No. 22-3603

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 4, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUSSELL DAVIS,

Defendant-Appellant.

ORDER

BEFORE: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: January 04, 2024

Mr. William Bernard Norman
Norman Law
115 Lincoln Avenue
Berea, OH 44017

Re: Case No. 22-3603, *USA v. Russell Davis*
Originating Case No.: 1:16-cr-00260-1

Dear Mr. Norman,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Matthew B. Kall

Enclosure

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

File Name: 23a0232p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUSSELL DAVIS,

Defendant-Appellant.

No. 22-3603

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:16-cr-00260-1—Christopher A. Boyko, District Judge.

Decided and Filed: October 23, 2023

Before: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: William Bernard Norman, W.E.B. NORMAN LAW, INC., Berea, Ohio, for Appellant. Matthew B. Kall, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

MURPHY, J., delivered the opinion of the court in which KETHLEDGE, J., joined. GILMAN, J. (pp. 15–19), delivered a separate dissenting opinion.

OPINION

MURPHY, Circuit Judge. If a police officer violates the Fourth Amendment by conducting a search without probable cause, the "exclusionary rule" requires a court to prohibit the use of any recovered evidence at the defendant's criminal trial. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). In *United States v. Leon*, 468 U.S. 897 (1984), however, the Supreme

Court held the exclusionary rule typically will not apply if the officer obtained a warrant for this search—even if the judge who issued the warrant erred in finding that probable cause existed. *See id.* at 922. That said, *Leon* added that the officer cannot rely on the judge's probable-cause ruling to avoid the exclusionary rule if the affidavit requesting the warrant was so bare bones that no reasonable officer could believe that it established probable cause. *See id.* at 923. This case, which reaches us for a second time, raises a novel issue under *Leon*'s framework.

Russell Davis sold fentanyl that caused a deadly overdose. After a thorough investigation, a detective obtained a warrant from an Ohio magistrate to search Davis's home in Lorain, Ohio. In Davis's first appeal, the government conceded that the detective's affidavit in support of this warrant omitted facts showing the required probable-cause "nexus" between Davis and his home. *United States v. Davis*, 970 F.3d 650, 666 (6th Cir. 2020). But we remanded for an evidentiary hearing because the government contended that the detective had provided additional (unrecorded) oral testimony in front of the magistrate. *Id.* During this later federal hearing, the detective stated that he believed he had told the magistrate about the evidence connecting Davis to the home, but he could not recall any specifics. The district court held that this general belief sufficed to avoid the "bare-bones" label and thus to trigger *Leon*'s exception to the exclusionary rule.

We agree for two basic reasons. First, the detective had uncovered overwhelming evidence tying Davis to the home. And second, the magistrate (not the detective) bore any blame for failing to transcribe the detective's additional oral testimony under state law. We also reject Davis's other challenges to the warrant. So we now affirm Davis's conviction in full.

I

A

On the morning of March 7, 2016, Jacob Castro-White's mother tragically discovered that he had died from a drug overdose in their Lorain home. *Id.* at 654. A first responder alerted Detective Ernest Sivert of the Lorain Police Department. *Id.* At Davis's trial, Sivert detailed his ensuing investigation. *Id.* at 663. Sivert noticed that Castro-White's phone had many missed calls from Zaharias ("Harry") Karaplis. *Id.* During an initial interview, Karaplis implicated an

individual known as "Red" as the drug dealer who might have sold the fatal drugs to Castro-White. *Id.* But Karaplis also lied to Sivert by denying any involvement. *Id.*

Sivert learned of this lie after receiving Castro-White's phone records. *Id.* Those records revealed Castro-White's activities on the evening of March 6. *Id.* at 654–55. Around 10:00 p.m., Castro-White began to text another friend, Corey Stock, about obtaining heroin. *Id.* Stock said that he could ask a drug-dealer acquaintance if she had heroin, but Castro-White declined the offer and said he would wait for Red. *Id.* at 654. Shortly before midnight, he texted Karaplis to see if Karaplis could arrange a drug deal with this person. *Id.* at 654–55.

In a follow-up interview with Sivert, Karaplis continued to lie about his involvement. Sivert confronted him with the texts. *Id.* at 663. Karaplis then requested a lawyer. *Id.* Before doing so, he identified the "Stock" in Castro-White's texts as Corey Stock. *Id.* Stock later told Sivert that he had bought drugs from "Red" at a "Garden Avenue home" in Lorain. *Id.*

After retaining counsel, Karaplis spoke with Sivert a third time. At last, Karaplis admitted his role. *Id.* He had arranged the heroin deal with Davis, and Castro-White had driven him to Davis's Garden Avenue house at 12:34 a.m. on March 7. *Id.* at 655. Karaplis paid Davis $50 for "what he thought was heroin," and Karaplis and Castro-White split the drugs. *Id.* It turns out that Davis had provided the men with fentanyl—a much stronger drug. *Id.* When speaking to Sivert this third time, Karaplis described Red and Red's car, provided Red's phone number, and located on Google Maps the specific home where he had bought drugs from Red. *Id.* at 663.

Sivert traveled to this home and spotted a car parked nearby that fit Karaplis's description. *Id.* Sivert learned that the car's license plate was registered to "Russell Davis" and that Davis's nickname was "Big Red." *Id.* He also asked Karaplis to look at a photo array. *Id.* Karaplis identified Davis's picture as "Red" with "100 percent" confidence. *Id.*

About a week later, Karaplis received a text message from Davis. *Id.* Karaplis contacted Sivert. *Id.* Sivert had Karaplis set up a phone call with Davis. When Karaplis began to discuss Castro-White's death, Davis asked if the police had "sweat[ed]" him about it. *Id.*

After this call, Sivert asked an Ohio magistrate for a warrant to search Davis's Garden Avenue home for his cellphone. *Id.* Sivert's affidavit summarized the events as follows:

> 1. In the early morning hours of . . . March 7, 2016, Jacob Castro-White was in contact with Zaharias Karaplis, another heroin user, for the purpose of obtaining heroin.
> 2. Zaharias Karaplis and Jacob Castro-White made contact with a male known as "Red" and later identified as Russell Davis, on his cellular phone (216) 526-8810 for the purpose of purchasing heroin, both through text and voice communication.
> 3. Zaharias Karaplis and Jacob Castro-White met with Russell "Red" Davis on March 7, 2016 for the purpose of buying heroin from him.
> 4. Jacob Castro-White ingested the purported heroin from Russell "Red" Davis and it caused him to overdose. The time between the purchase of the heroin from Russell "Red" Davis and the estimated time of death, by the Lorain County Coroner Steven Evans is approximately one (1) hour.
> 5. Toxicology tests conducted by the Lorain County Coroner's Office revealed that Jacob Castro-White had a lethal dose of Fentynal in his sytem [sic].
> 6. On April 12, 2016 at 0945 hours Zaharias Karaplis received a text message from Russell "Red" Davis via his cellular telephone with the number (216) 526-8810.

Id. at 663–64. "Based on this investigation," Sivert added, he believed that Davis had been "trafficking in heroin" from the Garden Avenue home and using his cellphone as an "instrument" of that "trafficking business." Aff., R.31-1, PageID 121. Sivert also opined that the phone was likely still at the Garden Avenue home, referring to it as the "residence of Davis." *Id.*

The magistrate granted the search warrant. *Davis*, 970 F.3d at 664. During the search of Davis's home, police found, among other things, the phone and illegal drugs. *Id.*

The government indicted Davis on two drug counts. *Id.* at 654. Davis moved to suppress the evidence recovered from his home. *Id.* at 664. The district court denied this motion. *Id.*

Davis stood trial on one of the drug counts. *Id.* at 654–55. A jury convicted him of distributing fentanyl and found that the distribution caused Castro-White's death. *Id.* at 655. Given this fatality, the district court sentenced Davis to a mandatory life sentence. *Id.*

In his first appeal, Davis sought to overturn his conviction on many grounds. We rejected all of his claims except for two concerning Davis's Fourth Amendment challenge to Sivert's affidavit. *Id.* at 656–66. Alleging that Sivert had omitted material facts from his affidavit, Davis argued that the district court should have held a hearing to examine the detective's truthfulness under *Franks v. Delaware*, 438 U.S. 154 (1978). *Davis*, 970 F.3d at 664. Alternatively, Davis argued that Sivert's affidavit did not assert any facts to show that Davis lived at the Garden Avenue home. In response to the second argument, the government conceded that the affidavit lacked the required probable-cause "nexus" between Davis and this home. *Id.* at 666. But it suggested that Sivert had given more oral testimony in front of the magistrate who issued the warrant. *Id.*

