In the

# United States Court of Appeals

## For the Seventh Circuit

No. 22-1179

JACOB D. LICKERS,

*Petitioner-Appellant,*

*v.*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

Appeal from the United States District Court for the Central District of Illinois.
No. 4:20-cv-04164-SLD — **Sara Darrow**, *Chief Judge.*

ARGUED JANUARY 8, 2024 — DECIDED APRIL 12, 2024

Before WOOD, SCUDDER, and ST. EVE, *Circuit Judges.*

SCUDDER, *Circuit Judge.* Five years ago we affirmed the conviction of Jacob Lickers for transporting and possessing child pornography. He has since moved to vacate his convictions under 28 U.S.C. § 2255, alleging that his trial and appellate counsel rendered ineffective assistance in connection with an unsuccessful motion to suppress. The district court denied relief, and we affirm. Explaining why requires us to unpack a complex sequence of events involving parallel state

and federal investigations, two search warrant applications, two criminal prosecutions, two suppression rulings, and a direct criminal appeal.

## I

### A

In September 2015, undercover police officers Jimmy McVey and Ryan Maricle traveled to a public park in Monmouth, Illinois to meet a confidential informant. When they arrived, they saw something strange. A blue car sat parked on the shoulder of a road running next to the park, half on the road and half in the grass. Inside, the car's lone occupant, Jacob Lickers, "appeared excited, repeatedly looking toward the passenger seat, down at his lap, and then at a family with young children on a nearby playground." See *United States v. Lickers*, 928 F.3d 609, 613 (7th Cir. 2019). From afar Officers McVey and Maricle thought that Lickers might be a drug addict because his jerky movements resembled the "tweaking" that sometimes accompanies withdrawal. *Id.*

Upon approaching the vehicle and looking inside, the officers saw Lickers sitting in the driver's seat with a red dish towel draped over his lap. His cellphone rested on the passenger seat. At first Officers McVey and Maricle—who were dressed in plain clothes for their undercover assignment—impersonated drug dealers and asked Lickers if he was looking for pills. When Lickers said no, McVey and Maricle changed course, disclosed that they were police, and asked Lickers for identification. Lickers obliged.

By this point, Lickers appeared nervous. He was "breathing heavily" and furtively attempting to "knock his cellphone off the seat to the floor of the car." *Id.* All the while—and

despite "repeated requests to keep his hands visible"—Lickers kept his hands hidden beneath the towel. *Id.* Fearing the presence of a weapon, Officer Maricle ordered Lickers to remove the towel from his lap. Lickers complied, and the reason for his panicky behavior became clear—the towel was covering his exposed genitals. When Officer McVey demanded an explanation, Lickers divulged that he was looking at Craigslist and began to admit that he was "self-pleasuring" before catching himself and insisting that he was urinating into a cup. *Id.*

Suspecting Lickers of public masturbation, Officer McVey ordered Lickers to get dressed and exit the car. When Lickers opened the door, McVey smelled marijuana emanating from within. Lickers declined the officers' request to search the car, so they radioed for a K9 unit. The unit arrived about half an hour later and a drug dog alerted to the presence of marijuana near the passenger's side door. A search of the car uncovered about an ounce of marijuana. When Lickers admitted that the marijuana was his, he was placed under arrest for drug possession.

A more thorough inventory search resulted in the recovery of Lickers's cell phone, a laptop computer, and a digital camera from within the car. Officer McVey obtained a state court warrant later that day authorizing the forensic examination of those devices. Lickers's phone and computer both contained child pornography.

B

With this evidence in hand, state prosecutors charged Lickers in Warren County Circuit Court with possessing child pornography and marijuana in violation of Illinois law.

Lickers retained Daniel Dalton to defend him, whose first step was to file a motion to suppress that challenged the constitutionality of Officer McVey and Maricle's actions in the park. Dalton's principal contention was that the officers lacked reasonable suspicion to believe that Lickers had committed a crime when they initially seized him. Alternatively, Dalton argued that too much time had elapsed from when Officer McVey first smelled marijuana to when the K9 unit arrived on scene. See *United States v. Robinson*, 30 F.3d 774, 784 (7th Cir. 1994) (explaining that investigatory stops must be reasonable in both "scope and duration").

Dalton's strategy proved sound. The state court agreed with both arguments and suppressed all "physical evidence seized" during the stop, along with any statements Lickers made to Officers McVey and Maricle. The prosecution then dismissed all charges, bringing the state case to a swift end.

C

Not keen to let Lickers go unpunished, state officials referred the case for potential federal prosecution. In February 2016, FBI Special Agent Steven Telisak took possession of Lickers's phone and laptop to conduct an additional forensic examination. Although he believed that "the FBI might already have all the necessary authority" to conduct this second search, given that the devices had already been searched by state authorities, he applied in federal court for a fresh warrant to ensure compliance with the Fourth Amendment.

Agent Telisak's supporting affidavit drew heavily on, and even attached a courtesy copy of, the affidavit Officer McVey filed in support of his state warrant application months before. In one regard, however, Telisak went further than

McVey. Aware of the results of the state search, Telisak informed the federal judge that Lickers's devices had already been searched and were found to contain child pornography. At no point, though, did Agent Telisak caveat that the state court had suppressed that evidence based on a finding that Lickers's arrest was unconstitutional.

The district court issued the warrant, and federal investigators discovered a litany of incriminating messages Lickers had sent using the Kik messenger application. Those messages were laden with requests for child pornography. In one, Lickers shared a video with another Kik user portraying the sexual abuse of an infant child.

D

In time, a federal grand jury indicted Lickers on counts of transporting and possessing child pornography in violation of 18 U.S.C. § 2252A(a)(1) and § 2252A(a)(5)(B). The federal prosecution proceeded much like the state one had. Lickers again hired Daniel Dalton, who again filed a motion to suppress contending that the stop in the park violated the Fourth Amendment. Unlike before, however, Dalton also attacked the state search warrant (not the federal warrant as one might expect), which he contended "was so lacking in probable cause" that the state investigators could not reasonably rely on it.

The district court held an evidentiary hearing on the motion, at which Officer McVey testified about the events leading to Lickers's arrest and the search of his phone and laptop. Although Dalton questioned McVey about a range of topics, he did not inquire about the circumstances surrounding the referral of the case to the FBI or about what, if anything, Agent

Telisak knew about the state court suppression ruling at the time he swore out his federal search warrant affidavit. The district court denied the motion, finding nothing unconstitutional about Lickers's arrest and no defect in the state search warrant requiring suppression.

Lickers ultimately elected to plead guilty, reserving the right to appeal the district court's denial of his motion to suppress. In the end, the district court sentenced Lickers to concurrent terms of 132 months' imprisonment on each count, with a lifetime term of supervised release to follow.

