No. _____

IN THE

Supreme Court of the United States

JEMEL T. KNOX,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MELODY BRANNON
Federal Public Defender
DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

QUESTION PRESENTED

More than three decades ago, in order to save from suppression evidence obtained via a search warrant, this Court created the good-faith exception to the exclusionary rule. But the good-faith exception does not apply if the warrant affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 923 (1984). Since *Leon*, this Court has provided no guidance to the lower courts on the meaning of this latter phrase. Without guidance, the lower courts have applied the good-faith exception broadly, requiring little more than information (whether innocent or criminal, predictive or non-predictive, corroborated or not corroborated) from a known informant (whether reliable or not, irrespective of a motive to lie). The question presented is:

> Whether the good-faith exception applies to save a search warrant lacking in probable cause (as found by the district court), where the warrant was based entirely on information from an informant of unknown reliability with a motive to lie (an ex-girlfriend), and the officer corroborated only one innocent, non-predictive fact obtained from the informant.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Jemel T. Knox respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's panel decision, which is published at 883 F.3d 1262, is included as Appendix A. The Tenth Circuit's unpublished order denying Mr. Knox's petition for rehearing is included as Appendix C. The district court's order denying Mr. Knox's motion to suppress, which is published at 79 F.Supp.3d 1219, is included as Appendix B.

JURISDICTION

The United States District Court for the District of Kansas originally had jurisdiction under 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Mr. Knox timely appealed to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291. The Tenth Circuit affirmed in a published decision. On March 26, 2018, the Tenth Circuit denied Mr. Knox's petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

When officers search pursuant to a warrant that lacks probable cause, as in this case, the question becomes whether the good-faith exception to the exclusionary rule applies to save the unconstitutional search. The good-faith exception does not apply where the warrant 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. What this phrase means, however, is not clear. In the thirty-four years since this Court decided *Leon*, this Court has yet to provide any definition or meaning to the phrase.

Without guidance, the lower courts have essentially adopted watered-down probable-cause tests, primarily focusing on whether the information in the warrant affidavit came from a known or unknown informant, and if unknown, whether the officer corroborated the information. But the lower courts' tests not only differ from each other, but have also effectively rubber-stamped bare bones affidavits, particularly where the informant is known to the officer. Known informants, however, are not invariably reliable. Rather, in cases like this one, a known informant (like an ex-girlfriend) often has a motive to lie. In such instances, a reasonably well-trained officer should know that corroboration of such information is key. Where the only corroboration is of one innocent, non-predictive fact, the good-faith exception should not apply. Because the Tenth Circuit applied it here, review is necessary.

1. In early 2014, Jemel Knox failed to appear for a court hearing in a Kansas state court. Pet. App. 4a, 26a. A Kansas court issued an arrest warrant, and Detective Kevin Finley from the Johnson County, Kansas Sheriff's Office was tasked with

executing the warrant. *Id.* 2a, 26a-27a. Detective Finley tracked Mr. Knox to a third-party's residence (a woman named Alecia Young). *Id.* 2a-3a. Ultimately, officers obtained a warrant to search Ms. Young's residence not just for Mr. Knox, but for firearms as well. *Id.* 3.

In order to obtain the search warrant, Detective Finley swore out a three-page affidavit. R1.23-1. The affidavit included four introductory paragraphs, followed by twelve numbered paragraphs. *Id.*; *see also* Pet. App. 27a-29a. The bulk of the affidavit centered on probable cause to believe that Mr. Knox would be located at the residence. Of the twelve numbered paragraphs, only one paragraph – *paragraph four* – included any mention of the potential presence of firearms. *Id.* 27a. The other eleven paragraphs set forth general background information or reasons why Knox would be found at the residence. *Id.* at 26a-28a.

It is clear from the overall structure of the affidavit that its primary focus was to search for Mr. Knox. For instance, the second introductory paragraph described the residence to be searched and identified the thing to be seized as "the person of Jemel T. Knox." R1.23-1 at 1. This paragraph does not mention firearms. Similarly, the final two paragraphs only request to search for Mr. Knox. *Id.* at 3 ¶ 11 (indicating that officers were "seeking a search warrant" to enter the residence "to arrest Jemel Knox"), ¶ 12 (indicating that Detective Finley had been assigned to locate and arrest Mr. Knox). Neither of these final paragraphs mentioned firearms or requested to search the residence for firearms.

The affidavit mentioned the potential presence of firearms only twice. The fourth

introductory paragraph asked to search the residence for "[t]he body of Jemel T. Knox [date of birth omitted]; Firearms." *Id.* at 1; Pet. App. 27a. And this request hinged entirely on the averments made in paragraph four. In that paragraph, Detective Finley averred that, on January 22, 2014, he contacted Mr. Knox's ex-girlfriend, Cynthia McBee. Pet. App. 27a. Ms. McBee advised that: (1) Knox had become violent with her; (2) she obtained a protective order against him (on an unspecified date); (3) he "always carried a gun," "always carries a pistol in his pants," and "has numerous weapons to include an AR15 assault rifle and a Desert Eagle pistol"; (4) he threatened her and her neighbor in December 2013; (5) he threatened her father and her father's employees with a gun (on an unspecified date); (6) he had numerous girlfriends; and (7) two of his friends (found on Mr. Knox's Facebook page) were Michael Dupree Jr. and Alecia Young. *Id.*

A Johnson County judge signed the search warrant the same day that Detective Finley presented it (February 6, 2014). Pet. App. 29a. Much like the warrant affidavit, the warrant itself authorized, in three separate places, the search of Young's residence for Mr. Knox. R.23-2. The warrant authorized the search of the residence for "Firearms" only once. *Id.* Officers searched the residence that same day. Pet. App. 4. Officers found Mr. Knox, as well as a firearm that was located in a suitcase. *Id.*

2. In 2014, a federal grand jury in Kansas returned a one-count indictment against Jemel Knox, charging him with possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). Pet. App. 1a. Mr. Knox filed a motion to suppress the firearm. *Id.* 1a-2a. The district court agreed with Mr. Knox that the warrant affidavit lacked

probable cause. *Id.* 4a, 29a-43a. The court based its decision on three things: (1) the affidavit failed to establish Ms. McBee's reliability; (2) the affidavit failed to establish the timeliness of Ms. McBee's assertions, particularly that Mr. Knox "always" carried a gun; and (3) the affidavit failed to establish a nexus between the firearm and Young's residence. *Id.* But the district court refused to suppress the firearm and instead applied the good-faith exception to save the unconstitutional search. *Id.* 5a, 43a-47a. The district court did so based on its finding that the affidavit was not "devoid of factual support." *Id.* 44a. The district court noted that, because McBee was named, she "could be held responsible for fabricated allegations; her report was therefore entitled to greater weight than that of an anonymous tipster." *Id.* 44a-45a. Moreover, Detective Finley corroborated one innocent "fact" provided by McBee (that McBee identified Young as one of Knox's friends on Facebook). *Id.* 27a, 45a.

3. The Tenth Circuit affirmed. In doing so, the Tenth Circuit considered three factors: reliability, timeliness, and nexus. Pet. App. 19a-20a. On reliability, the Tenth Circuit stated that McBee, "a former girlfriend," "spoke from personal knowledge about the defendant's gun habits," and specified "the particular types of weapons Knox was known to carry." *Id.* 20a-21a. The Tenth Circuit acknowledged that corroboration of "non-predictive information cannot itself establish sufficient reliability for probable cause," but nonetheless noted that Detective Finley corroborated "McBee's information about the friendship between Knox and Young." *Id.* 21a.

The Tenth Circuit refused to find that, because McBee was an ex-girlfriend, a

reasonably well-trained officer would have viewed her statements with skepticism. *Id.* In support, the Tenth Circuit again noted that Detective Finley "was able to corroborate Ms. McBee's allegation of a relationship between Knox and Young," and that the detective "apparently spoke with Ms. McBee in person, offering him an opportunity to gauge her reliability." *Id.* 21a-22a. Despite this latter comment, in a footnote the Tenth Circuit noted that the "issuing judge," not police officers, "are responsible for making a comprehensive assessment of an informer's credibility, taking into account basis of knowledge, motivation to lie, and all other circumstances set forth in the affidavit." *Id.* 22a n.14 (quotations omitted). In the end, the Tenth Circuit held that, "based on Ms. McBee's personal knowledge of Knox's habits, acquired through the close proximity of a personal relationship, the information she provided bore some indicia of reliability." *Id.* 22a.

On timeliness, the Tenth Circuit noted that Ms. McBee indicated that Mr. Knox "had become violent with her 'lately'" and that he threatened her and her neighbor "less than a month before," "establishing timeliness regarding her testimony." *Id.* 23a. The Tenth Circuit also cited Ms. McBee's statement that Knox "always" carried a gun, a fact which the affidavit included in the same sentence of the affidavit as the recent threat. *Id.* The Tenth Circuit noted that carrying a gun "is a 'continuous and ongoing' felony." *Id.* Finally, the Tenth Circuit inferred that, because officers traced Mr. Knox's phone to Young's residence "twice in four days," it was reasonable for an officer to conclude "that Knox was not only visiting [Young's residence], but establishing a longer-term presence at the residence." *Id.* 23a. On nexus, the Tenth

Circuit concluded that McBee's "timely statement that Knox always carried a gun and the officers' timely information concerning Knox's location that provided the critical nexus between the illegal firearm sought in the search" and Young' residence, at least "when he was there." *Id.* 24a. Ultimately, the Tenth Circuit agreed that the good-faith exception saved the unconstitutional search. *Id.* 25a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Need Guidance And Clarification On What *Leon*'s "So Lacking In Indicia Of Probable Cause" Standard Actually Means.

When a search warrant is found to be lacking in probable cause—and thus results in an unconstitutional search under the Fourth Amendment—use of evidence emanating from the illegal search and seizure is generally barred. *See Mapp v. Ohio*, 367 U.S. 643, 648-49 (1961). While not a constitutional principle itself, the exclusionary rule is a judicially-created remedy "to effectuate the Fourth Amendment right of citizens [to be free from unreasonable searches and seizures]." *Illinois v. Gates*, 462 U.S. 213, 254 (1983). However, in *Leon*, this Court held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion [of evidence]." 468 U.S. 922. Thus, this Court established the good-faith exception to the exclusionary rule.