Ultimately, we remanded the case so the district court could hold an evidentiary hearing about what Sivert told the magistrate in person. *Id.* at 664, 666. We reasoned that the Fourth Amendment did not require written testimony. *Id.* at 666. We added that Sivert's investigation showed that he had plenty of facts connecting Davis to the Garden Avenue home. *Id.*

B

On remand, the district court held a hearing at which two witnesses testified: the magistrate who issued the warrant and Detective Sivert. Tr., R.147, PageID 2868. The magistrate explained that he followed a standard "process" when reviewing warrant requests. *Id.*, PageID 2880. He would "swear the officer," "review" the affidavit, and "discuss the issue with the officer[.]" *Id.* The magistrate did not use a court reporter to transcribe these conversations. *Id.* If an affidavit fell well short of probable cause but the officer knew more facts, the magistrate would ask the officer to draft another affidavit. *Id.*, PageID 2889–90. But the magistrate might not require a second affidavit if the first one fell "close" to the probable-cause line and the magistrate "needed clarification" on just one issue. *Id.*, PageID 2891. Although the magistrate described his general practice, he lacked a "specific recollection" of Davis's case. *Id.*, PageID 2882. But he would have been "shocked" if he had not spoken with Sivert about the warrant. *Id.*

Detective Sivert recalled more. Davis's case "stuck in [his] mind" because he knew the victim's grandfather, a retired police officer. *Id.*, PageID 2932. Sivert "discussed the majority of the case" with the magistrate but could not remember any details that he had disclosed. *Id.*, PageID 2933. He stated that he was "sure" that he had conveyed the many facts connecting Davis to the Garden Avenue home, but he added that he could not "be a hundred percent certain[.]" *Id.*

After this hearing, the district court again denied Davis's motion to suppress. *See United States v. Davis*, 2022 WL 2314009, at *1 (N.D. Ohio June 28, 2022). The court agreed that the affidavit failed to establish a probable-cause nexus between Davis and the Garden Avenue home. *See id.* at *4. It also found that the magistrate had put Sivert under oath to discuss the case. *Id.* at *6. But neither the magistrate nor Sivert could recall what Sivert had said. *Id.* at *6–7. Given the "unknown specifics," the court held that this testimony did not prove that Sivert conveyed facts to create probable cause that Davis lived at the home. *Id.* at *7.

Even so, the court held that the exclusionary should not apply under *Leon* because Sivert had relied on the magistrate's issuance of the warrant. *Id.* at *8–10. It initially rejected Davis's claim that *Leon*'s exception to the exclusionary rule could not apply because the magistrate had "abandon[ed] his role as a judicial officer." *Id.* at *9. The court next rejected Davis's claim that *Leon*'s exception should not apply because Sivert's supporting affidavit was "bare bones." *Id.* at *9–10. It decided that Sivert's general "belief" that he had told the magistrate the facts that connected Davis to the home sufficed to avoid the bare-bones label. *Id.* at *10. The court lastly rejected Davis's claim that Sivert's affidavit presented materially false information. *Id.* at *5.

Davis appeals a second time. We review the district court's findings of historical fact for clear error and its legal conclusions de novo. *United States v. Baker*, 976 F.3d 636, 641 (6th Cir. 2020). And we treat the court's ultimate decision to apply *Leon*'s warrant exception to the exclusionary rule as a legal conclusion. *United States v. Reed*, 993 F.3d 441, 446 (6th Cir. 2021).

II

The Fourth Amendment provides 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. To establish the probable cause necessary for a warrant, an officer's supporting affidavit must show a "probable-cause 'nexus'" tying the place to be searched to the items to be seized. *Reed*, 993 F.3d at 447. Here, Detective Sivert sought to seize Davis's phone from the Garden Avenue home. But Sivert's affidavit mistakenly omitted facts showing that Davis lived there. So the government does not dispute that the affidavit failed to establish probable cause that the police would find the phone at this location.

This case instead concerns the proper response to this Fourth Amendment problem. The Fourth Amendment's text does not require any specific remedy when a magistrate issues a warrant lacking probable cause. *See Herring v. United States*, 555 U.S. 135, 139 (2009). But the Supreme Court has long adhered to a judge-made "exclusionary rule" that sometimes bars the use of evidence at a defendant's trial if the police uncovered it in violation of the amendment. *See Davis v. United States*, 564 U.S. 229, 236–38 (2011); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995). The Court now applies this rule only if its benefits in stopping constitutional violations exceed its costs in hindering the trial's "truth-finding function" and permitting "wrongdoers" to escape punishment. *United States v. Robinson*, 63 F.4th 530, 534 (6th Cir. 2023).

Engaging in this cost-benefit balance, the Court in *Leon* held that the exclusionary rule generally should not apply if a judge issues a search warrant that violates the Fourth Amendment because it rests on an affidavit that does not establish probable cause. 468 U.S. at 916–21. *Leon* reasoned that the exclusionary rule exists to deter the misconduct of police officers—not judges. *See id.* at 916. In most cases, moreover, the officer seeking a warrant will "defer to the judge's legal conclusion" about whether probable cause exists. *Reed*, 993 F.3d at 450. So the blame for a bad warrant generally will fall on the judge. *See Leon*, 468 U.S. at 920–21.

Leon's rejection of the exclusionary rule would seem to govern Davis's case. After all, Sivert relied on the magistrate's conclusion that probable cause existed when he searched Davis's home based on the warrant that the magistrate had issued. And the magistrate (not Sivert) would have committed the primary "error" by overlooking that Sivert's affidavit failed to disclose facts showing that Davis lived at the home that Sivert sought to search. *Id.* at 921.

At the same time, *Leon* recognized that officers might sometimes bear the blame for unlawful warrants in "unusual" situations. *Id.* at 918. The Court identified "four" circumstances in which the exclusionary rule will still apply even if an officer obtains a warrant. *Baker*, 976 F.3d at 647 (citation omitted); *see Leon*, 468 U.S. at 923. Davis invokes three of these circumstances.

Circumstance One: "Bare-Bones" Affidavits. *Leon* held that the exclusionary rule should still apply even when an officer gets a warrant if the officer's supporting affidavit contained so little information that no reasonable officer could believe it established probable cause. 468 U.S. at 923. The classic example of this "bare-bones affidavit" alleges the officer's conclusory belief that probable cause exists without identifying any facts. *United States v. White*, 874 F.3d 490, 496, 498–99 (6th Cir. 2017). If, by contrast, an affidavit alleges "some modicum of evidence, however slight," connecting the sought-after items to the to-be-searched place, it will fall within *Leon*'s exception to the exclusionary rule. *Reed*, 993 F.3d at 451 (citation omitted).

Davis argues that Sivert drafted a bare-bones affidavit because it did not identify even a "modicum" of a connection between himself and his home. The government does not dispute Davis's claim that the affidavit *alone* was bare bones. So we need not consider that issue.

Rather, we must ask only whether Sivert's further testimony took this case outside the "bare-bones" camp. The district court could not identify any specific facts that Sivert told the magistrate because neither witness could recall the details years later. *See Davis*, 2022 WL 2314009, at *7. At best, Sivert stated a general "belief" that he told the magistrate about the information tying Davis to the residence. *Id.* at *10. The district court held that this belief provided the "modicum of evidence" required to trigger *Leon*'s exception. *Id.* We agree for two reasons.

First, Sivert uncovered plenty of evidence tying Davis to the Garden Avenue home. Stock told Sivert that he had bought drugs from "Red" at this home. *See Davis*, 970 F.3d at 663. Karaplis likewise identified the home on Google Maps as the place of the drug deal that led to the fatal overdose. *See id.* And Sivert corroborated their information. *See id.* When surveilling the home, he noticed the car that Karaplis identified as Red's and confirmed that the car belonged to Davis. *Id.* At the evidentiary hearing, Sivert added that he had run Davis's phone number through a police database, which also listed the Garden Avenue address as Davis's home. Tr., R.147, PageID 2946–47, 2960. If disclosed in Sivert's testimony, this evidence would have satisfied the Fourth Amendment by establishing probable cause that Davis lived at the home. *Davis*, 970 F.3d at 666.