E

We appointed Mark Rosen to represent Lickers on direct appeal. Renewing the arguments Dalton had presented to the district court, Rosen urged us to find two Fourth Amendment violations—that the arrest of Lickers in the park was unlawful and that the state court search warrant lacked probable cause.

We took a different route. We agreed with the district court "that no aspect of the police's encounter with Lickers in Monmouth Park offended the Fourth Amendment." *Lickers*, 928 F.3d at 617. But we found ourselves puzzled by the challenge to the state search warrant. After all, it was "the federal search"—not the state search authorized by the state warrant—that "yielded the evidence that resulted in the federal prosecution and conviction Lickers ... challenge[d] on appeal." *Id.* at 619. A successful attack on the state warrant could therefore benefit Lickers only to the extent it cast doubt on the federal warrant as well.

The easiest path forward, we concluded, was to construe Lickers's challenge to the state warrant as part and parcel of a larger attack on the federal warrant, the logic being that any

deficiencies in Officer McVey's state court affidavit would likewise undermine Agent Telisak's federal court affidavit given the heavy reliance the latter placed on the former. We reasoned that if the state warrant lacked probable cause, then Agent Telisak's references to the child pornography on Lickers's devices—which was found only by executing the state warrant—could not be considered in evaluating the validity of the federal warrant. See *Lickers*, 928 F.3d at 618.

Having framed the question presented on direct appeal in this way, we held that *both* warrants had been issued without probable cause, as neither warrant application foreclosed the possibility that Lickers had been viewing adult pornography in the park. That conclusion did not dispose of the case, however. We observed that in *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court recognized an exception to the exclusionary rule for evidence seized in "objectively reasonable reliance" on a search warrant later determined to have lacked probable cause. *Id.* at 922. Suppression therefore depended on whether the federal agents that procured and executed the federal warrant had "act[ed] in objective good faith." *Id.* at 920.

Although the government carried the burden to prove good faith under *Leon*, Agent Telisak's decision to apply to the federal district court for a warrant created a presumption of good faith. See *United States v. Koerth*, 312 F.3d 862, 868 (7th Cir. 2002). To rebut that presumption, Lickers had to come forward with direct or circumstantial evidence that the federal officers acted in an objectively unreasonable manner. See *Leon*, 468 U.S. at 922–23; see also *United States v. Matthews*, 12 F.4th 647, 653 (7th Cir. 2021) (describing burden shifting framework). This is a difficult showing to make even under

the best of circumstances. See *United States v. McMurtrey*, 704 F.3d 502, 509 (7th Cir. 2013). In Lickers's case, it proved all but impossible.

Because Dalton and Rosen placed such heavy focus on the state warrant, Lickers lacked the evidence he needed to demonstrate bad faith on the part of the federal officers, in particular Agent Telisak. As we observed at the time, "[n]either Lickers nor the government devote[d] a word to [Agent Telisak's] conduct." *Lickers*, 928 F.3d at 619. The only evidence potentially suggestive of bad faith was Agent Telisak's omission of the state court's suppression ruling from his search warrant affidavit. But here, too, Lickers "failed to offer any evidence" of what Telisak knew, if anything, about that ruling at the time he swore out his affidavit. *Id.* "[O]ur review of the record" thus left "us of the firm mind that the process that resulted in the application for, and execution of, the federal search warrant reflected good faith on the part of the federal agents." *Id.* Because *Leon* applied to save the federal search warrant, we affirmed the district court's denial of Lickers's suppression motion.

F

Lickers moved to vacate his convictions under 28 U.S.C. § 2255. Invoking his constitutional right to the effective assistance of trial and appellate counsel, see *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (trial counsel); *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985) (appellate counsel), he argued that Dalton and Rosen took missteps litigating his motion to suppress that were so grave and inexcusable that his lawyers failed to function "as the 'counsel' guaranteed" to him by the U.S. Constitution. *Strickland*, 466 U.S. at 687.

As Lickers saw things, Agent Telisak's omission of the state court's suppression ruling from his federal search warrant affidavit was strong evidence of bad faith that Dalton and Rosen unjustifiably failed to leverage. Lickers's motion identified two primary ways that Dalton could have done so.

*First*, Dalton could have moved for an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). *Franks* requires the suppression of evidence obtained by virtue of a warrant procured through knowing or reckless deception. See *id.* at 155–56. A defendant who makes a "substantial preliminary showing" that a search-warrant affiant acted in bad faith by knowingly or recklessly including material falsehoods in or omitting material information from a search warrant affidavit is entitled to an evidentiary hearing on that claim. See *McMurtrey*, 704 F.3d at 504–05. Lickers alleged that Dalton was deficient for failing to move for such a hearing, emphasizing that even if Dalton fell short of obtaining suppression in the district court, such a hearing would have given Lickers an invaluable opportunity to gather the evidence he needed to overcome *Leon*'s presumption of good faith on direct appeal.

*Second*, Lickers criticized Dalton's failure to question Officer McVey at the federal suppression hearing about "whether, when, and how he informed [Agent] Telisak or any other federal officers of [the] state warrant's suppression."

Lickers's motion said less about Rosen's appellate representation but appeared to take the position that Rosen had had all he needed to overcome *Leon* on appeal, notwithstanding Dalton's failure to develop the record in the district court. It also criticized Rosen for not pressing a *Franks* argument on appeal.

In opposing § 2255 relief, the government presented sworn affidavits from Dalton and Rosen explaining their reasons for not approaching the defense in the ways Lickers identified. Dalton stated that he had considered Agent Telisak's omission of the state court's suppression ruling from the federal warrant application to be immaterial because it concerned the constitutionality of Lickers's arrest and was not "based on a finding that the warrant application lacked probable cause." He further stressed that "the state suppression ruling was in no way binding on the District Court." Rosen, for his part, explained that he did not raise the issue of Agent Telisak's bad faith on direct appeal because it had not been presented to the district court.

The district court denied Lickers's motion without holding an evidentiary hearing. Two considerations proved important to the district court. As a procedural matter, the district court read our decision on direct appeal to establish that Agent Telisak acted in good faith, a ruling it did not believe Lickers could relitigate through his § 2255 motion. As a substantive matter, the district court concluded that Lickers's ineffective-assistance claims failed because the state court suppression ruling was immaterial to a proper analysis of the federal search warrant application.

This appeal followed.

## II

Before reaching the merits of any ineffective-assistance claims, we must determine whether the district court was correct to conclude that Lickers is procedurally barred from revisiting Agent Telisak's good faith in this post-conviction proceeding. The government defends that holding under the law

of the case doctrine, "a longstanding rule of federal practice," *Peoples v. United States*, 403 F.3d 844, 847 (7th Cir. 2005), that provides that legal rulings rendered at one stage of a lawsuit should not, as a general matter, be reexamined in subsequent stages, see *Cannon v. Armstrong Containers Inc.*, 92 F.4th 688, 701 (7th Cir. 2024).

