390." Without such an assertion we concluded the affidavit fails to establish the nexus between the place to be searched and the evidence sought. *Id.*" (emphasis added).

United States v Brown, 828 F.3d 375, 382 (6th Cir. 2016), citing *United States v Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004)(en banc).

c. The Search Warrant Affidavit Fails Even Under a "Totality of Circumstances" Analysis and Cannot Reasonably Excused on this Record by Application of Leon's "Good Faith Exception"

An affidavit should be reviewed using a *totality of the circumstances* analysis.

United States v Allen, 211 F.3d 980 (6th Cir. 2000) (en banc). Probable cause exists when there is a fair probability, given a totality of the circumstances that contraband or

evidence of a crime will be found at a particular place. *United States v Greene*, 250 F.3d 471 (6th Circ. 2001); *United States v Davidson*, 936 F.2d 856 (6th Circ. 1991).

Fishing expeditions fueled by hunches and suspicions do not supply probable cause to conduct a search. *Shamaeizadeh v Cunigan* 338 F.3d 535 (6th Cir. 2003); *United States v Freeman*, 209 F.3d 464 (6th Cir. 2000).

In *United States v Leon*, 468 U.S. 897 (1984) a "good faith" exception was recognized and the court held that even if an affidavit is insufficient, the search can still be upheld if the police acted in good faith. In *Leon* the "Supreme Court established a new objective inquiry limiting suppression to circumstances in which the benefits of police deterrence outweigh the heavy costs of excluding 'inherently trustworthy tangible evidence' from the jury's consideration. *United States v Gilbert*, 952 F.3d 759, 763 (6th Cir. 2020).

However, the good-faith exception is inapplicable in four situations: (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a bare bones affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient. *United States v Leon*, 468 U.S. 897, 914-915, 923 (1984); *United*

States v. Hython 443 F.3d 480, at 484 (6th Cir. 2006).

There can be no good faith exception applicable to facts as those presented here, where the officer could not have objectively relied upon the magistrate's issuance of the warrant. The good faith exception does not apply where a "reasonably trained officer would have known that [her] affidavit failed to establish probable cause and that [she] should not have applied for the warrant." *Malley v. Briggs*, 475 U.S. 335 (1986).

In *United States v. Hython*, *supra*, the 6th Circuit, in ruling that the search warrant was invalid on staleness grounds, identified numerous cases providing guidance in the analysis of when the 4th Amendment has been offended by the issuance or execution of a search warrant lacking the requisite foundation:

The parameters of objective reasonableness in the good-faith context have been explored primarily in relation to whether an affidavit established a sufficient nexus between illegal activity and a place to be searched. See *Carpenter*, 360 F.3d at 594 (affidavit describing marijuana field near residence fall[s] short of establishing required nexus between criminal activity and residence); *United States v. Laughton*, 409 F.3d 744, 751 (6th Cir.2005) (no modicum of evidence connected defendant, *485 criminal activity, and address to be searched); *United States v. Helton*, 314 F.3d 812, 821-23 (6th Cir.2003) (outgoing calls from house to known drug dealer did not create substantial basis to believe evidence could be found in house); *United States v. Van Shutters*, 163 F.3d 331, 337 (6th Cir.1998) (affidavit did not establish any connection between target of investigation and home to be searched); *United States v. Weaver*, 99 F.3d 1372, 1378-79 (6th Cir.1998) (boilerplate language in affidavit failed to provide particularized facts regarding alleged crime occurring on premises to be searched); *United States v. Leake*, 998 F.2d 1359, 1365 (6th Cir.1993) (minimal surveillance did not corroborate anonymous tip that narcotics could be found in basement of specific house); see also *United States v. Washington*, 380 F.3d at 248 (Moore, J., dissenting) (affidavit created only sparse and speculative connection between drug supplier and place to be searched). Although no bright-line rule dictates its outer limit, the zone in which the good-faith exception may be applied is bound on one end by the requirements of probable cause-once that standard is met, application of the exception is unnecessary. Therefore, the relationship between staleness and probable cause is a reasonable place to

begin this analysis."

United States v. Hython, at 484-485.

Even more compellingly, Defendant Johnson's instant motion demonstrates abject failure of evidential, contextual, and circumstantial support in the Search Warrant Affidavit. It was so woefully deficient regarding "probable cause" and the related factor of "nexus" to the premises that all four of the factors rendering inapplicable the "good faith exception" are implicated, though only one need be found.

In this regard, the affiant's affidavit informed the Court of an event- *the discovery and removal of drugs from Defendant Johnson's person in the restaurant parking lot following the traffic stop*- which did not, in fact, occur. (Exhibit 5- video of arrest).

But far more fundamentally, and more objectively demonstrative of the Fourth Amendment deficiency in this case, is the fact that the Search Warrant Affidavit was merely bare bones. It thus provided no basis, let alone a substantial one, for a determination of probable cause.

Further, it lacked so significantly in probable cause as to render official belief in its existence entirely unreasonable. Therefore, it cannot be plausibly maintained that the officers' reliance on the warrant was in good faith. *United States v Leon*, 468 U.S. 897, 914-915, 923 (1984); *United States v Gilbert*, 952 F.3d 759, 763 (6th Cir. 2020); *United States v. Hython*, 443 F.3d 480, at 484 (6th Cir. 2006).

This is violative of fundamental 4th Amendment principles and protections, rendering the resulting warrant invalid and the evidence excluded. *United States v Williams*, 615 F.3d 657, 668 (6th Cir. 2010). All evidence obtained by an unconstitutional search and seizure is inadmissible in federal court regardless of its source. *United*

States v Pearce, 531 F.3d 374, 381 (6th Cir. 2008)(citing, *Mapp v. Ohio*, 367 U.S. 643, 654 (1961).

Further, all evidence derived therefrom is no less subject to suppression as fruit of an unlawful search and seizure, the so called “fruit of the poisonous tree” doctrine. *Wong Sun v U.S.*, 371 U.S. 471, 485, 835 S. Ct. 407, 9 L. Ed 2d 441 (1963).

IV. DEFENDANT JOHNSON REQUESTS A FRANK'S HEARING

Defendant is respectfully requesting a hearing pursuant to *Franks v Delaware*, 438 U.S. 154 (1978). In this regard, the Search Warrant Affidavit informed the Court of an event- *the removal of drugs from Defendant Johnson's person during a pat down in the restaurant parking lot following the traffic stop*- which on all appearances, did not occur. (**Exhibit 5- video of arrest**).

To be sure, the “bare bones” Search Warrant Affidavit, even with the misrepresented fact, has been shown to have been demonstrably without probable cause in support of the warrant. The ensuing search of the Allen Street House was therefore unlawful. It has further been established that no *good faith* exception is applicable here, to excuse the warrant's material deficiencies.

But it also is material to the Court's consideration that misrepresentations were made as part of the submission as well. This can establish yet another, independent basis to suppress the evidence seized.

To show entitlement to a hearing a defendant must make a “substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.” *Franks v Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, (1978). and the allegedly false

statement must be necessary to the finding of probable cause. *Id.*

Of course, Defendant Johnson reiterates, that even with the misrepresented statement the Search Warrant Affidavit cannot be sustained on review. The government may have had enough evidence to pursue an arrest warrant for Defendant Johnson based on the alleged transactions which occurred in May 2020, 8 months earlier. But the Allen Street House was nowhere implicated in those historical events. (see Part II, *supra*, Procedural Background, Part III b, *supra*, "Nexus" analysis).