In some courts, this evidence also would have triggered *Leon*'s exception to the exclusionary rule even if Sivert had not disclosed it to the magistrate. These courts hold that they may consider all of the circumstances (including facts "outside of the four corners of the affidavit") to evaluate whether an officer reasonably relied on a judge's finding that probable cause existed when issuing a warrant. *United States v. Farlee*, 757 F.3d 810, 819 (8th Cir. 2014); *United States v. McKenzie-Gude*, 671 F.3d 452, 459–60 (4th Cir. 2011); *United States v. Martin*, 297 F.3d 1308, 1318–19 (11th Cir. 2002); *United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992); *see also State v. Dibble*, 150 N.E.3d 912, 916–17 (Ohio 2020); *Adams v. Commonwealth*, 657 S.E.2d 87, 93–94 (Va. 2008); *Moore v. Commonwealth*, 159 S.W.3d 325, 328 (Ky. 2005); *State v. Edmonson*, 598 N.W.2d 450, 460–61 (Neb. 1999); *Moya v. State*, 981 S.W.2d 521, 525–26 (Ark. 1998).

Admittedly, our court rejects this rule. When engaging in the *Leon* inquiry, we will not rely on information known only to the officer (and not the magistrate). *See United States v. Waide*, 60 F.4th 327, 342 (6th Cir. 2023); *United States v. Laughton*, 409 F.3d 744, 751–52 (6th Cir. 2005); *see also United States v. Knox*, 883 F.3d 1262, 1270–73 & n.7 (10th Cir. 2018); *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988). We instead will consider only the outside-the-affidavit information that an officer discloses to a magistrate by other means. *See United States v. Frazier*, 423 F.3d 526, 535–36 (6th Cir. 2005); *see also United States v.*

Thomas, 852 F. App'x 189, 198–99 (6th Cir. 2021). Under our approach, then, Sivert's personal knowledge that Davis lived at the Garden Avenue home does not alone satisfy *Leon*.

Yet this approach brings us to our *second* reason why we will apply *Leon*'s warrant exception to the exclusionary rule: Sivert provided more facts to the magistrate. And the magistrate bears the blame for failing to make a record of these facts.

To begin with, the district court found that the magistrate had put Sivert under oath and obtained more information about the case. *See Davis*, 2022 WL 2314009, at *6. Our caselaw permits us to consider this extra information. *See Frazier*, 423 F.3d at 535–36. Sivert later opined that he "believe[d]" he told the magistrate the facts connecting Davis to the residence. Tr., R.147, PageID 2933. And the district court concluded that his testimony did not satisfy the Fourth Amendment only because nobody transcribed it. *See Davis*, 2022 WL 2314009, at *6–7.

Who is to blame for this oversight? That question matters under *Leon*. The Supreme Court has made clear that the exclusionary rule exists to deter only *police* misconduct. *See Davis*, 564 U.S. at 246. When an unlawful search arises from a *judge's* action, the Court has refused to exclude any evidence. That occurred in *Leon* itself, which reasoned that a judge bears the blame for issuing a warrant without probable cause. 468 U.S. at 921. The Court has since expanded this principle to other judicial errors. It refused to apply the exclusionary rule when a court clerk wrongly failed to notify the police that an arrest warrant had been quashed. *See Evans*, 514 U.S. at 4–5, 14–16. And it refused to apply the exclusionary rule when a police officer relied on an appellate court's misreading of the Fourth Amendment. *See Davis*, 564 U.S. at 241.

This principle applies here too. The magistrate (not Detective Sivert) had a duty to record his testimony under Ohio law. *See Dibble*, 150 N.E.3d at 921. When considering warrant requests, Ohio judges "may require the affiant to appear personally . . . , and may examine under oath the affiant and any witnesses the affiant may produce." Ohio Crim. R. 41(C)(2). This Ohio rule adds: "Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit." *Id.* The Ohio Supreme Court has held that any blame for failing to record this testimony belongs

to a judge. *Dibble*, 150 N.E.3d at 921. It reasoned that the "officer has no control over the court's recording and transcription procedures." *Id.* In this case, then, the "very fact" that the magistrate took more testimony would have led Sivert to reasonably "believe that the testimony [had] legal significance and [was] being properly considered in assessing probable cause." *Id.*

In sum, even if Sivert's affidavit could be described as bare bones, the added information that he gave the magistrate suffices to avoid the exclusionary rule. Sivert had substantial evidence connecting Davis to the Garden Avenue home. He testified about his investigation. And we lack specific details about his testimony only because the magistrate failed to transcribe it. Since Sivert did not engage in any intentional or reckless misconduct, the exclusionary rule should not apply to the evidence recovered from his search. *See Herring*, 555 U.S. at 147–48.

In response, Davis argues that we may not consider Sivert's oral testimony because Ohio law allegedly prohibits courts from relying on unrecorded evidence at later suppression hearings. Ohio Crim. R. 41(C)(2). His argument suffers from two problems. For one thing, this Ohio rule regulates state courts and does not govern in these federal proceedings. *See, e.g.*, *United States v. Beals*, 698 F.3d 248, 263–64 (6th Cir. 2012); *United States v. Wright*, 16 F.3d 1429, 1434 (6th Cir. 1994). And under our court's view of federal law, we may rely on information outside an affidavit where, as here, an officer conveys the information to the magistrate. *See Frazier*, 423 F.3d at 535–36. We have not limited this principle only to recorded information. For another thing, the Ohio Supreme Court itself recently held that this Ohio rule does not bar the use of unrecorded testimony when evaluating a *Leon* defense in Ohio's own courts. *See Dibble*, 150 N.E.3d at 920–21. So it would make no sense for us to rely on the rule to reject the testimony in federal court.

Circumstance Two: Officer Falsehoods. *Leon* also held that the exclusionary rule should apply despite a magistrate's issuance of a warrant if a police officer obtained the warrant by making a knowingly or recklessly false statement in the affidavit requesting it. 468 U.S. at 923. *Leon* cited the Court's earlier holding in *Franks* for this rule. *Leon*, 468 U.S. at 923. *Franks* held that a false statement in an affidavit can invalidate an ensuing warrant if the defendant proves two elements: that the officer knowingly or recklessly included the false statement and that the affidavit would not have established probable cause without it. 438 U.S. at 155–56.

Davis argues that this *Franks* rule should apply here because Sivert's affidavit did not tell the magistrate about Harry Karaplis's credibility issues, including his lies during their first two interviews. Davis thus does not rely on a *false statement* of fact in Sivert's affidavit. He relies on the *omission* of facts from the affidavit.

Although we have not categorically excluded these types of omissions from the *Franks* inquiry, we have repeatedly held that a defendant must meet a "higher" standard to invalidate a warrant based on an omission (rather than a false statement). *United States v. Neal*, 577 F. App'x 434, 450 (6th Cir. 2014) (quoting *United States v. Fowler*, 535 F.3d 408, 415 (6th Cir. 2008)); *see, e.g.*, *United States v. Fisher*, 824 F. App'x 347, 353–54 (6th Cir. 2020); *United States v. Alford*, 717 F. App'x 567, 570 (6th Cir. 2017); *United States v. Martin*, 920 F.2d 393, 398 (6th Cir. 1990). When describing this higher standard, we have sometimes noted that a defendant must prove that an officer omitted the information "with an intention to mislead" (not just with recklessness) and that the omission of the information was "critical to the finding of probable cause[.]" *Mays v. City of Dayton*, 134 F.3d 809, 816 (6th Cir. 1998); *see Hale v. Kart*, 396 F.3d 721, 726–27 (6th Cir. 2005). Other times, though, we have suggested that the defendant must show that the officer omitted the information intentionally or with reckless disregard. *See United States v. Graham*, 275 F.3d 490, 506 (6th Cir. 2001); *United States v. Atkin*, 107 F.3d 1213, 1217 (6th Cir. 1997). If the latter rule applies, it is unclear how we have set a "higher" standard for omissions than the one that governs false statements (as we have said).

Regardless, Davis cannot meet any version of *Franks*'s first element. The district court found that Sivert had not intentionally misled the magistrate or acted in reckless disregard of the truth when failing to disclose Karaplis's credibility problems. *See Davis*, 2022 WL 2314009, at *5. We treat this conclusion as a finding of historical "fact" about Sivert's state of mind and so review it under the deferential clear-error standard. *See United States v. Poulsen*, 655 F.3d 492, 504 (6th Cir. 2011); *United States v. Bonds*, 12 F.3d 540, 568–69 (6th Cir. 1993). Yet Davis does not point to any evidence to suggest—nor does he even argue—that Sivert intended to mislead the magistrate or acted in reckless disregard of the truth. Plenty of evidence shows the contrary. Sivert testified that he found Karaplis's statements credible despite his earlier lies. *See*

Davis, 2022 WL 2314009, at *5. Sivert also did much to corroborate the statements. *See id.* He reviewed Castro-White's phone records, interviewed Corey Stock, and surveilled Davis's house.