But the good-faith exception does not save all unconstitutional searches. In *Leon*, this Court enumerated four instances in which the good-faith exception would not apply. *Id.* at 923. This case involves one such instance: where 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.*

Generally, when the good-faith exception is applied, the underlying warrant lacks probable cause, making the search necessarily unconstitutional. *See, e.g. United States v. Clark*, 638 F.3d 89, 93-94 (2d Cir. 2011) (applying good-faith analysis after finding the warrant was not supported by probable cause); *United States v. Wilhelm*, 80 F.3d 116, 121-22 (4th Cir. 1996) (same); *United States v. Brown*, 828 F.3d 375, 385-86 (6th Cir. 2016) (same); *cf. United States v. Edwards*, 813 F.3d 953, 959 (10th Cir. 2015) (asserting discretion to address *Leon*'s good-faith exception without first addressing probable cause itself); *United States v. Flanders*, 468 F.3d 269, 270-71 (5th Cir. 2006) (same); *United States v. Matthews*, 753 F.3d 1321, 1325 (D.C. Cir. 2014) (noting that "[i]n the end, we need not determine the vexing issue of probable cause, as we conclude that even if probable cause is lacking, the admission of the evidence was not reversible error because of the *Leon* exception").

Nonetheless, a consideration of probable cause and Fourth Amendment principles is necessary to determine whether the affidavit has the requisite "indicia of probable cause" upon which a law enforcement officer may rely in good faith. *See Leon*, 468 U.S. at 926 (holding "suppression is appropriate only if the officers . . . could not have harbored an objectively reasonable belief in the existence of probable cause"). Probable cause exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. Specifically, when the underlying affidavit incorporates or relies upon information provided by a

third party (an informant), probable cause is determined by the "totality-of-the-circumstances." *Id.* Under this approach, an informant's veracity, reliability, and basis of knowledge are considered in relation to each other and as a whole. *Id.* at 233 (noting, "a deficiency in one [element] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other").

Gates established that a deficiency in one of these areas could be compensated for by "some other indicia of reliability." *Id.* This "other" indicia of reliability includes corroboration of some or all of the details or allegations provided by the informant. *See, e.g. Florida v. J.L.*, 529 U.S. 266, 270 (2000). It is well-established that where the informant is an anonymous or unknown informant, corroboration in some form is necessary. *See id.*; *Wilhelm*, 80 F.3d at 123 (holding the good-faith exception did not apply because it was unreasonable for affiant to rely on information from an anonymous informant without any corroborating any information); *United States v. Leake*, 998 F.2d 1359, 1367 (6th Cir. 1993) (holding it was unreasonable to rely on anonymous tip after affiant conducted surveillance but did not observe any unusual or incriminating activity).

1a. Here, the **Tenth Circuit** applied the good-faith exception, in relevant part, because the named informant (Mr. Knox's ex-girlfriend) provided information that "bore some indicia of reliability." Pet. App. 22a. Particularly, the Tenth Circuit found persuasive that the informant both spoke from personal knowledge (by nature of her past relationship with the defendant) and specified the weapons she knew the defendant to carry. *Id.* Additionally, the Tenth Circuit considered that the affiant had

corroborated a single factual element contained within the informant's statement: a friendship between the defendant and a third party. *Id.* Thus, although not determinative in itself, the Tenth Circuit considered the corroboration of a single innocent fact in its totality-of-the-circumstances analysis of the informant's reliability, ultimately upholding the application of the good-faith exception.

1b. The corroboration of an informant's tip can indeed provide the necessary indicia of reliability for information procured via an informant, especially when the informant is anonymous. *See Florida*, 529 U.S. at 270 (applying this standard when analyzing a *Terry*-stop "reasonable suspicion" issue based on a tip provided anonymously). However, in the context of the good-faith exception, it is much less clear; including how much corroboration—and of what kind of facts (innocent or criminal)—is necessary. For instance, the **Fifth Circuit** has applied the good-faith exception in a similar fashion as the Tenth Circuit, by finding the informant sufficiently reliable where law enforcement corroborated purely innocent descriptive facts the named informant had provided (presumably based on the informant's own personal observations). *United States v. Pena-Rodriguez*, 110 F.3d 1120, 1130-31 (5th Cir. 1997).[1]

In a similar vein, the **Eighth Circuit** applied the good-faith exception to the exclusionary rule after a confidential informant (not named but one who had provided

[1] To be sure, the affiant corroborated the existence of horse trailers, pickup trucks, and semi-tractors with extra saddle fuel tanks that the named informants had alleged the defendant used in their drug transportation scheme. However, without directly observing any criminal behavior associated with these vehicles, by confirming the descriptions and the existence of these vehicles does nothing to take this corroboration out of the realm of corroborating only "innocent" facts.

information to law enforcement in the past and therefore is not an unidentified anonymous informant), in part, because the affiant had "verified numerous innocent facts." *United States v. Carpenter*, 341 F.3d 666, 673 (8th Cir. 2003). Likewise, the **D.C. Circuit** held the good-faith exclusion applicable in a case involving a previously-unknown but now-identified informant,[2] where the only corroboration the affiant undertook was the accused's name and address (two purely innocent facts). *Matthews*, 753 F.3d at 1323.

Additionally, the **Seventh Circuit** applied the good-faith exception even though law enforcement took only "minimal attempts" to corroborate a "known" informant's information,[3] including identifying the apartment building where the informant allegedly purchased drugs and the informant's positive identification of the defendant from police photographs. *United States v. Robinson*, 724 F.3d 878, 885-86 (7th Cir. 2013). In this instance, the Seventh Circuit justified applying the good-faith exception where only descriptive and innocent facts provided by the informant were corroborated by relying on the fact the informant's statement was "detailed, recent, [and a] firsthand account . . . that was likely self-incriminating" (in the sense that he admitted to purchasing drugs from defendant at the identified location). *Id.*

---

[2] Although the source was not named in the affidavit (or at least the portion cited by the D.C. Circuit), the source is most similar to a "named" (as opposed to an "anonymous") informant as the affiant avers that one reason he believes the source to be credible and reliable is that he "knew the source had recently been found to be in possession of a quantity of methamphetamine in 'its' residence." *Matthews*, 753 F.3d at 1321.

[3] Again, although the informant in this case was "anonymous" in terms of not being named in court filings (including the search warrant affidavit), the informant spoke with police face-to-face and even appeared before a judge alongside the officer in a probable cause-style proceeding, implying that the informant was in-fact "known" to law enforcement, the officer, and the warrant-issuing judge.

1c. Alternatively, the **Sixth Circuit** expressly held in *United States v. Weaver* that the good-faith exception did not apply after finding that "a reasonably prudent officer would have sought greater corroboration" under the circumstances of the case. 99 F.3d 1372, 1381 (6th Cir. 1996). In effect, the Sixth Circuit found that the affidavit was so lacking in indicia of probable cause because the informant's information was based on hearsay (not a personal first-hand observation), and law enforcement *only* corroborated the location and ownership of the defendant's residence (by verifying that the utilities account for the residence was under the defendants name). Notably, the Sixth Circuit noted that the officer "had no prior knowledge connecting [the defendant] with illegal drugs or drug distribution [and] . . . took no additional steps to corroborate the informant's story." *Id.* at 1375.

2a. When faced with the good-faith exception, the circuit courts of appeals also place great reliance on the circumstances underlying the transaction of information between law enforcement and the informant. In other words, when the informant is "known" (in the sense that they are named in the affidavit, known by name or identity to the officer or the warrant-issuing judge, and/or provide their information in a face-to-face manner), the courts of appeals, including the Tenth Circuit, heavily weight this as establishing sufficient indicia of reliability to ultimately provide a sufficient indicia of probable cause for good faith reliance. This is the case even if the informant has a known and apparent motive to lie.

For instance, in this case, the **Tenth Circuit** expressly declined to consider the implication the informant's status as defendant's ex-girlfriend had in relation to the

reliability of her statements. Pet. App. 22a. In particular, the Tenth Circuit placed persuasive weight on the fact that the officer "apparently" met with the informant in-person and therefore had an "opportunity to gauge her reliability." *Id.* 21a-22a.

Similarly, despite the informant's self-described "estrangement from her father" (whom she implicated as involved in criminal activity), the **Eighth Circuit** nevertheless applied the good-faith exception in *United States v. Warford*, 439 F.3d 836, 841-42 (8th Cir. 2006). The Eighth Circuit discounted the informant's apparent motive to lie because of her detailed and specific first-hand account of information. *Id.*; *see Illinois v. Gates*, 462 U.S. 213, 234 (1983) (noting that in the probable cause context, an informant's tip may be "entitl[ed] . . . to greater weight than might otherwise be the case" notwithstanding an apparent ulterior motive if the information provided by the informant is specific, detailed, and based on first-hand observation).

The **Seventh Circuit** has taken this reasoning even further, applying the good-faith exception and expressly holding "[t]he fact that the police used [informant's] statement even when they knew she was biased was not unreasonable." *United States v. Peck*, 317 F.3d 754, 758 (7th Cir. 2003). Indeed, the Seventh Circuit relied on the informant's personal relationship with the defendant for establishing personal knowledge, and discounted her apparent ulterior motive. Thus, even though the previously unknown informant explicitly expressed her desire to have the defendant punished for "not paying for diapers for their child," and law enforcement failed to substantively corroborate any of the informant's statements (only looking up defendant's criminal history), the good-faith exception applied because the court

found the informant's alleged personal relationship with the defendant provided reliability because the information was based on first-hand observations. *Id.* at 755-58.

Alternatively (once again), the **Sixth Circuit** refused to apply the good-faith exception where the affiant "failed to conduct any independent investigation to corroborate [the informant's] allegations" after discovery of the existence of a bad motive—in that the alleged defendant had recently fired the informant. *United States v. Czuprynski*, 8 F.3d 1113, 1118-1119 (6th Cir. 1993).

2b. In terms of the status of the informant, the circuit courts of appeals have blindly applied the good-faith exception based on a finding of inherent reliability in informants who are "known," based on the reasoning that a known informant can be held criminally liable for false statements made to law enforcement. For instance, the **First Circuit** accepted an officer's assertion that the source was "trustworthy" because of the source's history of working with law enforcement, holding that "some assurance of reliability exists" because the informant was "known to the police and can be held responsible if his assertions prove inaccurate or false." *United States v. Tiem Trinh*, 665 F.3d 1, 10-11 (1st Cir. 2011) (citing *United States v. Barnard*, 299 F.3d 90, 93 (1st Cir. 2002) (applying this principle in the probable cause context to find merit in the officer's mere assertion of the informant's reliability based upon the fact that he was known to law enforcement, and could therefore be held responsible for giving less-than-truthful information)). The **Tenth Circuit** has explicitly applied this same principle within the probable cause context, finding reliability based on the sole fact

that the informant is "known." *See United States v. Pulliam*, 748 F.3d 967, 971 n.2 (10th Cir. 2014) (citing *United States v. Johnson*, 364 F.3d 1185, 1190 (10th Cir. 2004)); *see also* Pet. App. 20a.