Misrepresented facts in an affidavit submitted in support of a warrant request is also relevant as an additional factor in the government's predictable assertion of a good faith exception excusing the patent Fourth Amendment deficiencies in the Search Warrant Affidavit in this case. Defendant is respectfully requesting a hearing in order that these meaningful issues can be properly and thoroughly addressed.

V. CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Defendant, Delando Johnson, respectfully requests that this Honorable Court make a determination that the search of the Allen Street House on February 2, 2021, violated the Fourth Amendment, and that all evidence seized and derived therefrom must be suppressed from admission in any further proceedings in this case, including trial.

Additionally, Defendant requests the scheduling of a hearing on the issues presented.

Respectfully Submitted,

Dated: May 26, 2021

/s/ John M. Karafa
John M. Karafa
Attorney for Defendant Johnson

EXHIBIT 1
Search Warrant Affidavit

AO 106A (02/18) Application for a Warrant by Telephone or Other Reliable Electronic Means

UNITED STATES DISTRICT COURT

for the

Western District of Michigan

In the Matter of the Search of
(Briefly describe the property to be searched
or identify the person by name and address))
Case No. 1:21-mj-64
725 Allen Avenue, Muskegon MI 49442)
(search to include any garages, attached structures,
sheds, outbuildings & vehicles located in the curtilage))

APPLICATION FOR A WARRANT BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property (identify the person or describe the property to be searched and give its location):

See Attachment A

located in the Western District of Michigan, there is now concealed (identify the person or describe the property to be seized):

See Attachment B

The basis for the search under Fed. R. Crim. P. 41(c) is (check one or more):

evidence of a crime;
 contraband, fruits of crime, or other items illegally possessed;
 property designed for use, intended for use, or used in committing a crime;
 a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section	Offense Description
21 USC 846, 841(a)(1)	Conspiracy to Distribute Controlled Substances, Possession of Controlled Substances with Intent to Distribute

The application is based on these facts:

Continued on the attached sheet.
 Delayed notice of _____ days (give exact ending date if more than 30 days): is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

Heather Williamson
Applicant's signature

SA Heather Williamson, DEA
Printed name and title

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 by
telephone (specify reliable electronic means).

Date: 02/02/2021

Ray Kent
Judge's signature

City and state: Grand Rapids, Michigan

RAY KENT, U.S. Magistrate Judge
Printed name and title

Continuation of Application for Search Warrant

I, Heather Williamson, being duly sworn, state as follows:

I. Introduction

1. I am a Special Agent of the Drug Enforcement Administration ("DEA") and have been so employed since January 2013. I am currently assigned to the Grand Rapids District Office. Previously, I was assigned to the Southwest Border Initiative Group-3 ("SWB-3") and to the Los Angeles Strike Force for approximately six years. The Los Angeles Strike Force is an investigative group jointly led by the DEA and the FBI, and composed of several other federal, state, and local agencies that is focused on the disruption of the Mexico-based Sinaloa Cartel. Prior to working as a DEA Special Agent, I completed 20 weeks of training at the DEA Academy in Quantico, Virginia, which included instruction in narcotics identification, detection, trafficking, and interdiction; money laundering techniques; asset identification, seizure, and forfeiture; and techniques used by narcotics traffickers to avoid detection by law enforcement officials. I have investigated drug trafficking organizations involved in violating various federal laws, including, but not limited to, unlawful importation of controlled substances; the distribution of controlled substances; manufacturing of controlled substances; and possession with intent to distribute controlled substances, including cocaine, methamphetamine, heroin, and other dangerous drugs; as well as money laundering. I have participated in investigations of unlawful drug trafficking and money laundering and, among other things, have conducted or participated in surveillance; execution of search

warrants; debriefings of informants; reviewing of taped conversations and drug records; and have participated in investigations that include the interception of wire communications.

2. Through my training, education and experience, I have become familiar with the manner in which illegal drugs are transported, stored, and distributed, the methods of payment for such drugs, the laundering of narcotics proceeds, and the dialect (lingo) and coded language used by narcotics traffickers. In connection with my duties, I investigate criminal violations of the federal and state controlled substance laws, including, but not limited to, conspiracy and attempt to possess with intent to distribute and to distribute controlled substances, in violation of Title 21, United States Code, Section 846; possession with intent to distribute and distribution of controlled substances, in violation of Title 21, United States Code, Section 841(a)(1); use of communication facilities to facilitate drug trafficking offenses, in violation of Title 21, United States Code, Section 843(b); and offenses involving money laundering as well as conspiracy and attempt to do the same, in violation of Title 18, United States Code, Sections 1956 and 1957. Many of these investigations also involve firearms offenses, including violations of Title 18, United States Code, Sections 922(g) and 924(c).

3. Because this Continuation is for the limited purpose of establishing probable cause to support the issuance of a search warrant for the proposed subject premises, it contains only a summary of relevant facts. I have not included each and every fact known to me or to other law enforcement officers concerning the entities,

individuals, and events described in this Continuation. This Continuation is made for the purpose of establishing probable cause in support of search warrant for the residence at 725 Allen Avenue, Muskegon MI 49442 (**Subject Premises**) for evidence of the commission of the crimes of conspiracy to distribute and possess with the intent to distribute controlled substances, specifically methamphetamine, in violation of Title 21, United States Code, Section 846; and possession of controlled substances with the intent to distribute them and distribution of controlled substances, in violation of Title 21, United States Code, Section 841(a)(1).

4. The statements contained in this Continuation are based in part on: (a) my personal participation in this investigation; (b) information provided by other federal and state law enforcement officers, including members of the Michigan State Police's West Michigan Enforcement Team (WEMET); (c) laboratory analysis reports; (d) surveillance reports; (e) criminal history records; (f) information from confidential informants; and (g) my training and experience and the training and experience of other law enforcement agents.

II. Overview of Investigation

5. This Continuation is based on the DEA and WEMET's investigation into the drug trafficking activities of Delando JOHNSON, a/k/a "Fox," and his criminal associates. On January 29, 2021, Magistrate Judge Phillip J. Green of the United States District Court for the Western District of Michigan issued an arrest warrant pursuant to a criminal complaint charging D. JOHNSON with multiple instances of distribution of heroin. *See United States v. D. Johnson*, No. 21-mj-43.

6. The continuation in support of the criminal complaint established probable cause that, in May 2020, D. JOHNSON distributed heroin on three separate occasions. The facts stated in that continuation are incorporated by reference here and can be provided to the Court upon request.

7. D. JOHNSON's criminal history includes state convictions for delivery/manufacturing of cocaine/heroin less than 50 grams in 2009; possession/purchase/use of fraudulent proof of age in the purchase of tobacco for minors also in 2009; possession of a controlled substance on school property less than 25 grams in 2011; possession of cocaine/heroin less than 25 grams in 2012; misdemeanor interfering with electronic communications in 2014; a second or subsequent conviction for delivery/manufacturing of cocaine/heroin less than 50 grams in 2015; larceny in a building also in 2015; and felony firearms/weapons and possession of a firearm by a felon also in 2015.

III. Probable Cause

8. Beginning at approximately 7:14 AM on February 2, 2021, investigators maintained constant surveillance of the **Subject Premises** to attempt to execute the aforementioned arrest warrant of D. JOHNSON. Investigators knew that D. JOHNSON resided at the **Subject Premises** based on a November 17, 2020 cell phone bill using that address as a billing residence.

9. Shortly after 10:00 a.m. on February 2, 2021, D. JOHNSON exited the **Subject Premises** and entered into a white GMC Yukon XL with no other passengers. A fully marked police car initiated its lights and sirens and effected a

traffic stop to arrest D. JOHNSON in the parking lot of a Muskegon area restaurant.