Circumstance Three: Biased Magistrates. Leon lastly held that the exclusionary rule should apply despite a magistrate's issuance of a warrant if the magistrate "wholly abandoned" a "judicial role" and failed to act as a neutral adjudicator. 468 U.S. at 923. *Leon* highlighted the decision in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), as containing the prototypical facts that fit this exception. *See Leon*, 468 U.S. at 923. In *Lo-Ji*, a "Town Justice" issued a warrant to search a store for allegedly obscene films. 442 U.S. at 321–22. This judge then accompanied the police to the store and oversaw the search. *Id.* at 322–23. The Court held that the judge had not acted with the "neutrality and detachment" required of those who have the duty to issue warrants because he had joined in the executive branch's criminal investigation. *Id.* at 326–27.

Since *Leon*, we have interpreted this exception to apply if a magistrate acted as a mere "rubber stamp" for an officer by issuing the warrant without independently examining whether probable cause exists. *See United States v. Abdalla*, 972 F.3d 838, 847 (6th Cir. 2020); *United States v. Thomas*, 605 F.3d 300, 311 (6th Cir. 2010); *United States v. Leake*, 998 F.2d 1359, 1366 (6th Cir. 1993); *see also Leon*, 468 U.S. at 914. But prevailing on this theory takes more than a perfunctory allegation. Indeed, we have repeatedly rejected claims that magistrates abdicated their roles in this way. We, for example, held that a magistrate did not act as a "rubber stamp" just because he failed to catch that the warrant listed the wrong address in one section of the document. *See Abdalla*, 972 F.3d at 847–48. We also rejected such a claim when the magistrate edited an affidavit on the officer's behalf, noting that this attention to detail instead revealed that the magistrate had reviewed the warrant request "with a critical eye." *United States v. Warren*, 365 F. App'x 635, 637 (6th Cir. 2010) (quoting *Frazier*, 423 F.3d at 538).

Davis's claim here suffers from the same fate as the claims in these other cases. The magistrate neither participated in Sivert's investigation nor "rubber stamped" his affidavit. Indeed, the magistrate did not even rely solely on the affidavit. Rather, he put Sivert under oath and interrogated him about the investigation. As in our other cases, then, the record shows that

the magistrate reviewed Sivert's warrant request with healthy skepticism, not blanket trust. *See id.*

Davis counters that the magistrate violated Ohio Rule of Criminal Procedure 41 by failing to record Sivert's testimony. As the Ohio Supreme Court noted, however, this rule provides only that oral testimony will be admissible in later suppression hearings if a magistrate records it. *Dibble*, 150 N.E.3d at 920. The rule did not require such a recording.

Davis also makes much of the magistrate's opinion that Sivert had "unquestionable" credibility based on the 25 years that they have known each other. Tr., R.147, PageID 2902. Yet the magistrate still did not "rubber stamp" Sivert's affidavit despite the high regard in which he held the detective's character. And Davis cites no caselaw holding that a judge's favorable opinion of a witness's credibility alone renders the judge biased under *Leon*.

We affirm.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. Because the record is still devoid of what information was conveyed to the state-court magistrate at the time Detective Sivert applied for the search warrant in question, I am not persuaded that the testimony on remand saves the bare-bones affidavit. I would therefore reverse the judgment of the district court and remand for the court to consider the government's alternative argument predicated on harmless error.

I. BARE-BONES ANALYSIS

In *United States v. Leon*, 468 U.S. 897, 920 (1984), the Supreme Court held that evidence obtained pursuant to an invalid search warrant need not be suppressed "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." But an officer does not act in objective good faith if the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)). Such an affidavit has been characterized as "bare bones." *Id.* at 915, 926.

When assessing an officer's good-faith reliance on a search warrant, "[t]his court has been unequivocal in holding that . . . 'a determination of good faith reliance . . . must be bound by the four corners of the affidavit.'" *United States v. Waide*, 60 F.4th 327, 342 (6th Cir. 2023) (quoting *United States v. Laughton*, 409 F.3d 744, 751 (6th Cir. 2005)). But our court carved out a narrow exception to this rule in *United States v. Frazier*, 423 F.3d 526, 534–36 (6th Cir. 2005), for omitted information known to the affiant and revealed to the magistrate.

In *Frazier*, this court affirmed a district-court order denying the defendant's motion to suppress evidence that yielded marijuana and firearms. *Id.* at 529. The record in *Frazier* contained highly probative information concerning the defendant's participation in two prior drug transactions that was omitted from the affidavit. *Id.* at 535. Neither party disputed that the officers independently informed the magistrate that an informant had recorded the defendant's

participation in these two transactions. *Id.* The officers included this probative information in five related warrant affidavits presented contemporaneously to the magistrate. *Id.* This court held that "a court reviewing an officer's good faith under *Leon* may look beyond the four corners of the warrant affidavit to information that was known to the officer and *revealed to the magistrate*." *Id.* at 535–36 (emphasis added).

Frazier's narrow exception was subsequently applied in *United States v. Thomas*, 852 F. App'x 189 (6th Cir. 2021). In that case, a magistrate evaluated two related affidavits concerning a house and a barber shop. *Id.* at 191. The affidavit pertaining to the house contained highly probative information about the defendant's frequent meetings with a known drug dealer that was omitted from the barber-shop affidavit. *Id.* at 197. There was also evidence in the house affidavit that the drug dealer met with the defendant only when the dealer's drug supply was low. *Id.* at 197–98. Both warrants were issued the same day. *Id.* at 198. Because there was no question that the magistrate was presented with the key facts relevant to each warrant, there was no reason to believe that the magistrate did not recall and consider these key facts omitted from the barber-shop affidavit. *Id.* The omitted facts were therefore permitted to be considered under these circumstances. *Thomas* ultimately interpreted *Frazier* as standing for the proposition that "the good-faith exception could apply where *information clearly known and considered by the magistrate*, but inadvertently excluded from an affidavit, supported a finding of probable cause." *Id.* (emphasis added) (citation omitted).

In the present case, the government does not dispute that the affidavit at issue is bare bones. *See* Majority Op. at 8. Reliance on the affidavit alone would therefore be objectively unreasonable. *See Leon*, 468 U.S. at 923. To address this issue, we remanded this case with instructions for the district court to hold an evidentiary hearing. *United States v. Davis*, 970 F.3d 650, 666 (6th Cir. 2020). We reasoned that a remand was necessary because "[n]o evidence tells us whether [Detective] Sivert conveyed these facts [connecting Davis to the residence] under oath to the magistrate before the magistrate issued the warrant." *Id.* (citing *United States v. Beals*, 698 F.3d 248, 268 (6th Cir. 2012)).

But even after the remand, we have no clue about what material information Detective Sivert conveyed to the magistrate, let alone information "clearly known and considered by the magistrate." *See Thomas*, 852 F. App'x at 198. The magistrate has no recollection at all of any additional facts that Detective Sivert discussed with him. And Detective Sivert has no more than a "belief" that he informed the magistrate about the facts tying Davis to the residence in question.

The majority, for its part, agrees that, "[a]t best, Sivert stated a general belief that he told the magistrate about information tying Davis to the residence." Majority Op. at 8. But the majority contends that Detective Sivert's general belief provided "a modicum of evidence" to trigger *Leon*'s good-faith exception. *Id.* This court, however, has never applied the modicum-of-evidence analysis to settle what the magistrate was clearly told. The modicum-of-evidence test is instead relevant only in analyzing *Leon*'s good-faith nexus between criminal activity and the places to be searched. *See, e.g.*, *Laughton*, 409 F.3d at 749 (observing that good faith may be found where review "turn[s] up some modicum of evidence, however slight, to connect the criminal activity described in the affidavit to the place to be searched"); *United States v. Rose*, 714 F.3d 362, 368 (6th Cir. 2013) (holding that a modicum of evidence triggered the good-faith exception because "the . . . affidavit does . . . establish a link between criminal activity and [the defendant] . . . .").