However, the **First Circuit** and the **Fourth Circuit** stand out as having recognized that the mere assertion of an informant's reliability is not sufficient to support subsequent good-faith reliance on the issued-warrant. *See, e.g.*, *United States v. Barnard*, 299 F.3d 90, 93 (1st Cir. 2002); *Wilhelm*, 80 F.3d at 123 (holding officer's assertion that the unknown caller was a "concerned citizen," "mature," and of "truthful demeanor" without significant corroboration cannot support good-faith reliance on the warrant).

As a result of the lack of clarity provided by this Court after having enumerated the "so lacking in indicia of probable cause" exception to the exclusionary rule, the circuit courts of appeal have applied the standard in differing ways. In this case, the Tenth Circuit applied the good faith exception where the informant had a clear motive to lie, relying only on the informant's assumed personal observation of the information provided and the corroboration of a single innocent and innocuous fact (that Knox and Young knew each other). The other circuit courts of appeal have applied similar standards to varying degrees (to reach different conclusions). Review by this Court is necessary to provide clarification and guidance under the good-faith exception.

II. The Tenth Circuit Erred.

A reasonably well-trained officer would not have sought a warrant to search Young's residence for firearms. The affidavit did not contain reliable, verified, firsthand, sufficiently detailed, or timely information linking firearms to the residence. The Tenth Circuit erred when it applied the good-faith exception to save this unconstitutional search.

More than fifty years ago, this Court made clear that a warrant-issuing judge cannot rely solely on conclusory statements made by the affiant or another person. *Giordenello v. United States*, 357 U.S. 480, 486 (1958); *Jones v. United States*, 362 U.S. 257, 269 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 84-85 (1980). Thus, an officer cannot obtain a search warrant based on nothing more than conclusory allegations from a known informant. *Id.* The cases instead establish the need for officers to verify the informant's **veracity**, **reliability**, or **basis of knowledge**, as well as to **corroborate** the information given by the informant. *See, e.g.*, ; *Rugendorf v. United States*, 376 U.S. 528, 532 (1964) (finding probable cause where affidavit included information from numerous reliable informants, and officers corroborated the information); *Jones*, 362 U.S. at 271 (finding probable cause where the information was provided by an informant who had "previously given accurate information" and whose "story was corroborated by other sources of information"); *Draper v. United States*, 358 U.S. 307, 333 (1959) (finding probable cause where the information was provided by a person "whose information had always been found accurate and reliable" and where an officer corroborated predictive information given by the informant).

The cases make clear that corroboration is key. This Court has "consistently recognized the value of corroboration of details of an informant's tip by independent police work." *Gates*, 462 U.S. at 241. For instance, an affidavit that provides that a "credible person" provided "reliable information" that a home contained contraband, with no corroboration, is insufficient to establish probable cause. *Gates*, 462 U.S. at 239 (citing *Aguilar v. Texas*, 378 U.S. 108 (1964)). The officers are expected to make "some effort to corroborate the informant's report." *Gates*, 462 U.S. at 242 (citing *Aguilar*, 378 U.S. at 109 n.1).

Indeed, it is possible to verify an informant's veracity, reliability, and basis of knowledge through corroboration. For instance, if an informant accurately predicts future activities, as corroborated by law enforcement, this information could sufficiently establish an informant's veracity, reliability, and basis of knowledge. *Gates*, 462 U.S. at 243-245 (finding probable cause where officers corroborated an unknown informant's predictive information "likely obtained only from the Gates themselves, or from someone familiar with their not entirely ordinary travel plans").

But it is not enough to verify "innocent, innocuous information." *United States v. Quezada-Enriquez*, 567 F.3d 1228, 1233 (10th Cir. 2009). A tip from an informant must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* (quotation omitted). And this is true even when the informant provides an unsubstantiated claim that his detailed information was obtained firsthand. *United States v. Tuter*, 240 F.3d 1292, 1298 (10th Cir. 2001) (in this case certain firearms within the defendant's home).

The affidavit at issue here sought to search for firearms based solely on Cynthia McBee's statements. Pet. App. 27a-29a. But the affidavit did not claim, let alone attempt to establish, McBee's **veracity** or **reliability**. *Id*. The affidavit, for instance, did not allege that McBee was a reliable informant or that she had given truthful information in the past. *Id.* And because the affidavit alleged that McBee was Knox's ex-girlfriend, a reasonably well trained officer would have viewed her statements with skepticism. *See, e.g.*, *United States v. Fennell*, 65 F.3d 812, 813-14 (10th Cir.1995) (finding that unsworn allegations made by defendant's former girlfriend lacked even minimal indicia of reliability); *United States v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999) (calling hearsay from an ex-girlfriend "the least reliable form of hearsay"); *United States v. Lloyd*, 566 F.3d 341, 346 (3d Cir. 2009) (noting the "adversarial nature of a hearsay declarant's relationship with the accused prompts courts to scrutinize out-of-court statements made by former lovers").

Nor did the affidavit establish a sufficient **basis of knowledge** for Ms. McBee's belief that a firearm would be found on Mr. Knox. Five of her seven allegations had nothing to do with a firearm. Pet. App. 27a-29a. Ms. McBee did not indicate that Mr. Knox was violent toward her with a firearm, that he threatened her with a firearm, or that the protective order had anything to do with a firearm. *Id.* And the information that Mr. Knox had numerous girlfriends and a friend named Alecia Young went not to probable cause to believe that *a firearm* would be found at Alecia Young's residence, but instead that *Mr. Knox* would be found at Alecia Young's residence. Ms. McBee provided no information that Alecia Young carried firearms.

Id.

Only two of the seven allegations involved a firearm: that Mr. Knox always carried a gun and owned other weapons, and that Mr. Knox threatened Ms. McBee's father with a gun on an unspecified date. *Id.* But the affidavit did not state that McBee had firsthand knowledge to support these allegations. The affidavit did not indicate that Ms. McBee was present when her father was threatened, nor did the affidavit set forth how Ms. McBee knew that Mr. Knox always carried a firearm. *Id.* Her basis of knowledge was "completely unsubstantiated." *Tuter*, 240 F.3d at 1298. She "did not claim to have ever been inside [Young's residence] or to have seen the [firearms]." *Id.* The affidavit "gave no supporting explanation of [McBee's] basis of knowledge." *Id.* Nor could her descriptions of the firearms have provided an adequate basis of firsthand knowledge. Descriptions of firearms are not "the kind of highly specific or personal details from which one could reasonably infer that the caller had firsthand knowledge about the claimed criminal activity." *Id.*

With nothing to establish veracity, reliability, or basis of knowledge, a reasonably well-trained officer would have known that **corroboration** was necessary to support a search warrant for firearms. *Gates*, 462 U.S. at 242; *Aguilar*, 378 U.S. at 109 n.1. But the affidavit includes nothing to indicate that Detective Finley corroborated any information provided by Ms. McBee. Detective Finley did not obtain a copy of the alleged protective order, did not interview Ms. McBee's neighbor, father, or her father's employees about the alleged threats, did not verify that Mr. Knox had multiple girlfriends, and did not confirm in any way that Mr. Knox carried firearms.

Pet. App. 27a-29a.

Nor did Detective Finley verify that Mr. Knox and Alecia Young were friends, although it is true that officers traced Mr. Knox to Alecia's residence. To be clear, however, in tracing Knox to Young's residence, officers were not corroborating predictive information supplied by McBee. The affidavit never alleged that McBee predicted that Knox would travel to Young's residence. So this one innocuous fact is not enough to corroborate McBee's allegations of criminal activity. *Quezada-Enriquez*, 567 F.3d at 1233; *Tuter*, 240 F.3d at 1297. Indeed, this fact went only to *Mr. Knox's presence* at Young's residence, not that *firearms* would be found there. Detective Finley did not seek out Alecia Young to corroborate Cynthia McBee's allegations related to firearms.

Finally, although it is possible that Ms. McBee could have been held responsible for any fabricated allegations, this fact alone cannot preclude suppression. Otherwise, an affidavit would pass muster any time it included information from a known person. A reasonably well-trained officer, and especially one with over twenty-seven years of experience, would have known that the affidavit did not provide probable cause to search for firearms at Young's residence (although it did establish probable cause to search for Mr. Knox). Suppression was warranted. *See, e.g.*, *Poolaw v. Marcantel*, 565 F.3d 721, 733–34 (10th Cir. 2009) ("This court has unambiguously held that probable cause cannot be established, as noted, 'simply by piling hunch upon hunch.'")

There are two additional reasons the good-faith exception should not apply in this

case. First, the affidavit also suffered from staleness concerns. Pet. App. 36a-37a. It is well established that probable cause cannot be established based upon stale information. And here, the affidavit did not indicate when the incidents alleged by McBee took place. A reasonably well-trained officer would have known that it is imperative to establish that the information provided within the affidavit is not stale. *See*, *e.g.*, *United States v. Roach*, 582 F.3d 1192, 1201 (10th Cir. 2009). Without this information, the warrant-issuing judge has no basis to find probable cause. *Id.* "This is particularly so considering that firearm and drug trafficking are not the sorts of crimes whose evidence is likely to remain stationary for years at a time." *Id.* at 1202; *see also* Pet. App. 37a ("an affidavit must provide some factual basis for determining when the suspect was last known to possess a firearm").

Second, the affidavit failed to establish a sufficient nexus between the presence of firearms and 431 Freeman. Pet. App. 37a-43a. "[T]he necessity of a nexus between the suspected criminal activity and the particular place to be searched is so well established that in the absence of such a connection, the affidavit and resulting warrant are so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Poolaw*, 565 F.3d at 734.

Detective Finley freely admitted below that he had no information indicating that anyone kept firearms at 431 Freeman. R1.67 at 17-18. Instead, Ms. McBee claimed that Mr. Knox always carried a firearm. Pet. App. 27a. But Detective Finley did not seek a search warrant for firearms conditioned upon Mr. Knox's presence at Young's residence. Instead, Detective Finley sought, and obtained, a warrant to search

Young's residence for firearms, regardless of whether Mr. Knox was present at the home. *Id.*

A reasonably well-trained officer would have known that that the search warrant was invalid. Law enforcement had no information whatsoever that firearms were stored at Alecia Young's home. Nor was there any indication within the warrant that Mr. Knox lived with Alecia Young or otherwise stored firearms at her home. For these additional reasons, Detective Finley should not have sought a warrant to search the third-party home for firearms. *See* Pet. App. 40a-43a (citing *United States v. Rahn*, 511 F.2d 290 (10th Cir. 1975)).