After D. JOHNSON exited the vehicle, investigators conducted a pat down search of D. JOHNSON and noticed a bulge in his groin area. Investigators removed the object from his crotch, which field tested positive as approximately 7.2 grams of heroin and approximately 5.7 grams of cocaine base (crack). In the center console area of the vehicle, investigators seized a digital scale with white residue.

10. Based on the circumstances of his arrest, my training and experience, and familiarity with the investigation, I believe that D. JOHNSON is using the **Subject Premises** to store controlled substances, drug proceeds, or other evidence of drug trafficking crimes. D. JOHNSON left the **Subject Premises** before getting into the white GMC Yukon XL and before he was ultimately arrested with narcotics on his person and a digital scale with residue in his vehicle.

11. After taking D. JOHNSON into custody, investigators secured the **Subject Premises** and have maintained surveillance at the residence pending issuance of the requested warrant.

12. I know from training and experience that subjects involved in drug trafficking often use their residences or the residences of friends, family, or close associates to store drugs and otherwise further their drug trafficking. Drug traffickers frequently maintain quantities of drugs in these places of residence, along with packaging materials, scales for weighing drugs, and rubber or latex gloves to prevent the transfer of fingerprints and/or the contamination of drugs. Subjects also tend to keep currency, i.e., the proceeds of drug trafficking, and ledgers, notebooks,

and other documentation whereby they track their purchases and sales of narcotics.

In addition to hard copy documents, drug traffickers often maintain records of their activities on electronic equipment such as computers and "tablet" mobile computing devices. Many if not most financial institutions now provide software applications ("apps") to their customers which permit the rapid movement of funds between and among financial accounts. Drug traffickers who move money through financial institutions to buy and sell drugs now may do so using home computers and tablet devices.

13. I know from training and experience that drug traffickers frequently utilize mobile telephones to facilitate drug transactions and often store such devices at their residences. Drug traffickers rely upon voice phone services, SMS and MMS text messaging, social media instant messaging services, and electronic mail apps to communicate with suppliers, customers, and confederates. Mobile telephones are portable and phone providers often do not require purchasers or users of the devices to provide their true names and/or addresses, so drug traffickers often maintain multiple devices to avoid detection by law enforcement. Mobile phones often contain evidence indicative of drug trafficking, including records of incoming and outgoing calls; text messages; photographs of narcotics, coconspirators, or currency; and, in the case of "smart phones," Global Positioning System ("GPS") data indicating the location of the device at given points in time.

14. I know from training and experience that, to protect against theft, drug traffickers frequently keep firearms and ammunition on or about premises where

they store drugs, currency, or other items of value. Because drug traffickers cannot report the theft of drugs, drug proceeds, or other items of value to law enforcement without substantial risk of their illicit activities being discovered, they themselves must "police" areas where drugs are bought, sold, and stored through the possession and use of firearms and other dangerous weapons.

15. Further, based upon my training, experience, and participation in financial investigative aspects involving large amounts of controlled substances, I am aware of the following:

- a. Drug traffickers often purchase and/or title their assets in fictitious names, aliases or the names of relatives, associates or business entities to avoid detection of these assets by government agencies.
- b. That even though these assets are in names other than the drug traffickers', the traffickers actually own and continue to use these assets, and exercise dominion and control over them.
- c. Drug traffickers often maintain, on hand in their residences, large amounts of currency in order to maintain and finance their on-going narcotics business;
- d. That it is common for drug traffickers to maintain books, records, receipts, notes, ledgers, receipts relating to the purchase of financial instruments and or the transfer of funds, and other papers relating to the transportation, ordering, sale and

distribution of controlled substances. That the aforementioned books, records, receipts, notes, ledgers, etc., are maintained where the traffickers have ready access to them, including their residences;

- e. That it is common for drug traffickers to secrete contraband, proceeds and records of drug transactions in secure locations within their residences, their businesses and/or other locations which they maintain dominion and control to ensure ready access to these items and to conceal them from law enforcement authorities; that subjects involved in drug trafficking often have unexplained wealth and assets as they do not have a job, nor do they report income on their state or federal tax returns. Subjects often use cash, money orders, and cashier's checks, and prepaid debit cards as a way of purchasing items as a way to disguise where the funds are ultimately coming from. Subjects will place assets in the names of nominees, which are often friends and family members in an attempt to hide the true ownership of the assets.
- f. That in order to accomplish this concealment, drug traffickers have built "stash" places within their residences or businesses for these items.

- g. That it is common for persons involved in drug trafficking to maintain evidence pertaining to their obtaining, secreting, transfer, concealment and or expenditure of drug proceeds. This evidence includes currency, financial instruments, precious metals and gemstones, jewelry, books, records, invoices, receipts, records of real estate transactions, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, cashier's checks, bank checks, safe deposit box receipts or keys, records concerning storage lockers and money wrappers. These and other items are maintained by the drug traffickers within their residences, businesses, or other locations over which they maintain dominion and control.
- h. That drug traffickers often utilize electronic equipment such as computers, facsimile machines, currency counting machines and telephone answering machines to generate, transfer, count, record and/or store the information and that this equipment is frequently stored inside the traffickers' residences.
- i. That when drug traffickers amass large proceeds from the sale of controlled substances that the drug traffickers attempt to legitimize these profits through money laundering activities. To accomplish these goals, drug traffickers utilize, but are not limited to, domestic and international banks and their attendant

services, professionals such as attorneys and accountants, casinos, real estate, shell corporations and business fronts, storage lockers, safe deposit boxes and otherwise legitimate businesses that generate large quantities of currency.

- j. That the sale of controlled substances generates large quantities of United States currency in small denominations (commonly referred to as "street money").
- k. That it is common for drug traffickers to separate their "street money" by denomination and organize this currency in rubber banded stacks in varying \$1,000 increments to facilitate quick counting.
- l. That the courts have recognized that the small and medium denominations of questionable currency, along with the manner in which the currency is handled, carried and concealed may establish probable cause that there is a substantial connection between the questionable currency and drug transactions.
- m. That drug traffickers at times become fearful that their extravagant spending habits will bring them under scrutiny by the Internal Revenue Service or other federal, state, or local agencies. The "source" of their income reported on tax returns can be falsely stated, misleading or generic in terms. Retained

copies of these returns are commonly kept by the traffickers in their residences and businesses.

- n. That drug traffickers commonly maintain addresses or telephone numbers in books or papers which reflect names, addresses and/or telephone numbers of their associates in the trafficking organization.
- o. That drug traffickers take or cause to be taken photographs of themselves, their associates, their property, and their product. That these traffickers usually maintain these photographs in their possession.
- p. That the courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed, in particular, trafficking in controlled substances.
- q. That drug traffickers commonly have in their possession, that is, on their person, at their residences and/or their businesses, firearms, including but not limited to: handguns, pistols, revolvers, rifles, shotguns, machine guns and other weapons. These firearms are used to protect and secure a drug trafficker's property. This property may include, but is not limited to controlled substances, jewelry, controlled substance paraphernalia, books, records and United States currency.

- r. That drug traffickers frequently receive their supply of drugs through packages sent by U.S. Mail or third-party delivery service.

Attachment A

Description of Premises to be Searched

725 Allen Avenue, Muskegon MI 49442 (Subject Premises)

The property to be searched is commonly known as 725 Allen Avenue, Muskegon MI 49442 (Subject Premises). The primary structure is a single-family residence, yellow in color with brown trim, the numbers 725 affixed on top of north facing door. The house is located on the south side of Allen Avenue and is the ninth house west of South Getty Street and has a detached garage. A photograph of Subject Premises from Google Earth is provided below:



This application specifically requests authorization to search the house, along with any attached structures, garages, sheds, outbuildings, or vehicles located within the curtilage of Subject Premises. This Application further requests authorization to employ a K-9, trained in the detection of controlled substances, to assist in the search.