Neither the majority nor the government has identified a case equating *Leon*'s good-faith nexus analysis with the quantum of proof necessary to clearly show that the magistrate knew of and considered facts omitted from an affidavit. The facts here are thus materially different from those in the cases of *Frazier*, 423 F.3d at 535, and *Thomas*, 852 F. App'x at 191, that are cited by the majority. Given that we lack what information Detective Sivert told the magistrate, I find no basis for the majority's conclusion that we may look beyond the affidavit under these circumstances. Absent additional evidence supplementing the affidavit, then, the bare-bones affidavit is insufficient to support a finding of good faith.

II. DETECTIVE SIVERT'S UNREASONABLE RELIANCE

The majority's second reason for applying *Leon*'s good-faith exception is because "the magistrate bears the blame for failing to make a record of these facts [provided by Detective Sivert]." Majority Op. at 10. To the contrary, good faith under *Leon* is a question of the officer's reasonableness, not the reasonableness of the issuing magistrate. *Frazier*, 423 F.3d at 533 ("The 'good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'") (quoting *Leon*, 468 U.S. at 922 n.23); *Thomas*, 852 F. App'x at 198 ("[G]ood-faith is ultimately a question of officer reasonableness in executing the warrant, not the reasonableness of the issuing magistrate.").

Consequently, irrespective of the magistrate's failure to transcribe Detective Sivert's oral testimony (whatever it was), the blame for relying on an undisputedly bare-bones affidavit falls on Detective Sivert. And bare-bones affidavits do not fall within *Leon*'s good-faith exception to the exclusionary rule. *United States v. Reed*, 993 F.3d 441, 450 (6th Cir. 2021).

III. HARMLESS ERROR

Alternatively, the government argues that affirming on the basis of harmless error would be appropriate because the government had already obtained phone records, text messages, and "compelling evidence" proving that Davis sold the heroin that caused Castro-White's death. The district court did not reach the government's harmless-error argument because the court found that *Leon*'s good-faith exception applied. *See United States v. Davis*, No. 1:16CR260, 2022 WL 2314009, at *10 (N.D. Ohio June 28, 2022). I would remand this case so that the district can address in the first instance whether the government's error was harmless in light of the other evidence implicating Davis in Castro-White's death. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975) ("[This] is a matter best decided, in the first instance, by the District Court. That court will be free to take . . . new evidence . . . .").

IV. CONCLUSION

In sum, because Detective Sivert's testimony on remand does not shed any light on why he relied on a bare-bones affidavit, I believe that the *Leon* good-faith exception does not apply. I would therefore reverse the judgment of the district court and remand this case for the court to consider the government's alternative argument predicated on harmless error. Accordingly, I respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	**CASE NO. 1:16CR260**
	)	
Plaintiff,	)	**SENIOR JUDGE**
	)	**CHRISTOPHER A. BOYKO**
vs.	)	
	)	
RUSSELL DAVIS,	)	**OPINION AND ORDER**
	)	
Defendant.	)	

CHRISTOPHER A. BOYKO, SR. J.:

After a limited remand from the Sixth Circuit, Defendant asks this Court to exclude evidence because probable cause was not established to search his residence. (Doc. 141). However, the exclusionary rule does not automatically exclude evidence uncovered in violation of the Fourth Amendment. This is especially true where, as here, law enforcement exhibited good faith in their reliance on a judicially approved search warrant.

Accordingly, the Court **DENIES** Defendant's Motion to Suppress.

I. BACKGROUND[1]

On May 4, 2018, a Jury convicted Defendant for his distribution of fentanyl, from which a death resulted. Defendant appealed. The Sixth Circuit affirmed the conviction but, after concession by the Government, remanded the case back to this Court for a probable cause hearing. *United States v. Davis*, 970 F.3d 650, 666 (6th Cir. 2020).

[1] This Court's Background is taken from testimony received on remand, with supplementation from the trial transcript as necessary.

Appendix A

On remand, the Court ordered cross-briefs and held a hearing on March 10, 2022. Two witnesses testified on behalf of the Government: Lorain Municipal Court Magistrate D. Chris Cook[2] and Detective Ernest "Buddy" Sivert, a retired 29-year veteran of the Lorain Police Department. Defendant did not present any witnesses.

While the Sixth Circuit's remand concerns the events that occurred on April 12, 2016, more background is necessary. A month earlier, on March 7, 2016, Detective Sivert responded to a call concerning an overdose death. The victim was JCW, a young male whose grandfather had been a Lorain Police Officer. From this initial call, the case stood out to Detective Sivert.

An investigation ensued. Relevant here, police obtained JCW's cellphone. The cellphone was password protected and authorities were unable to move pass the lock screen. Unable to review the content of JCW's cellphone, Detective Sivert subpoenaed Verizon (JCW's cellphone provider) for relevant records.

Despite the cellphone being locked, law enforcement could see that one person attempted to contact JCW numerous times that morning. That person was Zaharias "Harry" Karaplis. So, Detective Sivert asked Harry to come to the police station, which Harry did on March 7, 2016. During that interview, Harry lied to Detective Sivert about his involvement with narcotics. But Harry did confirm that JCW had a drug problem and Harry identified an individual by the name of "Red" as the potential source of the narcotics.

Two days after meeting with Harry, Detective Sivert received phone logs from Verizon. After organizing the information, Detective Sivert realized that Harry had not been completely forthcoming during his interview. Based on his review, Detective Sivert determined that Harry and JCW went together to purchase narcotics that night.

[2] Magistrate Cook has since been elected to the Lorain County Court of Common Pleas. The Court refers to him as "Magistrate" simply to reflect the position he held during the relevant period.

Detective Sivert then asked Harry back to the police station for a follow up interview. During this second interview, Detective Sivert presented Harry with the evidence from JCW's cellphone. At this point, Harry requested an attorney.

During the second interview with Harry, Detective Sivert confirmed another potential witness – Corey Stock. Stock's name had appeared throughout the text messages that Detective Sivert received on March 9. Detective Sivert asked Stock to come to the police station for a conversation. The two met on March 22. During that conversation, Detective Sivert obtained a "location of a house" and "a description of someone."[3]

Detective Sivert thought it was necessary to meet with Harry for a third time. This time, Harry came with counsel. At this meeting, Harry, using Google Maps, identified the residence where he and JCW went to purchase drugs the morning of March 7. That residence was identified as 1832 Garden Avenue. Harry also provided a physical description of Defendant, as well as a description of Defendant's vehicle.

The same day as Harry's third meeting, Detective Sivert surveilled the suspect residence on Garden Avenue. During surveillance, Detective Sivert located 1832 Garden Avenue and matched it to the property identified by Harry. Detective Sivert also observed a vehicle outside of the residence that matched Harry's description. He ran the vehicle's license plate through police database and determined that Defendant owned the vehicle.

Back at the station, Detective Sivert continued his search of police records. This resulted in evidence showing that Defendant had the nickname of "Big Red." Detective Sivert also

[3] This paragraph is supplemented by Detective Sivert's testimony at Trial. During the remand hearing, Detective Sivert did discuss talking with Stock and Stock telling Detective Sivert where Defendant's house was located. (Doc. 147, PageID: 2959-60).

conducted a photo array containing Defendant's picture. After being shown this photo array, Harry indicated on Defendant's photograph that "100% this is Red." (Doc. 148-2).

A few days later, on April 12, Harry met with Detective Sivert for a fourth time. This time, Harry showed the detective a text message he said came from Red. This prompted Detective Sivert to attempt a controlled phone call between Harry and Red that would be recorded for evidence. During the call, Defendant provided damaging information.

On the same day as the controlled call, law enforcement sought a search warrant for 1832 Garden Avenue. Specifically, police sought Defendant's cellphone. In support of the search, Detective Sivert[4] made the following allegations:

> 1. In the early morning hours of...March 7, 2016, [JCW] was in contact with Zaharias Karaplis, another heroin user, for the purpose of obtaining heroin.
>
> 2. Zaharias Karaplis and [JCW] made contact with a male known as "Red" and later identified as Russell Davis, on his cellular phone (***) ***-8810 for the purpose of purchasing heroin, both through text and voice communication.
>
> 3. Zaharias Karaplis and [JCW] met with Russell "Red" Davis on March 7, 2016 for the purpose of buying heroin from him.
>
> 4. [JCW] ingested the purported heroin from Russell "Red" Davis and it caused him to overdose. The time between the purchase of the heroin from Russell "Red" Davis and the estimated time of death, by the Lorain County Coroner Steven Evans is approximately one (1) hour.
>
> 5. Toxicology tests conducted by the Lorain County Coroner's Office revealed that [JCW] had a lethal dose of Fentanyl* in his system.
>
> 6. On April 12, 2016, at 0945 hours Zaharias Karaplis received a text message from Russell "Red" Davis via cellular telephone with the number (***) ***-8810.