III. The Resolution Of This Issue Is Extremely Important.

This case involves a search of a home pursuant to a warrant that lacked probable cause. The Fourth Amendment speaks directly to this issue: "no Warrants shall issue, but upon probable cause." The fact that the official misconduct in this case is directly at odds with the text of the Fourth Amendment is a strong reason by itself to grant this petition.

> Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.

Byrd v. United States, 138 S.Ct. 1518, 1526 (2018) (quotations omitted). And "when it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Thus, not only does this case involve a warrant issued without probable cause, but it also involves a subsequent search of a home without

probable cause. Yet, the unconstitutional search was excused by the lower courts below. For that reason as well, review is warranted.

Moreover, the traditional Fourth Amendment remedy – the exclusionary rule – exists "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974). "[T]he need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Id.* at 348. Such is this case.

But the good-faith exception precludes application of the exclusionary rule, despite a Fourth Amendment violation that results in criminal punishment. Because the exception effectually excuses a constitutional violation, the contours of the exception are vital to ensure meaningful protection from unlawful searches and seizures. And that is particularly true here, where this Court has essentially provided no guidance on the meaning of the phrase "so lacking in indicia of probable cause."

It is not uncommon for this Court to grant certiorari to address issues related to the good-faith exception. *See*, *e.g.*, *Davis v. United States*, 564 U.S. 229, 238-239 (2011) (citing and discussing prior cases). This Court's guidance is needed again. Review is necessary.

IV. This Case Is An Excellent Vehicle.

For two reasons, this case is an ideal vehicle to define the contours of *Leon*'s "so lacking in indicia of probable cause" standard.

1. The question presented arises on direct review from a published decision of a

federal court of appeals. After the Tenth Circuit affirmed, Mr. Kearn sought rehearing, but the petition was denied without comment. Pet. App. 52a. The conflict is thus ripe for review. There are no procedural hurdles to overcome for this Court to address the merits of this important question.

2. If this Court grants certiorari and holds that the good-faith exception does not save a warrant affidavit based solely on information from an informant of unknown reliability with a motive to lie, where the officer corroborates nothing other than one innocent, non-predictive fact, Mr. Knox would be entitled to relief on remand. With the firearm properly suppressed, Mr. Knox's conviction and sentence would be vacated, and the Fourth Amendment's core concern (the protection of the home from searches based on less than probable cause) would be vindicated. Review is necessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender

DANIEL T. HANSMEIER
Appellate Chief
Counsel of Record
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org
Counsel for Petitioner

FILED
United States Court of Appeals
Tenth Circuit

February 27, 2018

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEMEL T. KNOX,

Defendant - Appellant.

No. 16-3324

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:14-CR-20022-JAR-1)

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender, Chekasha Ramsey, Assistant Federal Public Defender, with him on the briefs), Kansas Federal Public Defender, Kansas City, Kansas, appearing for Appellant.

Jared S. Maag, Assistant United States Attorney (Thomas E. Beall, United States Attorney with him on the brief), Office of the United States Attorney, Topeka, Kansas, appearing for Appellee.

Before **BRISCOE**, **EBEL**, and **MATHESON**, Circuit Judges.

EBEL, Circuit Judge.

Defendant Jemel Knox was indicted in 2014 on one count of possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). He moved to suppress the

firearm that formed the basis for this charge as the product of an unconstitutional search.

The firearm had been seized during the execution of a search and arrest warrant issued by a Kansas state magistrate. The district court held that although there was insufficient evidence of probable cause to justify the warrant, the officers executing the warrant were entitled to rely in good faith on the magistrate's probable cause determination and the firearm was not subject to suppression. After his motion was denied, Knox entered a conditional guilty plea which preserved his right to appeal the district court's suppression decision. Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM the district court.

I. BACKGROUND

In mid-January 2014, after Jemel Knox failed to appear in Johnson County District Court on a state charge, the merits of which are unrelated to this appeal, Kansas officers discovered that Knox had cut off his GPS monitor and fled from the apartment at which he had been staying. Based on these events, a Kansas court issued a warrant for Knox's arrest, and Detective Kevin Finley from the Johnson County Sheriff's office was assigned to locate Knox and take him into custody.

A. The Investigation

Detective Finley's investigation took two primary tacks. First, Finley obtained an order to track a phone number he believed to be Knox's. On February 1, 2014, the phone was turned on, and several phone calls were placed to Lindsey Kurtz—with whom Knox had previously been living—and a young woman named Alecia Young.

Two days later, on February 3, 2014, technicians tracked Mr. Knox's phone to the general vicinity of an apartment complex located at 431 Freeman Ave., Wyandotte County, Kansas City, Kansas.

On February 6, 2014, police received a "ping" from Mr. Knox's cell-phone that placed him at 431 Freeman. As Detective Finley told the magistrate in seeking a warrant to search 431 Freeman based in part on this information, a "ping" is "a notification from T-Mobile that the phone is active and turned on and provides a distance between the nearest cell phone tower and the phone." (R. Vol. I at 36) ("Finley Aff.") ¶ 10. In this case the "ping" was accurate within a range of six meters. Officers then confirmed that Ms. Young resided at 431 Freeman, and observed a white Cadillac in the parking lot registered to Ms. Kurtz.

The second aspect of Detective Finley's investigation involved speaking with a former girlfriend of Knox's, Cynthia McBee. Ms. McBee indicated that Knox had "become violent with her lately," that he had threatened her and her neighbor on one occasion, and her father on another, and that he "always" carries a firearm. (Finley Aff. ¶ 4). As a previously convicted felon, Knox is prohibited from possessing firearms. Id. ¶ 1

On the basis of this investigation, Detective Finley swore an affidavit in Johnson County District Court, and a judicial warrant was issued on February 6, 2014 authorizing the search of 431 Freeman "to obtain the person of Jemel T. Knox," and the seizure of "The body of Jemel T. Knox" and "Firearms." (R. Vol. I at 37.)

B. The Search

That same afternoon Detective Finley and other Kansas officers executed the warrant. The officers found Knox hiding underneath the bed in the master bedroom and took him into custody. After his arrest, the officers searched the residence and seized a rifle from a suitcase located on the floor next to the bed under which Knox had been hiding. On this basis the United States indicted Knox on one count of being a felon in possession of a firearm in violation of § 922(g)(1).[1]

C. The Motion to Suppress

At the district court, Knox moved to suppress the rifle, arguing that Detective Finley's affidavit did not provide probable cause that a firearm would be located at 431 Freeman.[2] The district court agreed that the affidavit did not establish probable cause. The court based its decision on three things: (1) there was no information in the affidavit to establish Ms. McBee's reliability, (2) there was no information in the affidavit to establish the timeliness of Ms. McBee's assertions, particularly that the defendant "always" carried a gun, and (3) there was no information in the affidavit to establish a nexus between the firearm and 431 Freeman.

---

[1] Knox was also charged with receiving and possessing an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(d), 5861(f), and 5871, but that charge was later dismissed.

[2] The weapon was ultimately discovered near where Knox had been hiding from officers. However, it was not argued that the rifle was validly seized pursuant to the search-incident-to-arrest exception to the warrant requirement. That exception only applies when the search and the arrest are substantially contemporaneous. See, e.g., Lavicky v. Burnett, 758 F.2d 468, 474 (10th Cir. 1985). Because the seizure of the rifle here occurred well after Knox had been arrested and removed from the house, that exception does not apply and it was not argued here.

The district court nonetheless declined to suppress the firearm, deciding instead to apply the good-faith exception to the warrant requirement. In doing so, the court considered not only the information in Detective Finley's affidavit, but also information gleaned from Detective Finley at the suppression hearing that was not included in the affidavit, specifically: (1) that the affidavit had been prepared by an assistant district attorney, (2) the threat to Ms. McBee's father occurred less than two months prior to the warrant application, and (3) that a police report corroborated Ms. McBee's story about the threat to her and her neighbor.

Considering these facts alongside the information in the affidavit, the district court could not say it was "entirely unreasonable for Detective Finley to rely on the magistrate's authorization to search the apartment for firearms." (R. Vol. I at 83.) Therefore, it applied the Leon[3] good-faith exception to the warrant requirement. Following this ruling, Knox entered a conditional guilty plea to one count of being a felon in possession, judgment was entered, and Knox perfected our appellate jurisdiction by timely appealing.

II. DISCUSSION

The basic question presented in this appeal is whether the Leon good-faith exception to the warrant requirement should apply to the firearm found at 431 Freeman. Before reaching this question, however, we first address the standard of review on appeal, and whether it was appropriate for the district court to consider information outside the affidavit in assessing the executing officer's good-faith.

[3] United States v. Leon, 468 U.S. 897, 922 (1984).

A. The standard of review is de novo.

Under ordinary circumstances we review a district court's application of the good-faith exception to the warrant requirement de novo. See United States v. Augustine, 742 F.3d 1258, 1262 (10th Cir. 2014) (citing United States v. Danhauer, 229 F.3d 1002, 1005 (10th Cir. 2000)). This standard, however, is predicated on the appellant having objected to the challenged action at the district court. United States v. Burgess, 576 F.3d 1078, 1096 (10th Cir. 2009).

Here, there is no question that Knox objected to the weapon being introduced into evidence against him. Furthermore, Knox's suppression motion adequately considered, addressed, and briefed whether the good-faith exception would apply were the district court to find—as it did—that the warrant lacked probable cause. The government argues, nonetheless, that Knox's Leon argument on appeal is subject to plain-error review.

The government's position is predicated on the *form* of Knox's argument against the application of the good-faith exception, namely that he did not elaborate sufficiently on his argument that the district court was wrong to consider information beyond the scope of the affidavit. However, the government's characterization of Knox's arguments below as deficient is incorrect, so we need not address whether an insufficient elaboration would trigger a plain error standard of review.

In his Reply to the Government's Response to Defendant's Motion to Suppress, Knox says: "the reviewing Court must examine 'the text of the warrant and the affidavit to ascertain whether the agents might have 'reasonably presume[d] it to

be valid.' Any additional information that Detective Finley possessed, as well as information provided by the Government, is irrelevant to [the suppression] Court's determination." (R. Vol. I at 59–60) (quoting United States v. Corral-Corral, 899 F.2d 927, 932 (10th Cir. 1990) (internal quotations omitted)).