Attachment B

Things to be Seized

1. Controlled substances and all paraphernalia for packaging, processing, diluting, weighing, and distributing controlled substances, such as scales, funnels, sifters, grinders, glass panes and mirrors, razor blades, plastic bags, and heat-sealing devices.
2. Paraphernalia for packaging cash drug proceeds including heat-sealing devices, plastic packaging for cash, rubber bands, and money counting devices.
3. Personal books and papers reflecting names, addresses, telephone numbers, and other contact or identification data relating to distribution of controlled substances. Photographs of individuals, associates, their property, and their drugs. Records reflecting names, nicknames, addresses, and telephone numbers of both current and past drug associates.
4. Shipping labels or materials, boxes, receipts, or other records indicating use of the U.S. Mail or other courier services.
5. Books, records, receipts, notes, ledgers, airline tickets, money orders, wire transfer or money remittance records, real estate records, bank statements, and other records related to the receipt, expenditure and concealment or other disposition of income. Mail, deeds, leases, rental agreements, photographs, personal telephone books, diaries, utility and telephone bills, statements, identification documents and keys and other indications of residency.
6. Safes, safety deposit boxes, keys for safety deposit boxes, hidden compartments and other secure locations, which often contain the proceeds of drug trafficking activity, including large amounts of United States currency, financial instruments, precious metals, jewelry, and other items of value, as well as books and records regarding the acquisition, use, and disposition of such items of value.
7. Telephone records and telephone devices, including telephones, cellular/mobile/digital telephones, smartphones, digital pagers, voice pagers, and alpha-numeric display pagers.

8. Records relating to controlled substances income and expenditures of proceeds of drug transactions, and evidence of financial transactions relating to obtaining, transferring, secreting, or spending of large sums of money made from engaging in drug trafficking activities.
9. Proceeds of drug trafficking, including United States currency, other currency, precious metals, jewelry, and financial instruments, including certificates of deposit and stock and bonds.
10. Firearms and ammunition.

EXHIBIT 2
Warrant & Return

UNITED STATES DISTRICT COURT

for the

Western District of Michigan

In the Matter of the Search of

*(Briefly describe the property to be searched
or identify the person by name and address)*

725 Allen Avenue, Muskegon MI 49442

(search to include any garages, attached structures,
sheds, outbuildings & vehicles located in the curtilage)

) Case No. 1:21-mj-64

WARRANT BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search and seizure of the following person or property located in the Western District of Michigan
(Identify the person or describe the property to be searched and give its location)

See Attachment A

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal *(Identify the person or describe the property to be seized)*.

See Attachment B

YOU ARE COMMANDED to execute this warrant on or before **February 16, 2021** Time to exceed 14 days

In the daytime 6:00 a.m. to 10:00 p.m. At any time in the day or night because *good cause has been established*.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to **Ray Kent**

United States Magistrate Judge

Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *unless the officer can do so*.

for days *(not to exceed 30)* until, the facts justifying the later specific date of

Date and time issued: **2/2/2021 12:51 PM**


Ray Kent
Judge Signature

City and state: **Grand Rapids, Michigan**

RAY KENT U.S. Magistrate Judge
for immediate and take

AO 93C (08/18) Warrant by Telephone or Other Reliable Electronic Means (Page 2)

Return		
Case No.: 1:21-mj-64	Date and time warrant executed: 2/2/2021	Copy of warrant and inventory left with: 725 ALLEN AVE, MUSKEGON MI
Inventory made in the presence of: <u>DET. SCOTT LISKEY, WEMST</u>		
Inventory of the property taken and name(s) of any person(s) seized:		
<u>SEE ATTACHED STATE OF MICHIGAN RETURN.</u>		
Certification		
<p>I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.</p> <p>Date: <u>2/12/2021</u></p> <p style="text-align: right;"><u>Heather Williamson</u> Executing officer's signature SA HEATHER WILLIAMSON Printed name and title</p>		

STATE OF MICHIGAN)
) SS
COUNTY OF MUSKEGON)

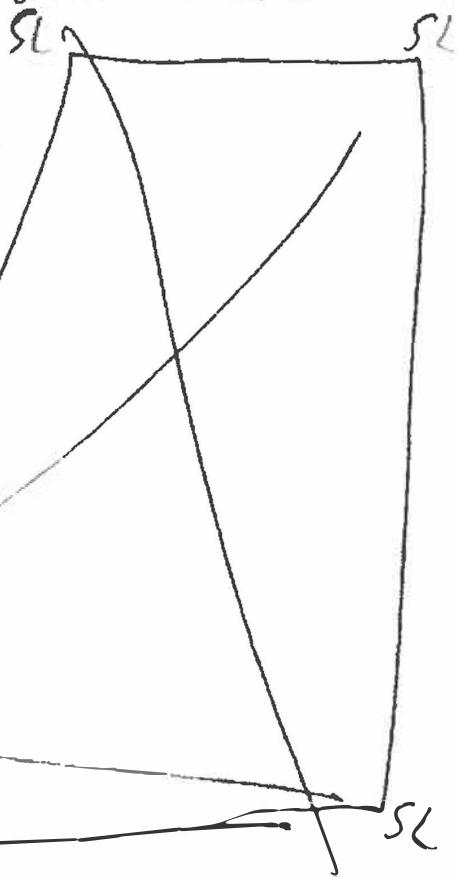
RETURN TO SEARCH WARRANT

I hereby certify and return, by virtue of the within Search Warrant, that I have searched for the property and other things therein named, at the place therein described.

[Strike either (1) or (2), whichever is inapplicable.]

(1) and tabulate for this court the following property and other things described as follows:

- 1- 2 small baggies Suspected Cocaine
- 2- 4 baggies Suspected Heroin
- 3- 1 bag Suspected Crystal Methamphetamine
- 4- 2 digital Scales
- 5- 3 .223 rifle magazines with Ammo
- 6- 1 Springfield pistol with Ammo
- 7- 1 pistol purchase document
- 8- \$5,168 US Currency
- 9- Ammunition



(2) and tabulate that I have been unable to find such property and other things.



Sheriff Municipal Police Officer Dep. Sheriff

DATED AT: Tuesday
this 2nd day of February
A.D. 2021
Address: 725 Allen Ave.

EXHIBIT 3
Arrest Warrant Affidavit

AO 91 (Rev. 11/11) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

Western District of Michigan

United States of America

v.

DELANDO JOHNSON,
a/k/a "Fox"

) Case No

1:21-mj-43

)

)

)

Defendant(s)

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief:

On or about the date(s) of 5/4/20, 5/11/20 & 5/27/20 in the county of Muskegon in the Western District of Michigan the defendant(s) violated:

<i>Code Section</i>	<i>Offense Description</i>
21 U.S.C. § 841(a)(1), (b)(1)(C)	Counts 1-3: Distribution of heroin, a Schedule II controlled substance.

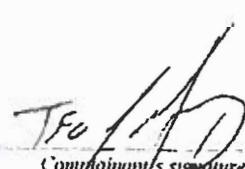
This criminal complaint is based on these facts:

¶ Continued on the attached sheet

The Court processed the complaint remotely. The Court verified the Affiant's identity (by AUSA confirmation and through Affiant self-identification). Affiant attested to the affidavit and complainant via telephone, which the AUSA transmitted by remote electronic means (e-mail). The Court signed the original complaint and transmitted a correct copy of same to the Applicant, via the AUSA, by remote electronic means (e-mail). The process complied with Rules 3 and 41.