Although more commonly applied to interlocutory rulings, the law of the case doctrine limits the scope of post-conviction review as well. See *Peoples*, 403 F.3d at 847. We have repeatedly recognized that when an appellate court decides an issue in resolving a defendant's direct criminal appeal, a defendant "cannot start from scratch [under § 2255] and ask the judiciary to proceed as if the first resolution had not occurred." *Id.*; see also *White v. United States*, 371 F.3d 900, 902 (7th Cir. 2004); *Fuller v. United States*, 398 F.3d 644, 648 (7th Cir. 2005). Invoking that principle here, the government reads our opinion on direct appeal to have conclusively decided that Agent Telisak acted in good faith and urges us to adhere to that ruling as law of the case.

We see things differently. Foremost, we do not believe that our opinion on direct appeal reached the broad holding the government ascribes to it. To the contrary, our observation regarding Agent Telisak's good faith rooted itself only in the limited factual record before us at the time. See, *e.g.*, *Lickers*, 928 F.3d at 619 ("Ultimately, our *review of the record* leaves us of the firm mind that the process that resulted in the application for, and execution of, the federal search warrant reflected good faith on the part of the federal agents." (emphasis added)); *id.* at 620 ("Every indication *from the record* is that the federal agents sought and executed the warrant in good faith." (emphasis added)). We need not belabor the point,

however, because on the broader reading of our direct appeal opinion preferred by the government, we remain hesitant to apply the law of the case doctrine.

We have emphasized that the doctrine "is not a straitjacket" as it establishes "no more than a presumption" that a prior ruling should be adhered to, the strength of which "varies with the circumstances." *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). Indeed, we have long recognized that issues decided in a direct criminal appeal may be revisited when "there is ... [a] good reason" for doing so, *Fuller*, 398 F.3d at 648, or when "the 'ends of justice' would be served" thereby. See *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1123 (7th Cir. 1991) (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)).

At least one very good reason exists for taking a renewed and broader look at Agent Telisak's good faith in this post-conviction proceeding. The core of Lickers's argument is that his lawyers' mistakes prevented him from gathering the evidence he needed to overcome the presumption of good faith that sunk his direct appeal. The notion that a fact-sensitive legal ruling, made on a record deficient by virtue of alleged ineffective assistance, should bind a defendant in a collateral attack challenging that very lawyering is a bridge too far for us on these facts. Were we to chart such a course, we would effectively foreclose defendants like Jacob Lickers from pursuing habeas relief for ineffective assistance that manifests in an adverse appellate finding on a material question of fact. We decline that invitation, at least in the circumstances before us here. The more just course, in our view, is to give Lickers a fair opportunity to prove what he believes any reasonable lawyer would have proved the first time around.

So we proceed to the merits of Lickers's request for relief under § 2255.

## III

### A

The Sixth Amendment provides that in all criminal prosecutions "the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right guarantees not just the presence of a lawyer, but instead "the *effective* assistance of counsel," *Strickland*, 466 U.S. at 686 (emphasis added) (citation omitted), meaning legal services that are objectively reasonable. See *id.* at 687–88.

The Due Process Clauses of the Fifth and Fourteenth Amendment have been interpreted to guarantee a similar right to the effective assistance of appellate counsel in a state or federal defendant's "first appeal as of right." *Evitts*, 469 U.S. at 396; *Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008). Although the Supreme Court has yet to articulate a standard to govern such claims, see *Evitts*, 469 U.S. at 392; see also *Fern v. Gramley*, 99 F.3d 255, 257 (7th Cir. 1996), we have tended to review them under the same standard that applies to Sixth Amendment challenges. See, *e.g.*, *Minnick v. Winkleski*, 15 F.4th 460, 470–71 (7th Cir. 2021). Neither Lickers nor the government urges a different approach, so we will follow that practice here.

Under the Supreme Court's decision in *Strickland v. Washington*, Lickers must demonstrate that the performance of Daniel Dalton in the district court and Mark Rosen on direct appeal "fell below an objective standard of reasonableness" and that their "deficient performance so prejudiced his defense that it deprived him of a fair trial." *Fountain v. United*

*States*, 211 F.3d 429, 434 (7th Cir. 2000) (citing *Strickland*, 466 U.S. at 688–94). These "are at best difficult showings to make." *Ebert v. Gaetz*, 610 F.3d 404, 411 (7th Cir. 2010).

On appeal Lickers continues to insist that Dalton and Rosen botched his motion to suppress by failing to argue that Agent Telisak acted in bad faith by omitting the state court's suppression ruling from his federal search warrant affidavit. He also faults each for failing to take appropriate and available measures to develop the record on that issue.

In evaluating Dalton and Rosen's performance, we must make "every effort ... to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. As the Supreme Court explained in *Strickland*, it can be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission ... was unreasonable." *Id.* We best resist this temptation by putting ourselves in defense counsel's shoes at the time of the challenged acts or omissions. We must then evaluate—from that perspective—whether counsel's "conduct falls within the wide range of reasonable professional assistance," bearing in mind that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689–90.

B

Reviewing Dalton and Rosen's actions with these principles in mind, we agree with the district court that Lickers's ineffective-assistance claims fall short. The government concedes on appeal that Agent Telisak was aware of the state court's suppression ruling at the time he swore out his federal search warrant affidavit. And we assume for the sake of

argument that had Dalton convinced the district court to hold a *Franks* hearing or conducted a more pointed examination of Officer McVey at the federal suppression hearing that the district court did hold, it might have been possible to gather the kind of evidence needed to overcome the presumption of good faith that ultimately proved fatal to Lickers's direct criminal appeal (or, more straightforwardly, to secure suppression under *Franks* itself). But even then, Lickers's claims fail.

Just because an argument has some remote chance of prevailing does not mean that a lawyer is constitutionally deficient for failing to bring it. Whether a lawyer provides ineffective assistance by failing to raise an argument depends in important part on its likelihood of success. See *Goins v. Lane*, 787 F.2d 248, 254 (7th Cir. 1986) ("Trial counsel is not obligated to present every conceivable theory in support of the defense."); *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013) ("Appellate lawyers are not required to present every nonfrivolous claim on behalf of their clients—such a requirement would serve to bury strong arguments in weak ones."). Lawyers cannot be faulted for eschewing the proverbial kitchen sink and instead focusing on arguments with better odds. After all, "trial counsel may undermine the credibility of the defense of his client if he simply presents the court with a barrage of attacks." *Goins*, 787 F.2d at 254; see also *Strickland*, 466 U.S. at 681 (describing advocacy as "an art and not a science" and taking pains to emphasize that "strategic choices must be respected" when "based on professional judgment").