Furthermore, at the suppression hearing, defense counsel objected multiple times to Detective Finley's testimony regarding information that would tend to support probable cause but was not included in the affidavit nor presented orally to the issuing magistrate. Counsel's basis for doing so was that it was "not relevant as to the proceeding, what additional information was provided to the [issuing] judge outside the four corners of the [affidavit.]" (R. Vol. I at 107–10). During her colloquy with the suppression judge following testimony, defense counsel further argued that "[i]f the [suppression] Court finds that the *affidavit* was devoid of any facts that would establish the probability of evidence that the criminal activity would be located in that desired search area, then the Leon good-faith exception does not apply . . . [notwithstanding] additional information given to the [suppression] Court to now establish this nexus." (Id. 126–27) (emphasis added). It is possible to cite several more instances where defense counsel either in writing or orally described the standard as whether the *affidavit* was so lacking in indicia of probable cause as to render the officer's belief in the existence of probable cause unreasonable. See, e.g., R. Vol. I at 73 (emphasis added).

Accordingly we decline the government's invitation to review the district court's decision for plain error. We will consider the district court's application of the good-faith exception de novo. Augustine, 742 F.3d at 1262.[4]

B. The district court erred in considering information not disclosed under oath to the issuing magistrate.

In determining that Detective Finley acted in good-faith reliance on the approved warrant, the suppression court apparently relied in part on information allegedly known to the detective at the time he sought the warrant, but not included in his affidavit in support of the warrant application or otherwise provided under oath to the issuing magistrate. (R. Vol. I at 82) ("Detective Finley also testified that the attorney did not detail in the affidavit every piece of information the detective obtained during his investigation.").

Specifically, there are three facts the suppression court may have considered in its good-faith analysis that were not provided under oath to the issuing magistrate:

1. The affidavit was prepared in consultation with an Assistant District Attorney, who chose what information to include in the affidavit and what information not to include in the affidavit.[5]

[4] Both parties agree, regardless of any confusion created by language we have included in previous cases, see, e.g., United States v. Danhauer, 229 F.3d 1002, 1005 (10th Cir. 2000), that this de novo review does not involve viewing the evidence "in the light most favorable to the government," Gov't Br. at 31–32 (detailing the source of the confusion and concluding that "there is no question" that good-faith review is entirely de novo without deference to the government).

[5] We agree with both parties that this information, relating to the so-called "warrant application process" may be considered by a suppression court in assessing an officer's good-faith reliance on a warrant. Cf. Messerschmidt v. Millender, 565 U.S.

2. The detective knew that the threats to Ms. McBee, her neighbor, her father, and her father's co-workers all occurred in December of 2013, and all likely included weapons.
3. A police report obtained by Detective Finley corroborated Ms. McBee's assertion that the defendant had threatened her and her neighbor twenty-five days before the search.

In general, even if a warrant is not supported by probable cause, evidence seized in good-faith reliance on that warrant is not subject to suppression. United States v. Leon, 468 U.S. 897, 922 (1984)). However, an exception to this general rule is that "when the affidavit in support of the warrant is 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable[,]'" the officer cannot be said to have acted in good-faith reliance on the magistrate's determination, and suppression is appropriate. Danhauer, 229 F.3d at 1007 (10th Cir. 2000) (quoting Leon, 468 U.S. at 923).

At issue here is whether, in assessing this exception, the suppression court may consider information known to the officer when he executed the deficient warrant but not disclosed in the affidavit or otherwise sworn to the issuing magistrate. The Tenth Circuit has not unequivocally resolved this question.

535, 553–55 (2012) (holding in the qualified immunity context that having secured the approval of their warrant application from both a superior and a deputy district attorney was "certainly pertinent in assessing whether [the officers] could have held a reasonable belief that the warrant was supported by probable cause").

Our most extensive discussion of this issue can be found in United States v. Danhauer, 229 F.3d 1002, (10th Cir. 2000). In Danhauer, we held an affidavit insufficient to establish probable cause because the allegations it contained from a confidential informant did not bear sufficient indicia of reliability or independent corroboration of the informant's information. 229 F.3d at 1006. We nonetheless upheld the denial of the suppression motion on Leon good-faith grounds because the affidavit contained "more than conclusory statements based on the informant's allegation about the alleged criminal activity." Id. at 1007. Our decision, then, rested on the information contained within the four corners of the affidavit. See also id. at 1006 (describing suppression court's responsibility as to review the "underlying documents" to determine whether they meet the Leon standard).

However, in dicta, we noted that "the absence of information establishing the informant's reliability or basis of knowledge does not necessarily preclude an officer from manifesting a reasonable belief that the warrant was properly issued, particularly when the officer takes steps to investigate the informant's allegations." Id. at 1007. At least arguably, then, Danhauer leaves open the question of whether a suppression court, in conducting a Leon analysis, may consider information known to an executing officer but not sworn to the issuing magistrate.

Since Danhauer, a series of unpublished opinions have further failed to provide clarity. Our clearest language can be found in United States v. Martinez-Martinez, 25 F. App'x 733, 737 (10th Cir. 2001) (unpublished) in which we held that when "determining whether Leon's good faith exception applies, the question is not

what is absent from the affidavit, but what is present." Five years later another unpublished opinion included dicta which could arguably be read to support the opposite conclusion. United States v. Perry, 181 F. App'x 750, 753 (10th Cir. 2006) (unpublished) ("[A] well-trained officer who knew facts establishing probable cause could reasonably err in relying on approval of a warrant based on an affidavit that inadvertently omitted some of those facts.").[6] Reviewing our binding and non-binding precedent in 2009, one panel of this Court acknowledged that the question of whether a suppression court could consider information not disclosed to the issuing magistrate "remains an open one in our circuit." United States v. Burgess, 357 F. App'x 974, 978 (10th Cir. 2009) (unpublished) (holding on plain-error review that the lack of a resolution in the circuit precluded a finding of plain error).

From this review, it is clear our own precedent provides no clear resolution for our present inquiry. Beyond our own geographic boundaries, this is a question that has split our sister circuits. In the Seventh and Ninth Circuits, judges may not consider information unless it is presented to the warrant-issuing magistrate. See, e.g., United States v. Koerth, 312 F.3d 862, 871 (7th Cir. 2002); United States v.

[6] The Perry court's decision to apply the Leon exception did not have to rest on the existence of factual information known to the officer but not included in the affidavit. 181 F. App'x at 753. Rather, the Court held that the information contained in the affidavit, even without the information known to the officer but not included, "provide[d] significant corroboration to the [confidential informant's] assertion[.]" Id.

Hove, 848 F.2d 137, 140 (9th Cir. 1988).[7] The reasoning adopted by these courts is that the relevant Leon exception is an *objective* consideration of whether the affidavit and any accompanying sworn information is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)).

In the Fourth, Eighth, and Eleventh Circuits, however, district courts are allowed to consider uncontroverted facts known to the officers who executed the warrant but inadvertently not disclosed to the issuing judge. See, e.g., United States v. McKenzie-Gude, 671 F.3d 452, 460 (4th Cir. 2011); United States v. Robinson, 336 F.3d 1293, 1297 n.6 (11th Cir. 2003); United States v. Marion, 238 F.3d 965, 969 (8th Cir. 2001). These circuits reasoned that not to consider such information "risks the anomalous result of suppressing evidence 'obtained pursuant to a warrant

[7] The Sixth Circuit arguably also lies on this side of the split. In 2005 that court held that "a determination of good-faith reliance . . . must be bound by the four corners of the affidavit." United States v. Laughton, 409 F.3d 744, 751 (6th Cir. 2005). It later softened this approach, holding that suppression courts could consider information disclosed to the issuing judge but not included in the affidavit. United States v. Frazier, 423 F.3d 526, 535 (6th Cir. 2005). In explaining its reasoning, the Sixth Circuit quoted one case from the Eighth Circuit that permits consideration of *all* information known to an executing officer. Id. at 536 (quoting United States v. Marion, 238 F.3d 965, 969 (8th Cir. 2001) (internal quotation marks omitted) ("When assessing the objective [reasonableness] of police officers executing a warrant, we must look to the totality of the circumstances, including any information known to the officers but not presented to the issuing judge.")). District courts in the Sixth Circuit have generally interpreted Frazier to stand for the proposition that information outside the four corners of the affidavit can be considered only when that information had been disclosed to the issuing magistrate. See, e.g., United States v. Wilhere, 89 F. Supp. 3d 915, 920 n.4 (E.D. Ky. 2015).

supported by the affidavit of an officer, who, in fact, possesses probable cause, but inadvertently omits some information from his affidavit.'" McKenzie-Gude, 671 F.3d at 460 (quoting United States v. Bynum, 293 F.3d 192, 199 (4th Cir. 2002)).[8]

After reviewing these authorities and our own discussions on the issue, we return nonetheless to the plain text of Leon itself. In outlining an exception to the general rule of Leon which allowed an officer's good faith reliance on a defective affidavit, the Court specified that reliance is not allowed when a reviewing court determines the officer did not "manifest *objective* good-faith" because the "*affidavit* [was] 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Leon, 468 U.S. at 923 (emphasis added) (quoting Brown, 422 U.S. at 610–11). Elsewhere the Leon Court talks about the requirement that "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be *objectively* reasonable." Leon, 468 U.S. at 922 (emphasis added). In a lengthy footnote, the Court decides to "eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant[, believing] that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'" Id. at 922 n.23 (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

[8] For a survey of the split as of 2005, see John E. Taylor, Using Suppression Hearing Testimony to Prove Good Faith Under *United States v. Leon*, 54 U. Kan. L. Rev. 155, 174–84 (2005).