Date: 01/29/2021

City and state: Grand Rapids, Michigan


TFO Joe Young, DEA

Printed name and title


Phillip J. Green, U.S. Magistrate Judge

Printed name and title

CONTINUATION OF COMPLAINT

I, Joseph Young, being duly sworn, state as follows:

INTRODUCTION

1. I am a Detective/Sergeant with the Michigan State Police ("MSP") and have been deputized as a Task Force Officer ("TFO") with the Drug Enforcement Administration ("DEA"), United States Department of Justice, since October 2016. As such, I am an "investigative or law enforcement officer" within the meaning of Section 2510(7) of Title 18, United States Code; that is, an officer of the United States who is empowered by law to conduct investigations of, and to make arrests for, offenses enumerated in Title 18, United States Code, Section 2516.

2. I am currently assigned to the Grand Rapids District Office in the DEA's Detroit Field Division. I have been employed with the Michigan State Police for over 25 years, 10 years of which I served on a narcotics task force. My law enforcement training has been comprised of specific instruction in narcotics investigations, including instruction in narcotics identification, detection, trafficking, and interdiction; money laundering techniques; asset identification, seizure, and forfeiture; and techniques used by narcotics traffickers to avoid detection by law enforcement officials.

3. During my time as a law enforcement officer, I have participated in investigations of unlawful drug trafficking and money laundering and, among other things, have conducted or participated in surveillance, the execution of search warrants, debriefings of informants, and reviews of taped conversations and drug

records. I have served as the affiant for search warrants of residences, storage facilities, smartphones, and computers, as well as warrants for Global Positioning System ("GPS") data through vehicle tracking devices. Additionally, I have served as an undercover officer in drug trafficking investigations. Finally, I have participated in investigations that included the interception of wire and electronic communications.

4. Through my training, education, and experience, I have become familiar with the manner in which illegal drugs are transported, stored, and distributed, the methods of payment for such drugs, the laundering of drug proceeds, and the dialect (lingo) and coded language used by drug traffickers.

5. In connection with my duties, I investigate criminal violations of the federal and state controlled substance laws, including, but not limited to, conspiracy and attempt to distribute and possess with intent to distribute controlled substances, in violation of Title 21, United States Code, Section 846; distribution and possession with intent to distribute controlled substances, in violation of Title 21, United States Code, Section 841(a)(1); use of communication facilities to facilitate drug trafficking offenses, in violation of Title 21, United States Code, Section 843(b); and offenses involving money laundering, as well as conspiracy and attempts to do the same, in violation of Title 18, United State Code, Sections 1956 and 1957. Many of these investigations also involve firearms offenses, including violations of 18 U.S.C. §§ 922(g) and 924(c).

6. The following statement is being submitted for the limited purpose of obtaining an arrest warrant for DELANDO JOHNSON, a/k/a "Fox," for distribution of heroin, a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). This continuation is also made for the purpose of searching the **Subject Device**, a cellular telephone assigned call number 231-329-5909 that is being used by DELANDO JOHNSON and is described below and in Attachment A to the search warrant application, should it be seized in the execution of the arrest warrant of DELANDO JOHNSON.

7. This statement is not intended to include each and every fact known by me or the government.

8. The information set forth in this affidavit is based upon my personal knowledge derived from my participation in this investigation and on information I believe to be reliable from other special agents and task force officers with the DEA, law enforcement officers of the Michigan State Police drug task forces, and other law enforcement officials, including: a) oral and written reports that I have received directly or indirectly from DEA and other law enforcement officials; b) interviews with confidential sources; c) results of physical surveillance; d) analysis of telephone calls and text messages that were consensually recorded during this investigation, the contents of which I have reviewed or that have been reported to me; and e) the training and experience of DEA Special Agents, investigators, and other law enforcement officials with whom I have spoken regarding this investigation, or whose reports I have reviewed.

PROBABLE CAUSE

I. Probable Cause that DELANDO JOHNSON Distributed Heroin

9. Since November 2019, the DEA, MSP, and the MSP-sponsored West Michigan Enforcement Team (WEMET) have been investigating a network of individuals that coordinate drug trafficking activities, the movement of bulk cash, and the facilitation of street violence that frequently includes illegal firearms, assaults, and shootings in furtherance of gang violence in and around the area of Muskegon, Michigan. This investigation has included the illegal activities of DELANDO JOHNSON, a/k/a "Fox."

10. During the course of this investigation, law enforcement has learned that DELANDO JOHNSON coordinates drug trafficking with other individuals in the Muskegon area, including but not necessarily limited to using the **Subject Device** to arrange drug deals, specifically focusing on the distribution of heroin. DELANDO JOHNSON's criminal history includes state convictions for delivery/manufacturing of cocaine/heroin less than 50 grams in 2009; possession/purchase/use of fraudulent proof of age in the purchase of tobacco for minors also in 2009; possession of a controlled substance on school property less than 25 grams in 2011; possession of cocaine/heroin less than 25 grams in 2012; misdemeanor interfering with electronic communications in 2014; a second or subsequent conviction for delivery/manufacturing of cocaine/heroin less than 50 grams in 2015; larceny in a building also in 2015; and felony firearms/weapons and possession of a firearm by a felon also in 2015.

11. Beginning in November and December 2019, DEA received information concerning the illegal drug trafficking activities in the Muskegon area from three confidential sources, including CS-3. CS-3 has been providing information to law enforcement about these illegal activities since May of 2020. CS-3's knowledge about drug trafficking in the area of Muskegon is derived from CS-3's direct involvement in drug trafficking and from subsequent controlled purchases of narcotics from DELANDO JOHNSON and other individuals. CS-3 is working as an informant in exchange for financial compensation. CS-3's criminal history consists of a misdemeanor conviction for retail fraud. CS-3 has proven reliable through multiple controlled purchases resulting in the seizure of ounce quantities of narcotics, money, and guns, in addition to providing intelligence corroborated by WEMET Detectives.

12. On May 4, 2020, CS-3 informed investigators that CS-3 could purchase a quantity of crystal methamphetamine and/or heroin from DELANDO JOHNSON. Later that day, at approximately 4:30 p.m., in the presence of investigators, CS-3 contacted DELANDO JOHNSON at 231-329-5909 (the **Subject Device**), at which time CS-3 requested to purchase a quantity of "ice cream," which is coded language for crystal methamphetamine. DELANDO JOHNSON told CS-3 that he did not sell that, but he had "boy," which is coded language for heroin. CS-3 told DELANDO JOHNSON that s/he had \$500 in "bread" (money) and asked what s/he could get for that. DELANDO JOHNSON informed CS-3 that CS-3 could get 4 or 5 grams (of heroin) for that amount of money because he charged \$100 per gram. CS-3 and

DELANDO JOHNSON agreed to meet in a few hours to conduct the drug transaction.

This call was recorded.

13. At approximately 6:10 p.m., CS-3 contacted DELANDO JOHNSON at 231-329-5909 (the **Subject Device**) to arrange a meeting time and place to conduct the previously discussed drug transaction. CS-3 and DELANDO JOHNSON agreed to meet at an intersection in the City of Muskegon, Michigan. Prior to the deal, investigators conducted a search of CS-3, found no weapons or contraband, and then provided CS-3 with \$500 pre-recorded WEMET buy money. Investigators then conducted surveillance of CS-3 to the agreed upon intersection.