In his affidavit, Dalton anchored his decision not to pursue the question of Agent Telisak's good faith in the practical disconnect between the content of the state court's suppression

ruling and the nature of the federal warrant application. Several considerations lead us to conclude that this rationale was wholly reasonable in the circumstances of this case.

It would be one thing if the state court's suppression ruling opined on whether Officer McVey's state search warrant affidavit sufficed to support a finding of probable cause. In that case, as we observed on direct appeal, it could well have "inform[ed]" the federal court's determination whether Agent Telisak's affidavit, modeled as it was on McVey's, likewise established probable cause. *Lickers*, 928 F.3d at 619. But remember that the state court suppression ruling said nothing about the state search warrant. It was instead premised on the state court's conclusion (one with which we disagreed on direct appeal) that Lickers's arrest in Monmouth Park was unconstitutional.

At most, then, the state court suppression ruling would have alerted the district court to the possibility that evidence described by Agent Telisak in his federal affidavit was the fruit of an unconstitutional search. Although this is no doubt generally important information, it is difficult on the actual facts of this case to see what legal bearing it could have had on the district judge's decision to issue the warrant. That substance of that ruling—with which we later disagreed—was in no way binding on the district judge. See *id.* at 620. More importantly, it is not the practice of issuing magistrates to hold quasi-suppression hearings, before the government brings federal charges, to determine whether information described in a search warrant affidavit is the fruit of an unconstitutional search. Instead, such issues are litigated precisely as they were in the district court: through a pre-trial motion to suppress.

In these circumstances, Dalton had no reason to assume that Agent Telisak omitted information about the state court suppression ruling with the intent to withhold facts and mislead the federal court into authorizing an unconstitutional search. And we find this especially so in light of Agent Telisak's express assurance to the district court that he was seeking the second warrant "out of an abundance of caution" and to ensure "compl[iance] with the Fourth Amendment." Agent Telisak, like attorney Dalton, may simply have believed that the search warrant application was not the proper time to litigate the constitutionality of Lickers's arrest.

But even if a reasonably competent attorney would have entertained serious doubts about Agent Telisak's good faith, neither of the steps Lickers believes Dalton should have taken to explore that issue were so likely to succeed as to make the failure to pursue them constitutionally problematic. In light of the factual and logical disconnect we have described between the state court suppression ruling and the federal search warrant application, Dalton would have faced considerable difficulty making the substantial preliminary showing of materiality necessary to obtain a *Franks* hearing. See *McMurtrey*, 704 F.3d at 504–05; *Shell v. United States*, 448 F.3d 951, 957–58 (7th Cir. 2006).

Our court has long assessed materiality under *Franks* using the so-called "hypothetical affidavit" test. Applying it is usually straightforward. "We eliminate the alleged false statements, incorporate any allegedly omitted facts, and then evaluate whether the resulting 'hypothetical' affidavit would establish probable cause." *Betker v. Gomez*, 692 F.3d 854, 862 (7th Cir. 2012). If it would not, the information is material—not necessarily individually, but at least collectively. Why?

Because, in the aggregate, the inclusion or omission from the affidavit of that bundle of information contributed to an erroneous finding of probable cause.

Applying that test is difficult in a case like this, where the affidavit lacks probable cause even *before* it is corrected to remove the taint of the alleged falsehoods or deceptive omissions. Nonetheless, it is not abundantly clear how the omission of a state court suppression ruling having no logical connection with the task before an issuing magistrate could be deemed material under our precedent—particularly where, as here, the merits of that ruling are erroneous as a matter of law. We need not take a definitive view of that question, however. It is enough to observe that any such contention would be a novel extension of our case law and to reiterate the longstanding "principle that '[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law.'" *Coleman v. United States*, 79 F.4th 822, 831 (7th Cir. 2023) (quoting *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993)).

Nor do we believe that it was constitutionally deficient for Dalton to refrain from questioning Officer McVey about Agent Telisak at the federal suppression hearing. Having decided to focus his motion to suppress on the constitutionality of Lickers's arrest—a strategy which, it is worth emphasizing, succeeded in the state court—and the adequacy of McVey's affidavit to establish probable cause, Dalton can hardly be blamed for limiting himself to questions relevant to those issues.

All of this prevents us from concluding that Dalton's failure to move for suppression under *Franks* or to probe Agent Telisak's knowledge about the state court proceedings in other ways was so misguided as to fall outside "the wide

range of reasonable professional assistance" contemplated by the Sixth Amendment. See *Strickland*, 466 U.S. at 689.

To be sure, it is tempting with the benefit of hindsight to question the wisdom of Dalton's inattention to Agent Telisak. But "[a] fair assessment of attorney performance requires that every effort be made ... to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; see also *Winfield v. Dorethy*, 956 F.3d 442, 457–58 (7th Cir. 2020). Heeding that admonition here, and applying *Strickland*'s "strong presumption that counsel's conduct" was reasonable, *Strickland*, 466 U.S. at 689, we conclude that Dalton satisfied the Sixth Amendment's demands. Although he may not have provided "perfect representation," *Strickland* "guarantee[s] ... only a reasonably competent attorney." *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (cleaned up). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id.*

Our conclusion that Dalton did not provide ineffective assistance compels the same conclusion with respect to Rosen. By the time Rosen took the reins on direct appeal, Dalton had neither challenged Agent Telisak's good faith nor developed a record on the issue. Lickers suggests that Rosen had all he needed to overcome *Leon*'s presumption of good faith. We disagree. Even assuming Rosen could prove that Agent Telisak knew about the state court's suppression ruling, it does not follow, for reasons we have already explained, that Telisak omitted that information in bad faith. Given the state of the record on appeal, Rosen did not have the evidence necessary to overcome the presumption of good faith under *Leon*.

Finally, to the extent Lickers contends that Rosen should have challenged the district court's failure to hold a *Franks* hearing, that argument was foreclosed by Dalton's failure to move for such a hearing on Lickers's behalf. To our knowledge, we have never held that a district court's failure to hold a *Franks* hearing on its own motion can amount to the kind of "clear" or "obvious" error of which appellate courts can take notice on plain error review. See *United States v. Olano*, 507 U.S. 725, 734 (1993). But assuming without deciding that is a possibility, this is not such a case. Given our conclusion that Lickers's own trial counsel could reasonably refrain from moving for a *Franks* hearing, it follows *a fortiori* that the district court did not commit plain error by failing to take that step either.

We therefore have little trouble concluding that Rosen, like Dalton, provided Lickers with constitutionally adequate representation.