This comports with the Court's general trend of preferring objective tests of law enforcement reasonableness over subjective inquiries into the knowledge or motivations possessed by individual officers. See, e.g., Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Accordingly, based on the plain text of Leon, we hold that a suppression court's assessment of an officer's good faith is confined to reviewing the four corners of the sworn affidavit and any other pertinent information actually shared with the issuing judge under oath prior to the issuance of the warrant, as well as information relating to the warrant application process.[9] Not only is this rule faithful to the text of Leon, it will enhance administrability and encourage law enforcement officers to provide issuing courts with the type of comprehensive affidavits upon which proper probable cause determinations should rest. See Illinois v. Gates, 462 U.S. 213, 239 (1983) (holding an affidavit "must provide the magistrate with a substantial basis for determining the existence of probable cause" and that "wholly conclusory"

[9] In assessing good faith a suppression court must ask whether "the magistrate so obviously erred that any reasonable officer would have recognized the error." Messerschmidt v. Millender, 565 U.S. 535, 556 (2012). Our opinion does not restrict a suppression court's ability to receive testimony illuminating how a reasonable officer would interpret factual information contained in an affidavit. Our holding today only precludes a suppression court from considering new factual information that is undisclosed to the issuing magistrate. In fact, we believe this is the most appropriate reading of Danhauer: That a suppression court may consider information known generally to reasonable officers that sheds light on the reasonableness of an officer's reliance on a warrant, but may not consider new factual information that was not disclosed to the issuing magistrate. See 229 F.3d at 1006; see also footnote 5 (discussing the availability of so-called "warrant application" information).

statements about the officer's beliefs are insufficient). We therefore confine our good-faith inquiry in this case to whether the affidavit itself is sufficiently detailed to merit application of the good-faith exception to the warrant requirement.

C. Here, the affidavit had enough indicia of reliability to support Detective Finley's good-faith reliance on the magistrate's warrant.

While the Fourth Amendment offers people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," the amendment is silent as to what repercussions should follow a violation of that right. U.S. Const. amend. IV. In response, courts have created the exclusionary rule, under which "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." United States v. Calandra, 414 U.S. 338, 347 (1974) (citing Weeks v. United States, 232 U.S. 383 (1914)).

The exclusionary rule, however, is not itself a constitutional guarantee. The constitutional violation occurs when an unreasonable search occurs, not when evidence seized in the course of that search is later introduced in a subsequent criminal proceeding. Penn. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 362 (1998). "Instead, the [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures[.]" Calandra, 414 U.S. at 347. Put succinctly, the exclusionary rule is not a constitutional right of the defendant, but rather is a disincentive for law enforcement to engage in unconstitutional activity.

Therefore, whether to apply the exclusionary rule in a given case turns on whether such application will be an effective deterrent against future Fourth Amendment violations. Herring v. United States, 555 U.S. 135, 141 (2009) (citing Stone v. Powell, 428 U.S. 465, 486 (1976); Calandra, 414 U.S. at 347–55). Even when exclusion would provide deterrence, courts must further inquire whether the benefits of that deterrence outweigh the "substantial social costs"— of excluding relevant and incriminating evidence of wrongdoing. Herring, 555 U.S. at 141 (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987)). Ultimately, then, for the exclusionary rule to apply, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144.

Conducting this balancing in Leon, the Supreme Court concluded that when a law enforcement officer relies in objective good faith on a warrant issued by a detached and neutral magistrate, and that warrant is later invalidated as not being supported by probable cause, evidence obtained as a result of that reliance should not be subject to suppression. Leon, 468 U.S. at 922. This rule, which became known as the Leon good-faith exception to the warrant requirement, recognizes that ordinarily an officer "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." Id. at 921.

One exception to the general rule of Leon holds that evidence will be suppressed notwithstanding the warrant "when the affidavit in support of the warrant

is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." United States v. Edwards, 813 F.3d 953, 970 (10th Cir. 2015) (quoting United States v. Augustine, 742 F.3d 1258, 1262 (10th Cir. 2014)). [10]

Given the "substantial social costs" of exclusion, Herring, 555 U.S. at 141, this exception applies not when an officer's reliance on the warrant is merely "misplaced," but rather only when his reliance is so "wholly unwarranted that good faith is absent[,]" United States v. Corral-Corral, 899 F.2d 927, 938–39 (10th Cir. 1990) (quoting United States v. Cardall, 773 F.2d 1128, 1133 (10th Cir. 1985)). The Supreme Court has recently admonished that "the threshold for establishing this exception [to Leon admissibility] is a high one, and it should be. . . . [Because] '[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination.'" Messerschmidt, 565 U.S. at 547 (quoting Leon, 468 U.S. at 923)). In recognition of this high standard, we have said that an officer is wholly unwarranted in relying on a warrant "only if the affidavit submitted in support

[10] There are four exceptions to the general rule of Leon:

> (1) when the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his reckless disregard of the truth; (2) when the issuing magistrate wholly abandon[s her] judicial role; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid.

United States v. Edwards, 813 F.3d 953, 970 (10th Cir. 2015) (quoting United States v. Augustine, 742 F.3d 1258, 1262 (10th Cir. 2014)).

of the warrant is *devoid* of factual support." United States v. Henderson, 595 F.3d 1198, 1201-02 (10th Cir. 2010).[11]

Knox urges us to suppress the rifle because no reasonable officer could have believed that the affidavit which the magistrate found to establish probable cause to search 431 Freeman for weapons actually established probable cause that weapons would be located at this address. (Aplt. Br. at 32–45.) Paragraph four of the affidavit, the only paragraph that discusses the likelihood weapons will be found at 431 Freeman, relies on the statements of Cynthia McBee, a former girlfriend of Knox's.

> 4. On 01/22/2014, affiant contacted a previous girlfriend of Knox's, Cynthia McBee. She advised she and Knox broke up and no longer lived together. She advised that Knox had become violent with her lately and she had a Protection Order issued against him. She did advise he always carried a gun and had threatened her and her neighbor in December. He had also gone to her father's job in Kansas City, Missouri and threatened him and his employees with a gun. She said he always carries a pistol in his pants and has numerous weapons to include an AR15 assault type rifle and a Desert Eagle pistol. Cynthia did advise that Knox had numerous girlfriends and most were only known by their street names. She did provide two friends names of

[11] Defendant urges us not to employ this standard, arguing that "it allows district courts to identify *any* fact within the affidavit to support the application of the good-faith exception, even a fact that this Court has rejected as sufficient to establish probable cause." Aplt. Br. at 30 n.6. We disagree with this characterization of our precedent. Law enforcement officers are responsible for having a "reasonable knowledge of what the law prohibits," Leon, 468 U.S. at 919 n.20, and for conforming their conduct to these rules, Davis v. United States, 564 U.S. 229, 241 (2011). The "devoid of factual support" standard does not mean that the district court may use facts clearly insufficient to establish probable cause as a reason to nonetheless apply the good-faith exception. A fact that is clearly insufficient to support probable cause under settled law is not "factual support" for a warrant absent context or other facts which, in total, could support the good-faith exception.

> Michael Dupree Jr, and Alecia Young. Cynthia was able to identify both parties by Knox's Facebook posts that the officer provided.

(Finley Aff. ¶ 4.)

"An affidavit establishes probable cause for a search warrant if the totality of the information it contains establishes the 'fair probability that contraband or evidence of a crime will be found in a particular place.'" United States v. Soderstrand, 412 F.3d 1146, 1152 (10th Cir. 2005) (quoting United States v. Rice, 358 F.3d 1268, 1274 (10th Cir. 2004), judgment vacated on other grounds, 543 U.S. 1103 (2005)). Whether probable cause exists in a given case is a "flexible, common-sense standard," and no single factor or factors is dispositive. Illinois v. Gates, 462 U.S. 213, 238–39 (1983).

In this circuit, we have identified three non-exclusive considerations that help guide a probable cause inquiry, particularly one in which the affiant relies on an informant or other witness's information:[12] 1) the reliability of the informer, 2) the

[12] There is a difference between traditional informants, who are often themselves criminals, and "citizen-informers," who are generally witnesses or victims rather than associates. See, e.g., United States v. Neff, 300 F.3d 1217, 1221 (10th Cir. 2002) (citing 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.3, at 88–89 (3d ed. 1996)). Ms. McBee is almost certainly an example of the latter, rather than the former, and we have previously noted that these citizen-informers tend to be more reliable than traditional informants, particularly when their information derives from first-hand knowledge. See Neff, 300 F.3d at 1221; LaFave, supra, § 3.4 ("Courts are much more concerned with veracity when the source of the information is an informant from the criminal milieu rather than an average citizen who has found himself in the position of a crime victim or witness."). Regardless, we have no occasion to decide into which category Ms. McBee should be placed, because we find that her information bears sufficient indicia of reliability for Leon purposes regardless of whether we asses it as that of an informer, or as that of a fact witness.

timeliness of the informer's allegations, and 3) the nexus between the item to be seized and the place to be searched. See United States v. Pulliam, 748 F.3d 967, 971 (10th Cir. 2014) (reliability); United States v. Snow, 919 F.2d 1458, 1459 (10th Cir. 1990) (timeliness); United States v. Gonzales, 399 F.3d 1225, 1228 (10th Cir. 2005) (nexus). Our inquiry is not whether the information in paragraph four in fact establishes probable cause that an illegal weapon will be found at 431 Freeman, but rather whether the affidavit is so facially deficient that reliance on a warrant issued in response to that affidavit cannot have been in good faith.

1. Reliability of the Informer

We have said that where, as here, the information contained in a warrant application comes largely from an informer, "we pay close attention to the veracity, reliability, and basis of knowledge of the informant about the target of the proposed search." Pulliam, 748 F.3d at 971 (citing Gates, 462 U.S. at 230). We consider an informer more reliable if she is willing to identify herself to authorities, Pulliam, 748 F.3d at 971, 971 n.2 (citing United States v. Johnson, 364 F.3d 1185, 1190 (10th Cir. 2004)), and the affiant is able to identify or at least describe her to the magistrate. And while hearsay evidence can support probable cause, the most powerful basis of knowledge for an informer is personal knowledge of the alleged wrongdoing, see Pulliam, 748 F.3d at 971.

Here, the informer, Ms. McBee, spoke from personal knowledge about the defendant's gun habits. As a former girlfriend she expressed knowledge of Knox's routines and whether he frequently carried firearms on his person. She spoke with

specificity about the particular types of weapons Knox was known to carry. Furthermore, while corroboration of non-predictive information cannot itself establish sufficient reliability for probable cause, see, e.g., United States v. Tuter, 240 F.3d 1292, 1297 (10th Cir. 2001), Detective Finley was able to corroborate Ms. McBee's information about the friendship between Knox and Young.

Knox encourages us to hold that Ms. McBee's statements were particularly un-reliable because she was the defendant's ex-girlfriend, and therefore "a reasonably well trained [sic] officer would have viewed her statements with skepticism." (Aplt. Br. at 35–36). We decline to do so. The only Tenth Circuit case cited by Knox for this proposition does not cast doubt upon an ex-girlfriend's allegations because of her status as an ex-girlfriend, but rather because of the general unreliability of her particular statements. United States v. Fennell, 65 F.3d 812, 813 (10th Cir. 1995). Furthermore, Fennell is easily distinguishable from the case at bar for two reasons.