14. At approximately 6:27 p.m., CS-3 received a phone call from DELANDO JOHNSON on the **Subject Device** informing CS-3 that he (DELANDO JOHNSON) would be there in a couple of minutes. At approximately 6:50 p.m., investigators observed DELANDO JOHNSON arrive. Surveillance then observed CS-3 approach DELANDO JOHNSON's vehicle and a few minutes later, observed the vehicle depart the area. Investigators maintained surveillance on CS-3 and ultimately picked CS-3 up to retrieve the drugs.

15. Investigators debriefed CS-3, at which time CS-3 stated that the deal went smoothly. CS-3 stated that DELANDO JOHNSON pulled up in the white car that investigators had observed, and CS-3 handed DELANDO JOHNSON the money. CS-3 attempted to weigh the drugs with a scale that was in the vehicle while DELANDO JOHNSON was counting the money; however, DELANDO JOHNSON told CS-3 not to pull out the scale because his child was in the car. CS-3 informed

investigators that there was an infant child in the rear seat of the vehicle. CS-3 stated that DELANDO JOHNSON told CS-3 that there were 4 grams, and CS-3 replied that there should be 5 grams. DELANDO JOHNSON told CS-3 that it was all there. This transaction was audio recorded and investigators corroborated CS-3's outline of events by reviewing the recording.

16. The drugs purchased by CS-3 were weighed and field-tested, and the result of the test was approximately 3.83 grams of heroin with fentanyl compound or methamphetamine.

17. On May 11, 2020, at approximately 4:00 p.m., CS-3 placed a recorded phone call to DELANDO JOHNSON on the **Subject Device**. CS-3 made the call in the presence of investigators in order to coordinate the controlled purchase of approximately 10 grams of heroin. DELANDO JOHNSON instructed CS-3 to meet him at a location in Muskegon, Michigan. Investigators then conducted a search of CS-3, found no weapons or contraband, and provided CS-3 with \$1,000 in DEA pre-recorded buy money. Investigators then drove CS-3 to the area of the arranged meeting spot and subsequently observed CS-3 get into a white sedan occupied by DELANDO JOHNSON. One of the investigators was close enough to the vehicle to identify DELANDO JOHNSON and observe no other occupants inside. Surveillance then observed the vehicle park in front of an apartment building.

18. Surveillance observed DELANDO JOHNSON get out of the vehicle and walk into an apartment located on the ground level of the building and subsequently return to the vehicle where CS-3 was waiting. Several minutes after DELANDO

JOHNSON returned to the car, CS-3 exited the vehicle. Investigators maintained surveillance on CS-3 and ultimately picked up CS-3 to retrieve the drugs. Investigators then conducted a search of CS-3, found no weapons or contraband, other than the purchased drugs in a clear plastic baggie, which CS-3 turned over to investigators.

19. A debriefing of CS-3 following the transaction consisted of the following in summary: CS-3 stated that the drug deal took place inside the vehicle with DELANDO JOHNSON, and that DELANDO JOHNSON told CS-3 that he had more heroin at another location. CS-3 further observed additional larger quantities of suspected heroin with DELANDO JOHNSON.

20. The drugs purchased by CS-3 were weighed and field-tested, and the result of the test was approximately 10.3 grams of heroin with fentanyl compound or methamphetamine.

21. On May 27, 2020, at approximately 3:45 p.m., CS-3 met with investigators and stated that DELANDO JOHNSON had informed CS-3 the prior day that he had 600 grams of heroin remaining. CS-3 stated that s/he could purchase additional heroin from DELANDO JOHNSON. In the presence of investigators, CS-3 placed a phone call to DELANDO JOHNSON on the **Subject Device**, at which time CS-3 and DELANDO JOHNSON agreed to meet at the apartment building where they had met on May 11, 2020 in order to complete the transaction. Investigators then conducted a search of CS-3, found no weapons or contraband, and subsequently provided CS-3 with \$1,200 in DEA pre-recorded buy money.

Investigators then drove CS-3 to the area of the arranged meeting spot. Surveillance observed DELANDO JOHNSON arrive at the apartment complex in a black Cadillac bearing no license plate. Surveillance officers then observed DELANDO JOHNSON go into apartment 1D for a brief period of time before returning outside to the parking lot. Surveillance officers then observed CS-3, DELANDO JOHNSON, and a female (believed to be DELANDO JOHNSON's girlfriend) get into the Cadillac and drive to a different apartment building and park.

22. Surveillance officers observed DELANDO JOHNSON and CS-3 walk into an unidentified apartment. Several minutes later, surveillance observed CS-3 exit on foot and immediately contact investigators to arrange to get picked up. Investigators maintained surveillance on CS-3 and ultimately picked CS-3 up to retrieve the drugs. Investigators then conducted a search of CS-3, found no weapons or contraband, other than the purchased drugs. Investigators then took possession of the suspected heroin.

23. A debriefing of CS-3 following the transaction consisted of the following in summary: CS-3 stated that s/he observed DELANDO JOHNSON going into an apartment on the lower level of the first apartment building consistent with where 1D would be located and that DELANDO JOHNSON came out of the building with a plastic bag. CS-3 stated that DELANDO JOHNSON and his girlfriend then got into the front seats of the Cadillac, while s/he got into the back and then proceeded to drive to the second apartment building. DELANDO JOHNSON and CS-3 then went into apartment 3C where a younger white male was inside. At that time, DELANDO

JOHNSON set down the bag he had obtained from his apartment (the first location) on the table and went to use the bathroom. CS-3 stated that s/he grabbed the bag and it felt like a large amount of what CS-3 believed to be heroin but stated s/he did not see what was inside. CS-3 stated that DELANDO JOHNSON returned from the bathroom and got approximately 12 grams of drugs from the bag and weighed it out in front of CS-3. CS-3 further stated that DELANDO JOHNSON sold the white male \$50 worth of heroin at the same time. CS-3 stated that s/he believed the bag was consistent with the 600 grams mentioned in prior conversations with CS-3. CS-3 further stated that, during the deal, the white male and DELANDO JOHNSON had a conversation that indicated DELANDO JOHNSON was storing "thousands of dollars" at the white male's apartment.

24. The drugs purchased by CS-3 were weighed and field-tested, and the result of the test was approximately 11.25 grams of heroin with fentanyl compound or methamphetamine.

25. Following the deal on May 27, 2020, DELANDO JOHNSON attended a social event that was also attended by BRENT WILKERSON, another drug trafficker in the Muskegon area. While at the event, DELANDO JOHNSON informed WILKERSON that CS-3 had made several drug purchases from him (DELANDO JOHNSON). After that, WILKERSON contacted CS-3 directly and offered to sell CS-3 heroin for \$95 per gram, which was cheaper than \$100 per gram that DELANDO JOHNSON was selling it for.¹

¹ Following DELANDO JOHNSON's efforts to connect CS-3 with WILKERSON,

II. Probable Cause to Search the Subject Device

26. There is probable cause to believe that forensic examination of the **Subject Device** will reveal electronic evidence of drug trafficking. The applied-for warrant would authorize the forensic examination of the **Subject Device** listed in Attachment A, should it come into law enforcement possession during the execution of the arrest warrant for DELANDO JOHNSON, for the purpose of identifying electronically stored data particularly described in Attachment B.

27. As shown above, DELANDO JOHNSON used the **Subject Device** for drug trafficking. Specifically, DELANDO JOHNSON used the **Subject Device** to arrange the deals with CS-3 outlined above. DELANDO JOHNSON has also continued to use the **Subject Device** to communicate with other drug traffickers in the Muskegon area, including WILKERSON. Specifically, between October 26, 2020 and January 2, 2021, the **Subject Device** was in contact with the phone WILKERSON used to arrange his own drug deals on 14 separate occasions. Finally, toll records show that as of January 2021, DELANDO JOHNSON continues to use the **Subject Device**.