## IV

This case exemplifies the practical and conceptual difficulties that can arise in our federal system of criminal justice, where state and federal criminal law often overlap and where a defendant can by a single act trigger separate prosecutions by separate sovereigns. In the context of parallel state and federal proceedings, rulings issued by one court may well bear on issues faced by the other. Such a scenario raises thorny questions concerning what obligation, if any, actors within one system—whether they be law enforcement officers or prosecutors—have to inform the court of rulings issued by coordinate courts. Though Jacob Lickers is not entitled to the relief he seeks, the issues he pressed on appeal are important ones. Today's decision—grounded in the unusual facts of this

path-dependent case—takes no position on when, under *Leon*, a federal official is obligated to inform a federal court of the judicial ruling of a coordinate court. All we conclude is that the link between the state court's suppression ruling and Agent Telisak's federal warrant application was too attenuated to obligate Daniel Dalton and Mark Rosen under *Strickland* to explore the possibility that its omission was a product of bad faith.

For these reasons, we AFFIRM.

# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

June 05, 2024

**Before**

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-1179

JACOB D. LICKERS,
*Petitioner-Appellant,*

*v.*

UNITED STATES OF AMERICA,
*Respondent-Appellee.*

Appeal from the United States District Court for the Central District of Illinois.

No. 4:20-cv-04164-SLD

Sara Darrow,
*Chief District Judge.*

## ORDER

On consideration of the petition for rehearing filed by the Petitioner-Appellant on May 29, 2024, both members of the original panel have voted to deny the petition for rehearing.[1]

Accordingly, the petition for rehearing is hereby DENIED.

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[1] Circuit Judge Wood retired on May 1, 2024, and did not participate in the consideration of this petition, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).

# UNITED STATES DISTRICT COURT

for the
Central District of Illinois

| | | |
|---|---|---|
| Jacob Daniel Lickers, | ) | |
| | ) | |
| **Petitioner-Defendant** | ) | |
| | ) | |
| **vs.** | ) | **Criminal Case Number:** 16-cr-40011 |
| | ) | |
| United States of America, | ) | **Civil Case Number:** 20-cv-4164 |
| | ) | |
| **Respondent-Plaintiff** | ) | |

## JUDGMENT ON MOTION UNDER 2255

**DECISION BY THE COURT.** This action came before the Court, and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that Petitioner Jacob Daniel Lickers's Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 is DENIED. The Court DECLINES to issue a certificate of appealability. This case is CLOSED.

**Dated: 12/23/2021**

s/ Shig Yasunaga
Shig Yasunaga
Clerk, U.S. District Court

["APPENDIX C"]

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**
**ROCK ISLAND DIVISION**

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| **JACOB DANIEL LICKERS,** | ) | |
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| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 16-cr-40011** |
| | ) | |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Respondent.** | ) | |

## ORDER AND OPINION

**SARA DARROW, Chief U.S. District Judge:**

Now before the Court is Petitioner Jacob Daniel Lickers's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (d/e 62). Lickers was initially charged in state court and successfully moved to suppress the evidence against him. During his federal criminal proceedings, Lickers again moved to suppress the evidence against him but his motion was denied, and the denial was affirmed on appeal. Now, he argues that his counsel was ineffective for failing to argue an additional ground for suppression of the evidence. For the reasons below, the Court DENIES Lickers's Motion to Request Counsel (d/e 63), DENIES Lickers's § 2255 motion (d/e 62), and DECLINES to issue a certificate of appealability. Lickers's Motion for Extension of Time to File a § 2255 Motion (d/e 61) is DISMISSED AS MOOT.

### I. BACKGROUND

Lickers was in his vehicle at a public park when two undercover officers unexpectedly encountered him, approached the vehicle, and began asking questions. Ultimately, this encounter led to Lickers's convictions for transportation of child pornography, in violation of 18

U.S.C. §§ 2252A(a)(1), (b)(1), and possession of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2). *See* Judgment, d/e 46. He is currently serving a sentence of 132 months imprisonment. *Id.* Lickers argues, however, that had counsel been effective, he would have succeeded on his motion to suppress and had the indictment dismissed.

**A. Offense Conduct**

The Seventh Circuit's opinion on direct appeal fully summarized the law enforcement encounter that led to Licker's criminal proceedings:

> On the afternoon of September 3, 2015, Jacob Lickers sat alone in his car, parked in the grass under a group of trees in Monmouth Park. Two undercover police officers dressed in civilian clothes, in the park to meet a confidential drug source, noticed Lickers and found his behavior odd. He appeared excited, repeatedly looking toward the passenger seat, down at his lap, and then at a family with young children on a nearby playground. On their second and third rounds through the park, the officers again passed Lickers and observed the same behavior. On their final pass they called dispatch to run the car's Colorado license plate.
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> The officers parked and continued to watch Lickers, at one point thinking that he may be a drug user because his movements reflected the tweaking commonly exhibited by someone craving methamphetamine. The officers decided to approach Lickers's car and start a conversation, including by offering to sell drugs. Upon doing so, Inspector Jimmy McVey saw that Lickers had a small towel covering his lap, which he kept putting his hands under, and a cellphone on the passenger seat. At that point, the second officer, Inspector Ryan Maricle, addressed Lickers by his first name, to which Lickers responded by asking if the two men were police officers. The officers so confirmed and displayed their badges.
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> Lickers's demeanor then changed. He became noticeably nervous, began breathing heavily, and sought to knock his cellphone off the seat to the floor of the car. He also kept placing his hands under the towel on his lap. Inspector McVey reacted by asking Lickers for his driver's license, which Lickers provided. McVey then radioed Lickers's information to dispatch and asked for a patrol car to come to the park.
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> Over the next minute or so, and despite the officers' repeated requests to keep his hands visible and out in the open, Lickers continued placing his hands under the towel on his lap. Concerned that Lickers may be concealing a weapon, Inspector Maricle directed him to remove the towel. Lickers did so, exposing his genitals. When Inspector McVey asked Lickers what he was doing, Lickers said he was

> looking at the website Craigslist on his phone and "self-pleasuring himself." He then immediately changed course, however, and insisted that he was urinating in a cup, despite the presence of a nearby public restroom.
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> Skeptical of the new explanation, Inspector McVey asked Lickers if he was viewing pornography on his phone while watching the family with children on the playground. Lickers had no response. At that point, McVey ordered Lickers to pull up his pants and step out of the car. The moment Lickers opened the car door, Inspector McVey smelled marijuana. When Lickers denied McVey's request to search the car, the police radioed for a K9 unit to come to the park. The unit arrived about 20 to 30 minutes later, and a dog circled the car and alerted near the passenger door, at which point Lickers admitted he had marijuana inside. The officers then found the marijuana and placed Lickers under arrest for drug possession. A subsequent, more thorough inventory search of the car resulted in the officers recovering Lickers's cell phone, laptop computer, and digital camera.
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> Later the same day a state court judge approved a warrant authorizing a search of these devices. The search revealed sexually explicit videos of young children on Lickers's phone.