[4] Detective Sivert did not draft the Affidavit. Instead, a fellow officer drafted it, Detective Sivert reviewed it and ultimately executed it.

(Doc. 31-1, PageID: 121).

The crux of the issue before the Court on remand is whether Detective Sivert presented additional testimony to supplement this Affidavit. Magistrate Cook testified that, while it is his normal process to read the affidavit, place the affiant under oath and then engage in further discussion, he did "not have a specific recollection of discussing th[is] case" with Detective Sivert. (Doc. 147, PageID: 2882). For his part, Detective Sivert testified that he and Magistrate Cook,

> Discussed the majority of the case. I can't sit here today and say specifically what we talked about, but it was general information about the case, basically how it started, the whole thing, and how we were able to reach the conclusion why we wanted a search warrant to obtain the phone.

(*Id.* at PageID: 2933).

Following the hearing, the Court requested additional briefing. The Government filed its post-hearing brief on April 18, 2022 (Doc. 149) and Defendant filed his brief on April 20, 2022. (Doc. 151).

II. LAW & ANALYSIS

A. Standard of Review

The Fourth Amendment to the United States Constitution states:

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

U.S. CONST. amend. IV.

Probable cause is defined as "reasonable grounds for belief, supported by less than prima facie proof, but more than mere suspicion" and exists "when there is a 'fair probability' given the

totality of the circumstances, that contraband or evidence of a crime will be found in a particular place." *United States v. Lattner*, 385 F.3d 947, 951 (6th Cir. 2004), *cert. denied*, 543 U.S. 1095 (2005) (citing *United States v. Davidson*, 936 F.2d 856, 859 (6th Cir. 1991)).

In *Illinois v. Gates*, the Supreme Court announced the basic standard for determining whether an affidavit establishes probable cause to issue a search warrant:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, ***given all the circumstances set forth in the affidavit*** before him [or her],...there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

426 U.S. 213, 238-39 (1983) (emphasis added); *see also United States v. Helton*, 314 F.3d 812, 819 (6th Cir. 2003); *Davidson*, 939 F.2d at 859.

A finding of probable cause "should be paid great deference by reviewing courts." *Gates*, 462 U.S. at 236. However, reviewing courts must ensure that the issuing magistrate or judicial officer did "not serve merely as a rubber stamp for the police." *United States v. Leon*, 468 U.S. 897, 914 (1984) (quoting *Aguilar v. Texas*, 378 U.S. 108, 111 (1964)). Further, reviewing courts "will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" *Id.* at 915 (quoting *Gates*, 462 U.S. at 239)).

Typically, a reviewing court concerns itself with only those facts which appear within the four corners of the affidavit. *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1998) (citing *Whitley v. Warden*, 401 U.S. 560, 564-65 (1971)); *Untied States v. Hatcher*, 473 F.2d 321, 324 (6th Cir. 1973). There is also a presumption of validity with respect to affidavits supporting search warrants. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Finally, it is well-recognized

that "affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation," and courts should "remain cautious not to interpret the language of affidavits in a hyper-technical manner." *Weaver*, 99 F.3d at 1378 (citations omitted).

In its post-hearing brief, the Government asks the Court to answer three questions: 1) did the Affidavit on its own establish probable cause to search 1832 Garden Avenue?; 2) if not, did Detective Sivert's oral testimony provide the additional facts necessary to search the residence?; and 3) if the answer is no, does the good-faith exception to the exclusionary rule apply? The Court answers these questions in turn.

B. The Affidavit's Four Corners Do Not Establish Probable Cause to Search the Residence

The four-corners of the Affidavit did not establish the requisite nexus to search 1832 Garden Avenue. 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 affidavit must suggest 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 and not merely that the owner of the property is suspected of crime. *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)).

Detective Sivert's Affidavit contains just six short factual paragraphs that detail JCW's overdose, the events preceding it and Defendant's role as the suspected supplier of the deadly drugs. It also includes facts that Defendant used his cellphone to facilitate drug sales and contact Harry after JCW's death. From these factual averments, Detective Sivert concluded "that [Defendant] is trafficking in heroin from the residence of 1832 Garden Avenue and is using his cellular telephone (***) ***-8810 as an instrument of his trafficking business...[and] that the

cellular telephone...is still inside 1832 Garden Avenue, Lorain, Ohio, the residence of [Defendant]." (Doc. 31-1, PageID: 121).

Beyond this conclusion, what is noticeably absent from Detective Sivert's averments are any factual allegations connecting Defendant to 1832 Garden Avenue. The only references to this address are in the recited conclusion and the opening paragraphs, with brief references to where the crimes were committed and the request to search the residence. This is improper, as the law requires an affidavit be supported by facts, rather than unadorned conclusions. *Weaver*, 99 F.3d at 1377. And since the Affidavit does not allege any facts connecting Defendant, his cellphone and his activities to 1832 Garden Avenue, the Affidavit does not present a "sufficient nexus between the place searched and the evidence sought." *Kenny*, 505 F.3d at 461.

The Government seemed to agree with this conclusion when the case was before the Sixth Circuit. *See Davis*, 970 F.3d at 666 ("The government now concedes that Sivert's affidavit did not contain enough facts tying Davis (and his phone) to this location"). And the Government does not seriously contend now that the Affidavit established the proper nexus to the residence. Instead, the Government relies on Detective Sivert's testimony at the remand hearing to establish probable cause. But we are not there yet. Accordingly, the answer to the Government's first question is "no" – the Affidavit on its face did not provide sufficient probable cause for issuing the warrant.

Before moving to Detective Sivert's testimony, the Court addresses Defendant's argument that the Affidavit presented materially false information under *Franks v. Delaware.* Throughout briefing and oral argument, Defendant attacks the Affidavit on facts that it did not contain. According to Defendant, if law enforcement would have included facts about the credibility of Harry, the Magistrate would have never issued the search warrant in the first place.

The Government argues this disclosure was unnecessary because each item was independently verified through further investigation.

To reiterate the above – when making a probable cause determination, courts are generally concerned with only those facts within the four corners of the affidavit. *Weaver*, 99 F.3d at 1378. Defendant would like the Court to consider ***additional facts*** not contained in the Affidavit. This is plausible, as a *Franks* issue may be predicated on material omissions. *United States v. Graham*, 275 F.3d 490, 506 (6th Cir. 2001). But the Sixth Circuit has "recognized that an affidavit which omits potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information." *United States v. Atkins*, 107 F.3d 1213, 1217 (6th Cir. 1997). To be entitled to a hearing, a defendant must (1) make "a substantial preliminary showing that the affiant engaged in a deliberate falsehood or reckless disregard for the truth in omitting information from the affidavit; and (2) [show that] a finding of probable cause would not be supported by the affidavit if the omitted material were considered[.]" *United States v. Fowler*, 535 F.3d 408, 415 (6th Cir. 2008); *see also United States v. Fisher*, 824 Fed. App'x 347, 353 (6th Cir. Aug. 19, 2020) (a defendant must show "that the affiant with an intention to mislead excluded critical information from the affidavit, and the omission is critical to the finding of probable cause"). Finally, when alleging material omissions, a defendant faces a higher bar for obtaining a hearing as opposed to an allegedly false affirmative statement. *Fowler*, 535 F.3d at 415; *see also Graham*, 275 F.3d at 506 (a *Franks* hearing is only merited in cases of omissions in 'rare instances').

Defendant has not established that the omitted material should have been included in the Affidavit. Even though Defendant did not hurdle the 'higher bar' to show his entitlement to a hearing, the Court allowed Defendant to proceed on this theory and question both witnesses

about his claims. But counsel's questioning did not establish that Detective Sivert engaged in any deliberate falsehood or recklessly disregarded the truth. Rather, it established that Detective Sivert verified and pursued additional investigatory tactics as he uncovered more information. As the Detective stated himself, he "wouldn't have presented [information obtained from Harry] if [he] didn't think it was credible." (Doc. 147, PageID: 2943). This certainly does not support Defendant's theory that the detective misled the Magistrate with certain omissions.

Furthermore, the Affidavit identified the main witness – Harry. This is not a scenario where law enforcement is relying on an anonymous source or a confidential informant. Rather, it was a witness known to law enforcement and the magistrate. Harry also admitted to certain criminal behavior, which is relevant to a probable cause finding. *See United States v. Harris*, 403 U.S. 573, 583 (1971) ("Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility – sufficient at least to support a finding of probable cause to search").