WILKERSON sold CS-3 a quantity of heroin on June 25, 2020. That deal subsequently led to WILKERSON being introduced to an undercover law enforcement officer ("UC") who then went on to make multiple controlled purchases of heroin and methamphetamine from WILKERSON between June and September 2020. In January 2021, concurrent with the charges outlined herein, the United States is seeking to charge WILKERSON by criminal complaint in the United States District Court for the Western District of Michigan based upon his sales to CS-3 and the UC. See *United States v. Wilkerson*, 1:21-mj-00045.

28. Based on my training and experience, I know that electronic devices such as the **Subject Device**, can be used to store electronic information for long periods of times, including years. Even if a drug trafficker is being cautious of law enforcement detection and deleting the substance of communications, significant data may still remain on the phone, such as call logs, contact information, photographs, wireless internet connections (which can reveal location information), and other location information.

29. Further, based upon my training, experience, and participation in drug investigations and financial investigations relating to drug investigations, I am aware of the following:

- a. Drug traffickers often keep names, aliases, and/or contact information of suppliers, purchasers, and others involved in drug trafficking in their devices;
- b. Drug traffickers sometimes use electronic messaging or messaging apps, in addition to MMS, SMS text messages, and voice call, to communicate with suppliers, purchasers, and others involved in drug trafficking on their devices;
- c. Drug traffickers often take pictures or videos of their drug trafficking associates, drugs, money and/or firearms, which they store on their devices;
- d. Drug traffickers often maintain, on hand, large amounts of currency in order to maintain and finance their on-going narcotics business and often store information related to the profits of their narcotics trafficking on their devices;
- e. Global Position System (GPS) data on phones may show the location of a drug trafficker at a given time, which may provide corroborating evidence of a drug delivery or other instance of drug trafficking;
- f. User attribution data and usernames, passwords, documents, and browsing history can provide evidence that the device is being

used by a drug trafficker and can provide other useful evidence to the drug investigation;

- g. Drug traffickers often use the Internet to look up various information to support their drug trafficking activities on their devices;
- h. Drug traffickers often have unexplained wealth and assets as they do not have a job, nor do they report income on their state or federal tax returns. Subjects often use cash, money orders, and cashier's checks, and prepaid debit cards as a way of purchasing items as a way to disguise where the funds are ultimately coming from. Subjects will place assets in the names of nominees, which are often friends and family members in an attempt to hide the true ownership of the assets. It is common for drug traffickers to maintain books, records, receipts, notes, ledgers, receipts relating to the purchase of financial instruments and or the transfer of funds, and other papers relating to the transportation, ordering, sale and distribution of controlled substances. That the aforementioned books, records, receipts, notes, ledgers, etc., are maintained where the traffickers have ready access to them, including their devices;
- i. It is common for persons involved in drug trafficking to maintain evidence pertaining to their obtaining, secreting, transfer, concealment and or expenditure of drug proceeds on their devices. This evidence includes information related to currency, financial instruments, precious metals and gemstones, jewelry, books, records, invoices, receipts, records of real estate transactions, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, cashier's checks, bank checks, safe deposit box receipts or keys, records concerning storage lockers and money wrappers; and
- j. Drug traffickers frequently receive their supply of drugs through packages sent by U.S. Mail or third-party delivery service and frequently keep copies of tracking numbers, receipts and photographs of packaged narcotics on their devices.

Technical Terms

30. Based on my training and experience, I use the following technical terms to convey the following meanings:

- a. **Wireless telephone:** A wireless telephone (or mobile telephone, or cellular telephone) is a handheld wireless device used for voice and data communication through radio signals. These telephones send signals through networks of transmitter/receivers, enabling communication with other wireless telephones or traditional "land line" telephones. A wireless telephone usually contains a "call log," which records the telephone number, date, and time of calls made to and from the phone. In addition to enabling voice communications, wireless telephones offer a broad range of capabilities. These capabilities include: storing names and phone numbers in electronic "address books;" sending, receiving, and storing text messages and e-mail; taking, sending, receiving, and storing still photographs and moving video; storing and playing back audio files; storing dates, appointments, and other information on personal calendars; and accessing and downloading information from the Internet. Wireless telephones may also include global positioning system ("GPS") technology for determining the location of the device.
- b. **Digital camera:** A digital camera is a camera that records pictures as digital picture files, rather than by using photographic film. Digital cameras use a variety of fixed and removable storage media to store their recorded images. Images can usually be retrieved by connecting the camera to a computer or by connecting the removable storage medium to a separate reader. Removable storage media include various types of flash memory cards or miniature hard drives. Most digital cameras also include a screen for viewing the stored images. This storage media can contain any digital data, including data unrelated to photographs or videos.
- c. **Portable media player:** A portable media player (or "MP3 Player" or iPod) is a handheld digital storage device designed primarily to store and play audio, video, or photographic files. However, a portable media player can also store other digital data. Some portable media players can use removable storage media. Removable storage media include various types of flash memory cards or miniature hard drives. This removable storage media can also store any digital data. Depending on the model, a portable media player may have the ability to store very large amounts of electronic data and may offer additional features such as a calendar, contact list, clock, or games.

- d. **GPS**: A GPS navigation device uses the Global Positioning System to display its current location. It often contains records the locations where it has been. Some GPS navigation devices can give a user driving or walking directions to another location. These devices can contain records of the addresses or locations involved in such navigation. The Global Positioning System (generally abbreviated "GPS") consists of 24 NAVSTAR satellites orbiting the Earth. Each satellite contains an extremely accurate clock. Each satellite repeatedly transmits by radio a mathematical representation of the current time, combined with a special sequence of numbers. These signals are sent by radio, using specifications that are publicly available. A GPS antenna on Earth can receive those signals. When a GPS antenna receives signals from at least four satellites, a computer connected to that antenna can mathematically calculate the antenna's latitude, longitude, and sometimes altitude with a high level of precision.
- e. **PDA**: A personal digital assistant, or PDA, is a handheld electronic device used for storing data (such as names, addresses, appointments or notes) and utilizing computer programs. Some PDAs also function as wireless communication devices and are used to access the Internet and send and receive e-mail. PDAs usually include a memory card or other removable storage media for storing data and a keyboard and/or touch screen for entering data. Removable storage media include various types of flash memory cards or miniature hard drives. This removable storage media can store any digital data. Most PDAs run computer software, giving them many of the same capabilities as personal computers. For example, PDA users can work with word-processing documents, spreadsheets, and presentations. PDAs may also include global positioning system ("GPS") technology for determining the location of the device.
- f. **IP Address**: An Internet Protocol address (or simply "IP address") is a unique numeric address used by computers on the Internet. An IP address is a series of four numbers, each in the range 0-255, separated by periods (e.g., 121.56.97.178). Every computer attached to the Internet computer must be assigned an IP address so that Internet traffic sent from and directed to that computer may be directed properly from its source to its destination. Most Internet service providers control a range of IP addresses. Some computers have static—that is, long-term—IP addresses, while other computers have dynamic—that is, frequently changed—IP addresses.

g. **Internet:** The Internet is a global network of computers and other electronic devices that communicate with each other. Due to the structure of the Internet, connections between devices on the Internet often cross state and international borders, even when the devices communicating with each other are in the same state.

31. Based on my training and experience, I believe that the **Subject Device** has capabilities that allows it to serve as a wireless telephone, digital camera, portable media player, GPS navigation device, and/or PDA. In my training and experience, examining data stored on devices of this type can uncover, among other things, evidence that reveals or suggests who possessed or used the device.