*United States v. Lickers*, 928 F.3d 609, 614 (7th Cir.), *cert. denied,* 140 S. Ct. 410 (2019).

**B. State Court Proceedings**

Lickers was subsequently indicted in state court on drug and child pornography charges. Lickers's attorney, Daniel Dalton, moved to suppress the evidence resulting from the police's initial detention of him in the park, the search of the car with the help of the K9 unit, and the evidence recovered from his phone. *See* Motion to Suppress, Ex. B, State Court Opinion and Order (d/e 17-2). On January 22, 2016, the state court granted the motion, concluding that the police "lacked sufficient justification to remove the defendant from his automobile" and lacked probable cause or reasonable suspicion to detain him for 20 to 30 minutes while waiting for the k9 unit to arrive. *Id.* Therefore, the state court ordered suppressed "all physical evidence seized and statements of the defendant made after the arrival of the uniform[ed] officers [in the park]." *Id.* The state charges against Lickers were later dismissed.

**C. Federal Investigation and District Court Proceedings**

About three weeks later, federal authorities began their investigation. The FBI sought a warrant to search Lickers's phone and laptop and presented an affidavit to the district court on February 17, 2021. Pet. Motion, Ex. C, Federal Search Warrant Affidavit (d/e 62 at p.45). The affidavit included a copy of the state search warrant application and disclosed that the search conducted by state authorities had revealed child pornography on Lickers's phone. Notably, the FBI's warrant application did not mention that the state court had granted a motion to suppress this evidence. The Court issued the warrant, and the FBI's ensuing search of Lickers's phone found pornographic images and videos of very young children, including one video of a girl not even a year old. Two days after seeking the warrant, on February 19, 2016, a federal criminal complaint was filed against Lickers. *See* d/e 1. In the complaint affidavit, the same FBI agent who sought the warrant noted that the state charges against Lickers would likely be dismissed due to the state court's prior suppression ruling. *Id.*

After being indicted, Lickers, still represented by Mr. Dalton, filed a motion seeking suppression of the evidence that formed the basis of his federal charges. *See* d/e 17. As he had successfully argued in state court, Lickers argued that his initial detention was unlawful and the subsequent warrantless search of his vehicle violated the Fourth Amendment. *Id.* He also argued that the later search of his phone and laptop computer, even though pursuant to a state warrant, was illegal because it lacked probable cause. *Id.* He argued that the good faith exception from *United States v. Leon*, 468 U.S. 897 (1984), did not save the warrant because the issuing judge wholly abandoned his neutral and detached judicial role and the supporting affidavit was so lacking in probable cause that officer reliance on the warrant was unreasonable.

*Id.* at 3. His motion did not address any deficiencies specific to the federal warrant or the good faith of the FBI agent in seeking and relying on the federal warrant.

After an evidentiary hearing, the Court found that the initial detention and warrantless search of the vehicle did not violate the Fourth Amendment. Tr. 117 (d/e 54). The Court also found that the state search warrant contained sufficient probable cause and that the judge issuing it did not stray from his neutral and detached role. Tr. 118.

Shortly after the suppression hearing, Mr. Dalton, filed a motion to withdraw as Lickers's attorney. *See* d/e 20, 21; September 7, 2016 Text Order. New counsel was appointed and Lickers pled guilty at a change of plea hearing on February 7, 2017. No written plea agreement was filed, but Lickers agreed to plea guilty to the charges while reserving his right to appeal the Court's order denying his motion to suppress. *See* d/e 25.

About one year later, on February 6, 2018, Lickers filed a motion to withdraw his guilty. *See* d/e 35, 40, 41. After a hearing on February 27, 2018, the Court found that Lickers did not truly want to withdraw his guilty plea. Rather, he wanted to "have another bite at the suppression apple." Mot. Tr. 20 (d/e 52). The Court found that Lickers's concern was that he "wanted a more specific challenge or a challenge at all to the search of the phone. And he's claiming, I think, that his attorney was ineffective at the time of the suppression hearing." Mot. Tr. 30-32. However, the Court found there was nothing on the record to make a finding that Mr. Dalton was ineffective during the suppression hearing in failing to make a more pointed challenge regarding the phone itself. *Id.* Accordingly, the Court denied the motion. *Id.*

The Court sentenced Lickers on May 25, 2018, to a below guidelines sentence of 132 months' imprisonment and a lifetime term of supervised release. *See* Judgment, d/e 46.

**D. Direct Appeal**

Lickers promptly appealed, challenging the Court's denial of his motion to suppress and his lifetime supervised release order. His attorney on appeal was Mark Rosen. The Seventh Circuit affirmed the conviction and sentence. *See United States v. Lickers*, 928 F.3d 609 (7th Cir. 2019). The Seventh Circuit found that the initial detention was constitutional because Lickers's odd behavior created the necessary reasonable suspicion to order him out of his car and that there had been no Fourth Amendment seizure prior to that point. *Id.* at 615-16. Further, upon smelling marijuana emanating from his car, officers had probable cause to call the K9 unit to the park and search his car. *Id.* at 616. Finally, the Seventh Circuit held that after finding marijuana in his car, the Fourth Amendment allowed the subsequent inventory search of the vehicle that recovered Lickers's phone and laptop computer. *Id.* at 617.

However, the Seventh Circuit found that the state search warrant did not contain sufficient probable cause to search the phone because it did not explain "what it was about Lickers's behavior in the park combined with law enforcement's experience investigating child pornography offenses that made it probable, and not just possible, that Lickers's phone contained child pornography." *Id.* at 618. The federal search warrant, which absent its reliance on the child pornography found as a result of state search warrant relied on the same facts, failed for the same reason: "We cannot conclude that what remains in the federal affidavit supplied enough facts to create a fair probability that the FBI would find child pornography on Lickers's phone. Maybe, but maybe is not probably, and that is where the federal warrant was lacking." *Id.*

Turning to the question of good faith, the Seventh Circuit noted that "[o]vercoming the presumption of good faith is no small feat as an officer cannot ordinarily be expected to question a judge's probable cause determination" and that the doctrine had only been found not to apply

in one occasion in recent years. *Id.* at 619. Importantly for the present motion, the Seventh Circuit found that the conduct of the FBI agent should have been considered instead of solely the conduct of the state law enforcement officers:

> Neither Lickers nor the government devote a word to the conduct of the FBI agent who obtained and executed the federal warrant. But that is where we conclude the focus should be given the combination of two factors. First, the federal search yielded the evidence that resulted in the federal prosecution and conviction Lickers now challenges on appeal. Second, nothing about the prior state proceedings, although they resulted in the dismissal of charges on the basis of the state court's ruling regarding the police's initial detention of Lickers in the park, raised questions for the federal agents about the integrity of the state search warrant application that could somehow have infected the subsequent federal application.
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> To be sure, the record leaves unanswered how much the FBI agent knew about the state court prosecution. The agent's attaching the state court warrant application to the federal application shows he at least knew there was a state investigation. But what we cannot tell, and what Lickers has failed to offer any evidence of, is whether the agent knew that a state court prosecution followed and resulted in the suppression of evidence, including the child pornography found on Lickers's phone, and dismissal of charges. We pause on this point to underscore that, had the FBI agent possessed this knowledge, it may have been relevant to the good faith determination, and the better practice would have been to include the information in the federal application. A state court's suppression ruling may inform a federal court's subsequent assessment of a federal warrant application.