Finally, the probable cause inquiry would not be impacted by the inclusion of this information. The fact that Harry initially lied to Detective Sivert about his own drug use has no bearing on the nexus to the residence – which the Court found was the missing link for probable cause. Accordingly, Defendant's challenge under *Franks* has no merit.

C. Detective Sivert's Supplemental Testimony Did Not Provide Probable Cause

Next, the Government claims that Detective Sivert provided the required nexus orally when he sought the search warrant from the Magistrate. Because the Detective did this while under oath, the subsequent search did not offend the Fourth Amendment. Defendant disagrees. He points to one fact gleaned from the hearing on remand – no one could testify as to the

specifics of what was discussed between the Magistrate and the Detective. Accordingly, it is impossible to find that the Detective provided the requisite nexus to the residence.

The Sixth Circuit has "long held that an affiant may supplement an inadequate affidavit with factual allegations presented to the magistrate through sworn testimony." *Davis*, 970 F.3d at 666 (collecting cases). This is because the Fourth Amendment "does not require oral testimony to be transcribed or otherwise recorded. Nor did the American legal tradition at the time of the Fourth Amendment's adoption." *Id.* (quoting *United States v. Patton*, 962 F.3d 972, 974 (7th Cir. 2020)). The important part, for Fourth Amendment purposes, is that the affiant be under oath when he provides the supplemental information. *See id.*; *Sparks v. United States*, 90 F.2d 61 (6th Cir. 1937) (supplemental testimony must be competent and sworn before supplementing a written affidavit); *United States v. Hang Le-Thy Tran*, 433 F.3d 472, 482 (6th Cir. 2006) ("the issuing magistrate may consider sworn, unrecorded oral testimony supplementing a duly executed affidavit to determine whether there is probable cause upon which to issue a search warrant"); *United States v. Parker*, 4 Fed. App'x 282, 284 (6th Cir. 2001) (supplemented information provided while under oath is clearly entitled to consideration, while unsworn testimony must be disregarded because probable cause affidavits are not to be supplemented with unsworn statements); *Patton*, 962 F.3d at 974 (reciting the Fourth Amendment's requirement of an "oath" supporting probable cause).

While the parties overlook the significance of the oath requirement, the Court finds that the evidence supports the fact that Magistrate Cook placed Detective Sivert under oath before discussing the investigation and issuing the warrant to search 1832 Garden Avenue. When asked directly by the Court, Detective Sivert answered that Magistrate Cook placed him under oath before discussing the case further. (Doc. 147, PageID: 2965). And for his part, Magistrate Cook

stated that it was his practice to always place officers appearing before him under oath. (*Id.* at PageID: 2880). Defendant did not contest either statement. Thus, the Court finds that Detective Sivert was under oath when he discussed the investigation with Magistrate Cook.

The issue for the Government, however, is that the record does not definitively establish ***what*** (i.e., the substance) Detective Sivert told Magistrate Cook under oath. And this is where Rule 41's requirement of transcribed oral statements would be helpful.[5] But the Court does not have that evidence because Magistrate Cook neglected to memorialize the conversation.

Instead, the Court is left with the evidence revealed at the hearing on remand and the witnesses' (understandably) hazy memories. Start with Magistrate Cook – he testified that he could not specifically recall issuing the warrant in this case. While it was his practice to talk about the investigation with affiants, he cannot recall doing so with Detective Sivert. (Doc. 147, PageID: 2881-82).

For his part, Detective Sivert does remember talking about this case with Magistrate Cook. That is because this investigation stood out to him – a retired officer's grandson dying of an overdose. But as to the substance of the conversation, that remains unclear. While on direct examination (and subject to substantial leading from the prosecutor), Detective Sivert testified that he "believed" he talked about Defendant's connection to 1832 Garden Avenue. Specifically, Detective Sivert said he:

> Believed we talked about the vehicle and the residence. Like I explained, I think we pretty much discussed a lot about the case, as far as how we obtained evidence and how we obtained information

[5] The Government wants to distinguish the requirements between Ohio Criminal Rule 41 and Federal Criminal Rule 41. But both Rules require a judicial officer to record any oral supplementation of an affidavit for a search warrant. *Compare* Fed. R. Crim. P. 41(d)(2)(C) ("testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit") *with* Ohio R. Crim. P. 41(C)(2) ("Before ruling on a request for a warrant, the judge...may examine under oath the affiant and any witnesses the affiant may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed, and made part of the affidavit").

> that led us to this point. That's a standard thing I would do in any search warrant, but specifically, verbatim I don't know if I could explain exactly what was said, but it was mostly about the process of the case, how it went through investigation.

(*Id.* at PageID: 2937).

On cross-examination, Detective Sivert reiterated he could not recall any specifics of the conversation and that he did not make a contemporaneous record. (*Id.* at PageID: 2938-39). On redirect then, the Government focused on all the information the Detective had at the time of the search that tied Defendant to 1832 Garden Avenue: i) a description of the suspect house, including location; ii) a description of the suspect vehicle; iii) police records tying Defendant to the residence; iv) surveillance of the residence by law enforcement; v) confirmation that the residence matched the provided information; and vi) confirmation that the vehicle matched the provided information, as well as that it was owned by Defendant.[6] (*See generally, id.* at PageID: 2955-62).

The witnesses' "hazy" recollections make these "frothy nexus waters," *see United States v. Reed*, 993 F.3d 441, 452 (6th Cir. 2021), even more unclear. To approve this warrant and supplementation, the Court must find that Magistrate Cook had a "substantial basis" to find probable cause to search a location. But the unknown specifics here, even considering Detective Sivert's "belief," make it impossible to determine if that substantial basis – and the all-important nexus – were discussed here. Because of this, the Court finds that the Affidavit, even after

[6] The Government also cites the text "Garden" from Defendant to Corey Stock as information that law enforcement had prior to the search of the residence. (*See* Doc. 147, PageID: 2956-57). This is factually incorrect. As the Government's Exhibit shows, the "Garden" text came from the Cellebrite of Defendant's phone, which was uncovered ***after authorities searched the residence***. Detective Sivert testimony at trial confirms this fact. (Doc. 97, PageID: 909-10, discussing that the Federal Bureau of Investigation conducted the Cellebrite search after authorities found Defendant's phone at his residence). The Government's mistake here underscores the issue presented in the case – what was relayed from Detective Sivert to Magistrate Cook at the time he applied for the Search Warrant?

considering Detective Sivert's additional sworn testimony, did not provide a substantial basis to search the residence.

D. Law Enforcement Relied in Good Faith on the Search Warrant

Despite the lack of probable cause, the Court finds that Detective Sivert and his fellow officers relied on the court-issued search warrant in good faith. Accordingly, the Court will not exclude the evidence uncovered at Defendant's residence.

The exclusionary rule – the court-developed remedy for Fourth Amendment violations, *see Mapp v. Ohio*, 367 U.S. 643 (1961) – does not mechanically suppress evidence for every Fourth Amendment violation. *United States v. Asgari*, 918 F.3d 509, 512 (6th Cir. 2019). One exception exists when a judicial officer (like Magistrate Cook here) makes the independent decision that probable cause existed for the search. *Reed*, 993 F.3d at 450. In those cases, if an officer relies in good faith on the court-issued search warrant, then the court should not bar the evidence found, so long as four exceptions to the good-faith rule do not apply. *Asgari*, 918 F.3d at 512; *United States v. Gilbert*, 952 F.3d 759, 763 (6th Cir. 2020) (*Leon* outlined four circumstances in which an officer's reliance would not be objectively reasonable). Defendant argues that two of the four circumstances are present here.[7]

i. Magistrate Cook did not Abandon His Role

First, Defendant claims that Magistrate Cook acted as a rubber stamp for the police. Defendant argues three facts support this determination: 1) Magistrate Cook did not inquire into the source's reliability and basis of knowledge of any hearsay evidence; 2) Magistrate Cook did not observe the procedural safeguards of Ohio Criminal Rule 41; and 3) no one could testify to

[7] Defendant also mentions that law enforcement's dishonesty in line with *Franks* also precludes the application of good faith. But as discussed above, officers did not deliberately convey a falsehood or display a reckless disregard for the truth by not including credibility considerations of Harry. (*See* Section B).

the specific facts relayed by Detective Sivert in supplementing the Affidavit. The Government barely addresses this argument, instead arguing that "there is no allegation that the issuing Magistrate was not neutral and detached in evaluating the [A]ffidavit." (Doc. 149, PageID: 3022).