Electronic Storage and Forensic Analysis

32. Based on my knowledge, training, and experience, I know that electronic devices can store information for long periods of time. Similarly, things that have been viewed via the Internet are typically stored for some period of time on the device. This information can sometimes be recovered with forensics tools.

33. *Forensic evidence.* As further described in the attachments hereto, this application seeks permission to locate not only electronically stored information that might serve as direct evidence of the crimes described on the warrant, but also forensic evidence that establishes how the **Subject Device** was used, the purpose of its use, who used it, and when. There is probable cause to believe that this forensic electronic evidence might be on the **Subject Device** because:

a. Data on the storage medium can provide evidence of a file that was once on the storage medium but has since been deleted or edited, or of a deleted portion of a file (such as a paragraph that has been deleted from a word processing file).

- b. Forensic evidence on a device can also indicate who has used or controlled the device. This "user attribution" evidence is analogous to the search for "indicia of occupancy" while executing a search warrant at a residence.
- c. A person with appropriate familiarity with how an electronic device works may, after examining this forensic evidence in its proper context, be able to draw conclusions about how electronic devices were used, the purpose of their use, who used them, and when.
- d. The process of identifying the exact electronically stored information on a storage medium that are necessary to draw an accurate conclusion is a dynamic process. Electronic evidence is not always data that can be merely reviewed by a review team and passed along to investigators. Whether data stored on a computer is evidence may depend on other information stored on the computer and the application of knowledge about how a computer behaves. Therefore, contextual information necessary to understand other evidence also falls within the scope of the warrant.
- e. Further, in finding evidence of how a device was used, the purpose of its use, who used it, and when, sometimes it is necessary to establish that a particular thing is not present on a storage medium.

34. *Nature of examination.* Based on the foregoing, and consistent with Rule 41(e)(2)(B), the warrant I am applying for would permit the examination of the devices consistent with the warrant. The examination may require authorities to employ techniques, including but not limited to computer-assisted scans of the entire medium, that might expose many parts of the device to human inspection in order to determine whether it is evidence described by the warrant.

35. *Manner of execution.* Because this warrant sought in this continuation seeks only permission to examine devices should they come into law enforcement's possession, the execution of this warrant does not involve the physical intrusion onto

a premises. Consequently, I submit there is reasonable cause for the Court to authorize execution of the warrant for search of the **Subject Device** at any time in the day or night.

Request for Authorization to Unlock Device with Fingerprints or Face Identification

36. Based on my knowledge and experience, I know that certain cellular telephones, including Apple iPhones, may be locked and/or unlocked by personal identification numbers (PIN), gestures or motions, and/or with biometric features, such as thumb and fingerprint recognition (collectively, "fingerprint ID") and/or facial recognition ("facial ID").

37. If a user enables the fingerprint ID unlock feature on a device, he or she can register several fingerprints that can be used to unlock that device. The user can then use any of the registered fingerprints to unlock the device by pressing the relevant finger(s) to the device's sensor, which typically is found on the front of the device. In my training and experience, users of devices that offer fingerprint ID or facial ID often enable it because it is considered to be a more convenient way to unlock the device than by entering a numeric or alphanumeric passcode or password, as well as a more secure way to protect the device's contents. This is particularly true when the user(s) of the device are engaged in criminal activities and thus have a heightened concern about securing the contents of the device.

38. In some circumstances, a fingerprint or face cannot be used to unlock a device, and a passcode or password must be used instead. Depending on the configuration of the security settings on the phone, the opportunity to unlock the

device via fingerprint ID or facial ID exists only for a short time. Fingerprint ID and facial ID also may not unlock the device if (1) the device has been turned off or restarted; (2) the device has received a remote lock command; or (3) several unsuccessful attempts to unlock the device are made.

39. The passcode or password that would unlock the device(s) found during the search is not known to law enforcement. Thus, it will likely be necessary to press the finger(s) of the user(s) or present the face of the user(s) of the device(s) found during the search to the device's fingerprint ID or facial ID sensor in an attempt to unlock the device for the purpose of executing the search authorized by this warrant. Attempting to unlock the relevant device(s) via fingerprint ID or facial ID is necessary because the government may not otherwise be able to access the data contained on those devices for the purpose of executing the search authorized by this warrant.

40. Although I do not know which of DELANDO JOHNSON's 10 fingerprints is capable of unlocking a particular device, based on my training and experience I know that it is common for a user to unlock a device via the fingerprints on thumbs or index fingers.

41. Based on the foregoing, I request that the Court authorize law enforcement to press the fingers (including thumbs) of DELANDO JOHNSON to the fingerprint ID sensor or to present his face to the facial ID sensor of any of his seized device(s) to attempt to unlock the device in order to search the contents as authorized by this warrant.

CONCLUSION

42. Based on the above information, I believe that there is probable cause to charge DELANDO JOHNSON, a/k/a "Fox," in the Western District of Michigan with distribution of heroin, a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Furthermore, there is probable cause to search the **Subject Device** should it be seized upon the execution of the arrest warrant.

EXHIBIT 4
Arrest Warrant

UNITED STATES DISTRICT COURT

for the

Western District of Michigan

United States of America

v.

)

) Case No. 1:21-mj-43

)

DELANDO JOHNSON

)

Defendant

)

ARREST WARRANT

To: Any authorized law enforcement officer

YOU ARE COMMANDED to arrest and bring before a United States magistrate judge without unnecessary delay

(name of person to be arrested)

DELANDO JOHNSON

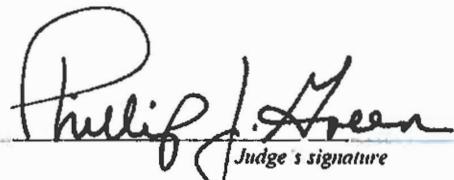
who is accused of an offense or violation based on the following document filed with the court:

Indictment Superseding Indictment Information Superseding Information Complaint
 Probation Violation Petition Supervised Release Violation Petition Violation Notice Order of the Court

This offense is briefly described as follows:

21 U.S.C. § 841(a)(1), (b)(1)(C) - Distribution of heroin, a Schedule II controlled substance.

Date: 01/29/2021



Judge's signature

City and state: Grand Rapids, Michigan

Phillip J. Green, United States Magistrate Judge

Printed name and title

Return

This warrant was received on (date) _____, at (city and state) _____.

, and the person was arrested on (date) _____.

Date: _____

Arresting officer's signature

Printed name and title

**This second page contains personal identifiers provided for law-enforcement use only
and therefore should not be filed in court with the executed warrant unless under seal.**

(Not for Public Disclosure)

Name of defendant/offender: DELANDO JOHNSON

Known aliases: a/k/a "Fox"

Last known residence: _____

Prior addresses to which defendant/offender may still have ties: _____

Last known employment: _____

Last known telephone numbers: _____

Place of birth: _____

Date of birth: 05/27/1992

Social Security number: 365-15-8347

Height: _____ Weight: _____

Sex: MALE Race: BLACK

Hair: BLACK Eyes: BROWN

Scars, tattoos, other distinguishing marks: _____

History of violence, weapons, drug use: _____

Known family, friends, and other associates (name, relation, address, phone number): _____

FBI number: 552856RC1; SID No: 3064645X (MI)

Complete description of auto: _____

Investigative agency and address: DEA - TFO Joe Young/ SA Heather Williamson
AUSA - Vito Soltro/ Stephanie Carowan

Name and telephone numbers (office and cell) of pretrial services or probation officer (if applicable): _____

Date of last contact with pretrial services or probation officer (if applicable): _____