*Lickers*, 928 F.3d at 619.

Despite noting the unanswered questions in the record, the Seventh Circuit was left with a "firm mind that the process that resulted in the application for, and execution of, the federal search warrant reflected good faith on the part of the federal agents." *Id.* While the warrant relied on evidence that had been suppressed by the state court, nothing suggested that "the federal application process reflected bad faith or, more specifically, any awareness by the FBI agents who sought or executed the warrant that it was lacking in any dimension or reflected the district judge abandoning her neutral role." *Id.*

**E. Lickers's § 2255 Motion**

Lickers filed this Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (d/e 62) on July 24, 2020. He argues that his counsel was ineffective during the suppression hearing for failing to raise the issue noted by the Seventh Circuit: whether the FBI agent knew about the state court suppression ruling at the time of seeking the federal warrant and whether this knowledge would have made his reliance on the search warrant not in good faith. He argues his appellate counsel also should have raised this issue, and/or sought to have the case remanded to the district court for purposes of questioning the FBI agent regarding his knowledge of the state court proceedings when he applied for the federal search warrant. Lickers has also filed a motion requesting counsel (d/e 63). The Government filed a response in opposition (d/e 69), which included affidavits from Lickers' trial counsel, Mr. Dalton (d/e 69-1) and Lickers' appellate counsel, Mr. Rosen (d/e 69-2). Lickers has filed a reply (d/e 72). This Order now follows.

## II. LEGAL STANDARD

Section 2255, "the federal prisoner's substitute for habeas corpus," *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012), permits a prisoner incarcerated pursuant to an Act of Congress to request that his sentence be vacated, set aside, or corrected if "the sentence was imposed in violation of the Constitution or laws of the United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Relief under § 2255 is appropriate for "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Harris v. United States*, 366 F.3d 593, 594 (7th Cir. 2004) (quotation marks omitted).

## III. DISCUSSION

Lickers's § 2255 motion is another attempt to litigate his suppression claims, this time arguing that he received ineffective assistance of counsel when counsel failed to present the argument later highlighted by the Seventh Circuit. The Seventh Circuit held that the search warrants in Lickers's case lacked probable cause, but were saved by the good faith doctrine under *United States v. Leon,* 468 U.S. 897 (1984). Pursuant to *Leon*, the Fourth Amendment's exclusionary rule does not apply to evidence obtained by law enforcement officers acting in reliance on a search warrant issued by a detached and neutral magistrate: "Judicial officers have the responsibility to determine whether there is probable cause to issue a warrant; police officers should not be expected to question that determination." *United States v. Harju*, 466 F.3d 602, 606 (7th Cir. 2006) (internal citations omitted). A police officer's decision to obtain a warrant is *prima facie* evidence that he was acting in good faith, and a defendant bears the burden of rebutting that presumption. *Id.* at 607; *accord, United States v. Otero*, 495 F.3d 393, 398 (7th Cir. 2007). A defendant can rebut this presumption "only by showing that the issuing judge abandoned his role as a neutral and detached arbiter, that the officers were dishonest or reckless in preparing the supporting affidavit, or that the affidavit was so lacking in probable cause that no officer could have relied on it." *United States v. Mykytiuk*, 402 F.3d 773, 777 (7th Cir. 2005). Lickers argues that his attorneys could have showed the good faith doctrine did not apply to the federal warrant because the FBI agent failed to include in the warrant affidavit the details of the state suppression ruling.

The Government, however, argues that the claims are procedurally barred because they were already raised and addressed on direct appeal. Alternatively, the Government argues that

Licker's claim fails on the merits. The Court agrees with both arguments and finds that motion must be denied.

**A. Licker's Claim is Procedurally Barred.**

Federal prisoners may not use § 2255 as a vehicle to circumvent decisions made by the appellate court in a direct appeal. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Doe v. United States*, 51 F.3d 693, 698 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 205 (1995). Accordingly, a petitioner bringing a § 2255 motion is barred from raising: (1) issues raised on direct appeal, absent some showing of new evidence or changed circumstances; (2) non-constitutional issues that could have been but were not raised on direct appeal; or (3) constitutional issues that were not raised on direct appeal, absent a showing of cause for the default and actual prejudice from the failure to appeal. *Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992), *overruled on other grounds by Castellanos v. United States*, 26 F.3d 717, 710-20 (7th Cir. 1994). "[I]t is generally proper to raise arguments of ineffective assistance of counsel for the first time on collateral review in a § 2255 petition because such claims usually. . . involve evidence outside the record." *Galbraith v. United States*, 313 F.3d 1001, 1007 (7th Cir. 2002).

Here, Lickers's claims of ineffective assistance of counsel stem from the Seventh Circuit's observation that neither Lickers's counsel nor the Government focused on the conduct of the FBI agent in applying for the federal warrant. Nonetheless, the Seventh Circuit's opinion *did* focus on the FBI agent's conduct and found that the agent had acted in good faith in relying on the warrant. Specifically, even though the record did not reveal whether the FBI agent knew about the state suppression hearing ruling, the Seventh Circuit found that good faith was evident because "the [FBI] agent took care to seek a new warrant to authorize a new, federal examination

of Lickers's phone, computer, and digital camera." *Id.* Ultimately, the Seventh Circuit stated that its review of the record left them "of firm mind that the process that resulted in the application for, and execution of, the federal search warrant reflected good faith on the part of the federal agents . . . ." *Id.* at 620.

Accordingly, the Seventh Circuit has already determined that the FBI agent acted in good faith regardless of his knowledge of the state suppression proceedings at the time of applying for the search warrant. Lickers's attempts to relitigate the issue here in the guise of an ineffective assistance of counsel is procedurally barred.

**B. Lickers Has Not Shown Ineffective Assistance of Counsel.**

Even if the Seventh Circuit decision had left open whether knowledge of the state suppression ruling could have altered the good faith determination, the Court finds that Lickers has not shown he received ineffective assistance of counsel when his counsel did not present the issue. The Sixth Amendment guarantees criminal defendants effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). Under *Strickland's* two-part test, a petitioner must show both that his attorney's performance was deficient and that he was prejudiced as a result. *Vinyard v. United States*, 804 F.3d 1218, 1225 (7th Cir. 2015). Courts, however, must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 690. A petitioner must also prove that he has been prejudiced by his counsel's representation by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Absent a sufficient showing of both cause and prejudice, a petitioner's claim must fail. *United States v. Delgado,* 936 F.2d 303, 311 (7th Cir. 1991).