First, in Fennell, authorities were unable to corroborate any aspect of the ex-girlfriend's unsworn testimony. Here, Detective Finley was able to corroborate Ms. McBee's allegation of a relationship between Knox and Young. Second, the officer in Fennell spoke with the ex-girlfriend over the phone, and thus "did not have an opportunity to observe her demeanor during the interview and therefore could not form any opinion as to her veracity." 65 F.3d at 813. Here, Detective Finley apparently spoke with Ms. McBee in person, offering him an opportunity to gauge

her reliability.[13] Accordingly, we decline to hold—or even suggest—that statements from ex-girlfriends are somehow less reliable than those from other sources.[14]

Therefore, based on Ms. McBee's personal knowledge of Knox's habits, acquired through the close proximity of a personal relationship, the information she provided bore some indicia of reliability.

2. Timeliness

Regardless of the source of the information, probable cause "cannot be based on stale information that no longer suggests that the items sought will be found in the place to be searched." Snow, 919 F.2d at 1459–60 (citing United States v. Shomo, 786 F.2d 981, 983 (10th Cir. 1986)). Whether information is sufficiently stale to foreclose probable cause "depends on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." Snow, 919 F.2d at 1460 (internal quotation marks omitted). When the illegal activity in question is "continuous and ongoing," we are less likely to foreclose probable cause on the basis

[13] The affidavit indicates that "Cynthia was able to identify both parties from Knox's Facebook posts that the officer provided." This at least implies that Detective Finley met in person with Ms. McBee. (Finley Aff. ¶ 4).

[14] This should not imply that ex-girlfriends will always make particularly reliable informers. Rather, issuing judges are responsible for making a comprehensive assessment of an informer's credibility, taking into account basis of knowledge, motivation to lie, and all other "circumstances set forth in the affidavit." See Gates, 462 U.S. at 238. In some cases ex-girlfriends will make particularly reliable informers given their close, personal relationship with the target of the investigation. In other situations, the particular circumstances of their present relationship may cast a shadow on the reliability of their information. There is no per se rule for when statements from an ex-girlfriend will bear sufficient indicia of reliability and when they will not.

of otherwise dated information. United States v. Mathis, 357 F.3d 1200, 1207 (10th Cir. 2004).

Even if the district court was correct in holding that there was insufficient evidence of timeliness in this affidavit to establish probable cause (a matter on which we do not express an opinion), that decision was not so obvious as to preclude good-faith reliance on the magistrate's decision. Ms. McBee indicated that Knox had become violent with her "lately," establishing timeliness regarding her testimony. (Finley Aff. ¶ 4). She similarly indicated that Knox "always" carried a gun and—listed in the same sentence of the affidavit—"had threatened her and her neighbor in December," less than a month before she spoke with Detective Finley. Id. Taken together, it is a reasonable assumption that Ms. McBee had seen Knox "lately" and he had guns on his person at that time. That the conduct described is a "continuous and ongoing" felony further militates in favor of probable cause. See Mathis, 357 F.3d at 1207.

Armed with the testimony that Knox "always" carried a gun and owned "numerous weapons," Detective Finley also established in the affidavit that a phone tied to Knox was tracked to 431 Freeman on February 3, 2014, and then again on February 6, 2014. (Finley Aff. ¶¶ 9,10). That he was there twice in four days suggested that Knox was not only visiting 431 Freeman, but establishing a longer-term presence at the residence. Given that the affidavit was sworn on February 6, and the warrant issued later the same day, this location information was timely.

3. Nexus

Finally, it is the conjunction of Ms. McBee's timely statement that Knox always carried a gun and the officers' timely information concerning Knox's location that provided the critical nexus between the illegal firearm sought in the search and 431 Freeman. In order for an affidavit to establish probable cause there must be "a 'nexus between the contraband to be seized . . . and the place to be searched.'" Gonzales, 399 F.3d 1225, 1228 (10th Cir. 2005) (internal alterations omitted) (quoting United States v. Rowland, 145 F.3d 1194, 1203–04 (10th Cir. 1998)). This nexus exists when the affidavit "describes circumstances which would warrant a person of reasonable caution in the belief that the articles sought are in a particular place." United States v. Villanueva, 821 F.3d 1226, 1236 (10th Cir. 2016) (internal quotation marks omitted) (quoting United States v. Biglow, 562 F.3d 1272, 1279 (10th Cir. 2009)).

In this case, Ms. McBee's timely statement that Knox "always" carried a gun, combined with the evidence that Knox was located at 431 Freeman, provides facially sufficient evidence that Knox's illegally possessed firearm would be at 431 Freeman when he was there. Furthermore, the affidavit established that as of the afternoon the affidavit was presented to the issuing magistrate, the cell phone was still "pinging" in the location of 431 Freeman, indicating that Knox likely remained inside the residence. (Finley Aff. ¶ 11.) In light of Ms. McBee's reliability, the timeliness of the information in the affidavit, and the nexus the affidavit created between Knox's firearms and 431 Freeman, we cannot say the affidavit was "so lacking in indicia of

probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923.[15]

Therefore, regardless whether the district court was correct in concluding that the affidavit was insufficient to establish probable cause, the good-faith exception to the warrant requirement precludes suppression of the fruit of the subsequent search. Accordingly the district court's decision denying Knox's suppression motion is AFFIRMED.

[15] While we do not hold that it is such a close question so as to necessitate reliance on this fact, that Detective Finley relied on an Assistant District Attorney to draft the affidavit and warrant application, would weigh in favor of applying the good-faith exception. Cf. Messerschmidt, 565 U.S. at 553–55 (holding in the qualified immunity context that having secured the approval of their warrant application from both a superior and a deputy district attorney was "certainly pertinent in assessing whether [the officers] could have held a reasonable belief that the warrant was supported by probable cause").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 14-20022-01-JAR
	)	
JEMEL KNOX,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Jemel Knox's Motion to Suppress Evidence (Doc. 23). Defendant contends the firearm seized during an apartment search should be suppressed because the warrant authorizing the search was not supported by a showing of probable cause. The Government has responded (Doc. 26), and an evidentiary hearing was held on November 24, 2014. The Court has reviewed the evidence and arguments adduced at the hearing and is now prepared to rule. As explained in detail below, although the Court finds the search warrant was not supported by probable cause, the Court concludes the good-faith exception to the exclusionary rule applies. The Court denies Defendant's motion.

I. Background

On January 16, 2014, Defendant failed to appear in state court for a hearing on a charge for felony fleeing and eluding. Officers determined that at the time of the hearing, Defendant had cut off his GPS monitor and fled from an apartment building at 907 North Iowa Street in Olathe, Kansas. Based on these events, the Johnson County District Court issued two warrants

for Defendant's arrest: one for failure to appear and another for aggravated escape from custody.

The Johnson County Sheriff's Office assigned Detective Kevin Finley to locate and arrest Defendant. In a search warrant affidavit later filed with the Johnson County District Court, Detective Finley describes the relevant pieces of his investigation as follows:

> 1. . . . Knox is . . . a convicted felon barred from possessing firearms.
>
> 2. [On 01/16/2014,] Officers contacted a Lindsey Kurtz, W/F 10/27/1984, at 907 N. Iowa, Olathe, Kansas and conducted a search and recovered the GPS Monitor. Mr. Knox was not located and Lindsey's 2003 Cadillac Deville was missing from the apartment parking lot. Lindsey only advised Knox left on foot and she had no idea where he would be. Lindsey advised her sister, Sidney Kurtz, had her Cadillac. Lindsey provided a telephone number of 660-528-0074 for Knox. Knox contacted Olathe Police Department at the time of Lindsey's interview and search of the apartment inquiring why officers were at the apartment looking for him. Knox called from the same telephone number as identified by Lindsey as belonging to Knox. Officers confirmed Sidney Kurtz did not have the Cadillac and that Knox was still in possession of the Cadillac.
>
> . . .
>
> 4. On 01/22/2014, affiant contacted a previous girlfriend of Knox's, Cynthia McBee. She advised she and Knox broke up and no longer lived together. She advised that Knox had become violent with her lately and she had a Protection Order issued against him. She did advise he always carried a gun and had threatened her and her neighbor in December. He had also gone to her father's job in Kansas City, Missouri and threatened him and his employees with a gun. She said he always carries a pistol in his pants and has numerous weapons to include an AR15 assault type rifle and a Desert Eagle pistol. . . . She did provide two friends names of Michael Dupree Jr, and Alecia Young. Cynthia was able to identify both parties by Knox's Facebook posts that the officer provided.
>
> . . .
>
> 6. On 01/28/2014, affiant was contacted by a source close to the investigation that Knox had obtained a new cell phone number of

660-525-2003. This officer attempted to contact the previous telephone number of 660-528-0074. It showed no longer in service and disconnected on 01/16/2014 by the telephone company.

. . .

8. On 01/30/2014, SA John Haugher had a federal order signed for cell phone tracking on telephone number 660-525-2003. The order was sent to T-Mobile and it was confirmed the phone account was active but not turned on. Investigators determined the phone was turned back on 02/01/2014 at 3pm. Phone records obtained show numerous calls to Lindsey Kurtz and Alecia Young that use the same numbers as investigators observed on Knox's previous phone's call log of 660-528-0074.

9. On 02/03/2014, technicians with the FBI were able to track the phone (660-525-3002) to the area of 431 Freeman, Wyandotte County, Kansas City, Kansas. This is an apartment complex and apartments are individually numbered. A computer check had provided the address for an Alecia Young B/F 11/15/1986 at 431 Freeman Kansas City, Kansas. Officers were unable to keep surveillance on the apartment due to location and time of day.

10. On 02/06/2014, the phone (660-525-3002) "pings," within a range of 6 meters, at the building of 431 Freeman, Wyandotte County, Kansas City, Kansas. A "ping" is a notification from T-Mobile that the phone is active and on and provides a distance between the nearest cell phone tower and the phone. Officers confirmed with management for the complex that Alecia Young . . . does reside and is on the lease at 431 Freeman. . . . Also, located in the parking lot was the white Cadillac registered to Lindsey Kurtz . . . . Officers observed a black male with a red hoodie exit a building at the apartment complex of 431 Freeman to go out to start the Cadillac. A white female drove away alone in the vehicle. Officers were unable to identify the female leaving in the Cadillac.