Leon found that an exception to its good-faith rule would be if the issuing magistrate wholly abandoned his judicial role. 468 U.S. at 923. In such a case, it would be unreasonable for law enforcement to rely on the judicially-approved warrant. *Id.* When a defendant makes such an argument, he bears the burden to prove that the judicial officer acted as a rubber stamp. *United States v. Frazier*, 423 F.3d 526, 537 (6th Cir. 2005).

To highlight a scenario where a judicial officer abandoned his role, the *Leon* Court cited its decision in *Lo-Ji Sales, Inc. v. New York.* In *Lo-Ji*, the town justice issued an open-ended search warrant that allowed for the seizure of unidentified items that the town justice himself thought met the definition of obscenity. 442 U.S. 319, 321-22 (1979). And to make that determination, the town justice participated – indeed, led – the police search of the property. *Id.* at 322. The *Lo-Ji* Court found that this violated the judicial officer's role to remain detached and neutral, as the town justice acted more like a law enforcement officer rather than a judicial officer. *Id.* at 327.

The example of *Lo-Ji* demonstrates why Magistrate Cook did not abandon his role as a judicial officer. And Defendant's three facts to the contrary do not satisfy his burden in demonstrating otherwise. First, Defendant cites no Fourth Amendment caselaw that supports the requirement that a judicial officer must inquire into the facts and allegations of an Affidavit. To the contrary, affidavits are reviewed based on what they contain, not on what they lack. *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000) ("The affidavit is judged on the adequacy of

what it does contain, not on what it lacks, or on what a critic might say should have been added"). Moreover, as discussed above, Detective Sivert independently verified each of the facts alleged, thereby not relying solely on Harry's information.

Second, Defendant faults Magistrate Cook for not recording the supplemental testimony as called for in Ohio Criminal Rule 41. While the Court agrees that a recording of this interaction would have been helpful for probable cause purposes, the Court disagrees that this means Magistrate Cook abandoned his role as a judicial officer. Indeed, the Sixth Circuit has applied *Leon*'s good-faith exception despite the judicial officer not following the prescribed rules of criminal procedure. *See United States v. Chaar*, 137 F.3d 359 (6th Cir. 1998) (applying *Leon* despite a technical violation of Federal Criminal Rule 41(c) telephonic warrant requirements). Thus, *Leon* tolerates judicial officers not strictly complying with the criminal rules of procedure.

Defendant's final point is that no one can testify to the specifics of the conversation between Magistrate Cook and Detective Sivert. Thus, Magistrate Cook acted simply as a rubber stamp. While this fact is relevant (indeed, determinative) for a probable cause finding, it does not show that Magistrate Cook abandoned his role. Defendant does not argue that Magistrate Cook did not read the Affidavit and simply approved the warrant because of his blind faith in Detective Sivert. Indeed, Magistrate Cook indicated that he would have reviewed the affidavit prior to authorizing the search. (Doc. 147, PageID: 2883). Thus, much of Defendant's attack goes to the specifics of the supplemental conversation – and not that a supplemental conversation, under oath, occurred. The Court finds that such supplementation demonstrates Magistrate Cook's neutrality. It reflects a quest for additional facts – albeit specifics that are unknown to this Court.

All told, Defendant's cited examples do not reflect Magistrate Cook's abandonment of his role or his lack of neutrality. *Leon* and its progeny tolerate some degree of judicial mistake. And Magistrate Cook's actions fall within that acceptable threshold.

ii. The Affidavit for Search, Coupled with Additional Testimony, was not Bare-Bones

Defendant also attacks law enforcement's good faith by arguing that the Affidavit was bare bones. A second exception to the good-faith rule involves situations where the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923. This exception applies to affidavits commonly classified as "bare-bones." *United States v. Baker*, 976 F.3d 636, 647 (6th Cir. 2020). A bare-bones affidavit is one that "merely states suspicions, or conclusions, without providing some underlying factual circumstances regarding the veracity, reliability and basis of knowledge." *Gilbert*, 952 F.3d at 763.

When the affidavit is threadbare with allegations concerning the nexus to the place to be searched, the affidavit will avoid the bare bones label so long as it identifies a 'minimally sufficient' nexus between the criminal activity and the place to be searched. *Reed*, 993 F.3d at 450. The Sixth Circuit reminds district courts of the "daylight" between proper nexus for probable cause and a minimally sufficient one for *Leon*. *Id.* at 450-51; *Gilbert*, 952 F.3d at 763 ("there must be daylight between the "bare bones" and "substantial basis" standards if *Leon*'s good-faith exception is to strike the desired balance between safeguarding Fourth Amendment rights and facilitating the criminal justice system's truth-seeking function"). And a minimally sufficient connection is "one in which there is 'some connection, regardless of how remote it may have been – some modicum of evidence, however slight – between the criminal activity at

issue and the place to be searched.'" *Reed*, 993 F.3d at 451 (quoting *United States v. McCoy*, 905 F.3d 409, 416 (6th Cir. 2018)).

Finally, Defendant argues that the Court cannot look past the four-corners of the affidavit to determine whether law enforcement acted in good faith. Citing the Sixth Circuit's 2005 decision in *United States v. Laughton*, Defendant argues that "a determination of good-faith reliance...must be bound by the four-corners of the affidavit." 409 F.3d 744, 751. While this is generally true, the Sixth Circuit distinguished *Laughton* and noted one significant exception: "a court reviewing an officer's good faith under *Leon* may look beyond the four-corners of the warrant affidavit to information ***that was known to the officer and revealed to the issuing magistrate***." *Frazier*, 423 F.3d at 535-36 (emphasis added). And the pronouncement in *Frazier* has been repeatedly affirmed in subsequent Sixth Circuit opinions. *See, e.g.*, *Reed*, 993 F.3d at 453; *United States v. Tucker*, 742 Fed. App'x 994, 999 (6th Cir. Aug. 7, 2018) ("when determining whether the executing officers acted in good faith, we are bound by the four corners of the affidavit and may not consider what the officer executing the warrant knew or believed unless the extra-affidavit information was made known to the issuing magistrate") (citations omitted).

With the above in mind, the Court holds that the Affidavit, along with oral supplementation, provided a minimally sufficient connection between Defendant's drug dealing, his cellphone and his residence. Thus, Detective Sivert reasonably relied on the search warrant issued by Magistrate Cook.

At the outset, the Court finds Detective Sivert's testimony credible. And as discussed above, this case is different than *Laughton*. Here, we have testimony that Magistrate Cook placed Detective Sivert under oath and discussed the investigation. Defendant does not dispute

these facts. There is also evidence that Detective Sivert conducted a thorough investigation between the time of JCW's death and the search of Defendant's residence. Again, Defendant does not attack the Detective's investigation – including surveilling the property, reviewing governmental records and corroborating witness statements concerning the residence. And the Court finds that Detective Sivert's 'belief' that he discussed this information with Magistrate Cook satisfies the 'modicum of evidence' necessary to connect Defendant, his drug dealing and his phone to 1832 Garden Avenue. While this belief may not have been enough for probable cause, the Court holds that it satisfies the "less-demanding showing" necessary for good faith under *Leon*. *See Laughton*, 409 F.3d at 748-49.

III. CONCLUSION

This case presents a difficult determination of whether probable cause existed to search 1832 Garden Avenue. And the passage of time does not aid in that analysis. Neither does the judicial officer's failure to follow the rules of criminal procedure.

But while the record "does not definitively establish the presence of probable cause, neither does its definitively establish its absence." *Patton*, 962 F.3d at 974. And Magistrate Cook's mistake cannot justify punishing law enforcement in this case. There was no debate – either at trial or at the hearing on remand – that Detective Sivert took additional investigatory steps not disclosed in his Affidavit. More importantly, there was no serious contention that Detective Sivert did not talk to Magistrate Cook while under oath. Detective Sivert testified that he discussed the entire case with Magistrate Cook. From Detective Sivert's point of view then, he complied with everything the judicial officer required of him. And since there is no evidence that he acted in bad faith throughout his investigation and relied on the Search Warrant, the

Court declines to suppress the evidence uncovered at 1832 Garden Avenue. Accordingly, the Court **DENIES** Defendant's Motion.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
Senior United States District Judge

Dated: June 28, 2022