Here, Lickers cannot show that he received ineffective assistance of counsel when his counsel failed to raise this issue. Looking just at the record of the criminal proceedings, it could be possible that counsel simply proceeded with the same arguments he had made in state court without considering whether additional grounds could be raised regarding the federal search warrant. This might have helped Lickers show the first prong: deficient conduct. However, Mr. Dalton has submitted an affidavit stating that he did not raise the issue because he did not consider the omission to be material for two reasons: the state court had not considered whether the state warrant lacked probable cause and such a determination would not have been binding on the district court. *See* Affidavit of Daniel Dalton, d/e 69-1.

The Court agrees with Attorney Dalton's assessment, and, for the same reason, finds that Lickers cannot show prejudice. Even if the FBI agent knew about the state suppression hearing (and even if the Seventh Circuit's decision left this issue unanswered), the Court finds that the FBI agent acted in good faith in relying on the federal warrant. As Lickers's defense counsel noted, the state suppression ruling did not address the validity of the warrant itself. Rather, the state court found that law enforcement lacked probable cause or reasonable suspicion to detain Lickers. Based on that finding, the state court suppressed all evidence from the encounter. The FBI agent's inclusion of the state suppression ruling surely would have been the better practice, as the Seventh Circuit noted. However, because the state court did not address whether the search warrant had sufficient probable cause, the FBI agent would not have had any reason to believe the warrant application itself was lacking probable cause. And, while including the state suppression ruling might have made the Court aware of later issues likely to come up in the case, the state suppression ruling was not binding on the Court. At the warrant stage, the Court must

only determine whether the warrant itself had sufficient probable cause. Inclusion of the state court suppression ruling would not have impacted that calculus in this case.

Importantly, it is not clear that the Court would have been required to suppress the evidence obtained from the warrants even if the Court had found that the initial encounter violated the constitution because the caselaw in this circuit is unsettled regarding whether the fruit of the poisonous tree would have even resulted in suppression of the evidence in this case had the district court or the Seventh Circuit agreed with the state court's finding that the detention was unconstitutional. *See Lickers*, 928 F.3d at 620 (leaving "for another day the question whether we are required to exclude all traces of that knowledge from our good-faith analysis under *Leon*, a question on which other circuits have offered differing views.) (citing *United States v. McClain*, 444 F.3d 556, 565–66 (6th Cir. 2005) (applying *Leon* good faith where an affidavit supporting a search warrant was tainted by evidence obtained in violation of the Fourth Amendment) with *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987) (endorsing contrary reasoning and declining to apply the *Leon* good-faith exception)). Accordingly, the limited state suppression ruling had little to say about how the case would proceed in federal court. And, as the Seventh Circuit noted "there was nothing impermissible about the federal authorities choosing to seek the warrant as part of pursuing a federal prosecution of Lickers following the state court's suppression ruling and dismissal of the state charges." *Lickers*, 928 F.3d at 620.

In another case, the outcome might be different. If the state court had found that the search state warrant lacked probable cause, that reasoned decision could certainly be material to the FBI agent's good faith reliance on the warrant, even if it would not be binding on the federal district court. Here, however, even if the Seventh Circuit's decision left open whether the

omission was material, the Court now holds that, based on the facts of this case, the omission was immaterial. Accordingly, Lickers cannot show prejudice on his trial counsel claim or his appellate counsel claim because raising this issue would not have changed the outcome of his suppression motion or appeal.

**C. Lickers's Motion for Counsel is Denied.**

Lickers has also filed a motion to request counsel (d/e 63). While parties seeking post-conviction relief under 28 U.S.C. § 2255 are not entitled to counsel, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), a court may appoint counsel for financially eligible § 2255 petitioners if it "determines that the interests of justice so require," 18 U.S.C. § 3006A(a)(2)(B). Lickers has not provided any details on why he should be appointed counsel. The Court notes that Lickers was well aware of the basis of his claim and advanced coherent arguments in support of his claim. While his claim may not have been run-of-the-mill, his briefing shows that he has sufficient understanding of the law and the facts of this case. Appointing counsel would not aid the Court in understanding Lickers's claims, nor otherwise be in the interests of justice. Accordingly, the Court DENIES Lickers' motion. *See Taylor v. Knight*, 223 F. Appx 503, 504 (7th Cir. 2007) (finding that "[t]he district court acted well within its discretion in denying [the petitioner's] request for appointed counsel" pursuant to 18 U.S.C. § 3006A(a)(2)(B) where the petitioner's "claims were not particularly complex," he "had litigated many similar claims before," and he "appeared to be informed about the facts and proceedings, was able to express himself in an understandable fashion, and showed no particular impediment to his trying the case himself").

## IV. EVIDENTIARY HEARING

Lickers has requested an evidentiary hearing. An evidentiary hearing is not always necessary in § 2255 cases. *See Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001). However, "[a] hearing is required unless the record conclusively shows that the movant is not entitled to relief." *Hicks v. United States*, 886 F.3d 648, 650 (7th Cir. 2018); 8 U.S.C. § 2255(b). Here, no hearing is necessary because Lickers's claim is procedurally barred and because, even if it is not procedurally barred, he is unable to show prejudice on any of his claims and has not sufficiently alleged material facts that, if true, would entitle him to relief on his ineffective assistance of counsel claims.

## V. CERTIFICATE OF APPEALABILITY

If Petitioner seeks to appeal this decision, he must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to the court of appeals from the final order in a § 2255 proceeding unless a circuit justice or judge issues a certificate of appealability). A certificate of appealability may issue only if Petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a claim is resolved on procedural grounds, a certificate of appealability should issue only if reasonable jurists could disagree about the merits of the underlying constitutional claim *and* about whether the procedural ruling was correct. *Flores-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Here, the Court does not find that reasonable jurists could disagree that Petitioner's claims are procedurally barred and/or meritless. Accordingly, the Court declines to issue a certificate of appealability.

## VI. CONCLUSION

For the reasons stated, the Court DENIES Petitioner Lickers's Motion to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255 (d/e 62) and his Motion for Appointment of Counsel (d/e 63). The Court DECLINES to issue a certificate of appealability. Lickers's Motion for Extension of Time to File a § 2255 Motion (d/e 61) is DISMISSED AS MOOT. The Clerk is DIRECTED and enter the Judgment in favor of Respondent and close the accompanying civil case, 20-cv-4164. This case is CLOSED.

Signed on this 23rd day of December 2021.

/s/ Sara Darrow
Sara Darrow
Chief United States District Judge

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