11. T-Mobile notifies investigators when the "ping" location changes and as of 1:07 pm on 2/06/14, the phone remains at the same location previously identified as 431 Freeman, Wyandotte County, Kansas City, Kansas. Jemel Knox has at least two felony warrants issued for his arrest at this time out of Johnson County District Court: 13CR2619 and 14CR151. Officers are seeking a search warrant to enter 431 Freeman, Kansas City, Wyandotte

County, Kansas to arrest Jemel Knox.[1]

Based on this affidavit, a Johnson County District Court judge issued a warrant authorizing officers to search the apartment at 431 Freeman and to seize (1) the body of Defendant Jemel Knox, and (2) firearms.[2] Detective Finley and other officers executed the warrant in the afternoon of February 6, 2014, the same day they had tracked Defendant's cell phone to the apartment. In the apartment, officers found and forcibly arrested Defendant. They also seized a .223 caliber semi-automatic rifle discovered in a suitcase in the apartment's master bedroom.

Defendant is now charged with being a felon in possession of a firearm. He moves to suppress the rifle seized in the execution of the search warrant, contending Detective Finley's affidavit did not provide probable cause to believe a firearm would be found in the apartment at 431 Freeman at the time of the search.

II. Discussion

A. Probable Cause

To issue a search warrant, a magistrate must determine that probable cause supporting a search exists.[3] "An affidavit establishes probable cause for a search warrant if the totality of the information it contains establishes the fair probability that contraband or evidence of a crime will be found in a particular place."[4] If a magistrate considered only a supporting affidavit in issuing

---

[1]Doc. 23-1.

[2]Doc. 23-2.

[3]*United States v. Soderstrand*, 412 F.3d 1146, 1152 (10th Cir. 2005).

[4]*Id.*

the warrant, the reviewing court likewise looks only to the affidavit to determine the existence of probable cause.[5] In addition, because of the strong preference for searches conducted pursuant to a warrant, the Court must afford "great deference" to a magistrate's probable-cause determination: the Court's duty is only to "ensure that the magistrate judge had a 'substantial basis' for concluding that the affidavit in support of the warrant established probable cause."[6]

As Defendant points out, the only information in Detective Finley's affidavit suggesting Defendant possessed a firearm came from Defendant's ex-girlfriend Cynthia McBee. During her conversation with the detective, Ms. McBee stated that: (a) she and Defendant no longer lived together; (b) she had obtained a protection order against Defendant; (c) Defendant had threatened her and her neighbor in December; (d) Defendant had threatened Ms. McBee's father and his employees at gunpoint; (e) Defendant "always" carried a firearm on his person; (f) Defendant possessed a number of weapons, including a pistol and a rifle; and (g) Michael Dupree, Jr., and Alecia Young were two of Defendant's friends.[7]

Defendant argues that Ms. McBee's information did not provide probable cause for the apartment search. Defendant contends, first, that the affidavit failed to show that Ms. McBee's statements about the firearms were reliable; second, that Ms. McBee's information was stale; and third, that Ms. McBee's report failed to establish a nexus between a firearm and the

---

[5]*United States v. Beck*, 139 F. App'x 950, 954 (10th Cir. 2005) (citing *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 n.8 (1971)). At the suppression hearing, Detective Finley indicated that the only extraneous evidence the magistrate considered in issuing the warrant was the detective's oral testimony on how "phone pings" work. Because the parties do not dispute the reliability of the cell-phone tracking method used in this case, the Court will consider only the supporting affidavit in reviewing the probable-cause determination.

[6]*United States v. Nolan*, 199 F.3d 1180, 1182 (10th Cir. 1999) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

[7]*See* Doc. 23-1 ¶ 4.

apartment at 431 Freeman. The Court will address each contention in turn.

1. Ms. McBee's Reliability

In evaluating an informant's report, the informant's veracity and basis of knowledge are highly relevant.[8] "Veracity and basis of knowledge are not, however, rigid and immovable requirements in the finding of probable cause. A deficiency in one element may be compensated for by a strong showing as to the other, or by some other indicia of reliability."[9] One valuable indication of reliability, frequently relied on to support a showing of probable cause, is independent police corroboration of the details set forth in an informant's report.[10]

Defendant contends Detective Finley's affidavit failed to show that Ms. McBee was a reliable source. The affidavit did not state that Ms. McBee had provided accurate information to the police on previous occasions, nor did it indicate the basis of Ms. McBee's knowledge concerning the firearms she reported Defendant to possess. Further, in Defendant's view, Detective Finley did little to corroborate the accuracy of Ms. McBee's information. Absent a showing on Ms. McBee's veracity and basis of knowledge, and without some form of corroboration suggesting Defendant possessed firearms, Defendant insists Ms. McBee's report could not establish probable cause.

The Government maintains that Detective Finley corroborated enough of Ms. McBee's report to show that she was a reliable informant. In particular, Ms. McBee informed Detective

---

[8]*See United States v. Pulliam*, 748 F.3d 967, 971 (10th Cir. 2014); *United States v. Corral*, 970 F.2d 719, 727 (10th Cir. 1992) (citing *Gates*, 462 U.S. at 230).

[9]*Corral*, 970 F.2d at 727 (quoting *Gates*, 462 U.S. at 233) (internal quotation marks omitted).

[10]*See Gates*, 462 U.S. at 241 ("Our decisions . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work.").

Finley of a friendship between Defendant and Alecia Young. The detective corroborated that friendship through Defendant's phone records, which show numerous calls to Ms. Young's phone, and through tracking technology that pinpointed Defendant's cell phone to Ms. Young's apartment building on the day of the search. Because Ms. McBee thus proved correct about Defendant's relationship with Ms. Young, the Government urges that Ms. McBee was "more probably right about other facts," including the facts she reported about Defendant's possession of firearms.[11]

The value of police corroboration in establishing probable cause depends on the types of facts corroborated. Where an informant predicts "future actions of third parties not easily predicted," corroboration of those predictions is entitled to great weight.[12] Where, on the other hand, officers corroborate only innocent, non-predictive information that does not show an informant's "knowledge of concealed criminal activity," the informant's report is generally insufficient to establish probable cause.[13] Thus, in *United States v. Tuter*,[14] the Tenth Circuit found that an informant's tip failed to provide probable cause even though the tip accurately described the suspect's appearance, residence, and vehicle, as well as the age of the suspect's

---

[11]*See Gates*, 462 U.S. at 244 (quoting *Spinelli v. United States*, 393 U.S. 410, 427 (1960) (White, J., concurring)).

[12]*See id.* at 245 (finding an anonymous tip sufficient to establish probable cause because it "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties not easily predicted); *see also Alabama v. White*, 496 U.S. 325, 332 (1990) (deeming an anonymous tip sufficiently reliable because police corroborated the informant's predictions regarding the suspect's future activity).

[13]*See Florida v. J.L.*, 529 U.S. 266, 270–71 (2000) (emphasis added) (finding that a tip was insufficient to establish even a reasonable suspicion where the tip accurately described the suspect's physical attributes but did not predict future behavior).

[14]240 F.3d 1292 (10th Cir. 2001).

child.[15] Accuracy on those "innocent, innocuous" facts did not show the report was reliable "in its assertion of illegality,"[16] that is, in its assertion that the suspect was making pipe bombs in his garage.[17] The Tenth Circuit also found probable cause lacking in *United States v. Danhauer*,[18] where police corroborated information about the suspect's residence and criminal history but did not "verify the informant's most serious allegation, that the [suspect was] manufacturing methamphetamine."[19]

In some circumstances, however, corroboration of innocent, non-predictive information may be meaningful. In *United States v. Jenkins*,[20] the Tenth Circuit noted that such corroboration carries some weight where the reported information is not readily observable, but rather helps establish that the informant and the suspect in fact have a relationship.[21] Because the informant in that case knew that the suspect had a birthday in September, owned a storage rental unit near his residence, and had recently been arrested on a domestic violence charge, the informant's report suggested he had a relationship with the suspect and, thus, a potential basis of knowledge for his allegations of drug trafficking and gun possession.[22] But the *Jenkins* court also relied on more direct indicia of criminal activity to find probable cause. The affiant

---

[15] *Id.* at 1297–98.

[16] *See id.* at 1296 (quoting *J.L.*, 529 U.S. at 272).

[17] *See id.* at 1297–98.

[18] 229 F.3d 1002 (10th Cir. 2000).

[19] *Id.* at 1006.

[20] 313 F.3d 549 (2002).

[21] *See id.* at 555.

[22] *See id.*

detective, in particular, had obtained information from other officers who knew the suspect to be a gang member with a reputation for dealing crack cocaine; police reports also showed that the suspect possessed a handgun at the time of his recent domestic violence arrest.[23] In light of these additional facts further confirming the informant's report, the court found the report sufficiently reliable to permit a finding of probable cause.[24]

The Court finds this case similar to *Tuter* and *Danhauer*. As in those cases, the supporting affidavit here contains no information about the veracity or historical reliability of Ms. McBee.[25] Thus, as in those cases, her report "provides virtually nothing from which one might conclude that [Ms. McBee] is either honest or [her] information reliable."[26] And like the officers in *Tuter* and *Danhauer*, Detective Finley corroborated only innocent, non-predictive information that is available to those without a special knowledge of the criminal activity suspected.[27] Ms. McBee's awareness of Defendant's friendship with Alecia Young does tend to show that Ms. McBee, like the informant in *Jenkins*, in fact had a relationship with the suspect.[28] That fact alone, however, has not sufficed to establish probable cause absent some additional

---

[23]*Id.* at 556.

[24]*See id.* at 554.

[25]*See Tuter*, 240 F.3d at 1297; *Danhauer*, 229 F.3d at 1004, 1006; *see also United States v. Bishop*, 890 F.2d 212, 215 (10th Cir. 1989).

[26]*See Tuter*, 240 F.3d at 1297 (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)) (internal quotation marks omitted).

[27]*See id.*; *Danhauer*, 229 F.3d at 1006.

[28]*See* 313 F.3d at 555.

indication that the informant's report is truthful and accurate "in its assertion of illegality."[29] The affidavit in this case, in contrast to the one at issue in *Jenkins*, contains no independent indication that Ms. McBee's allegations of *criminal activity* were reliable.

In addition, and perhaps most importantly, the affidavit fails to show corroboration of other claims which appear readily verifiable and which, if true, would more directly substantiate Ms. McBee's report about the firearms.[30] Detective Finley, for example, might have confirmed with Ms. McBee's father and his employees that Defendant had in fact threatened them at gunpoint. The detective might have asked Ms. McBee's neighbor whether Defendant threatened her in December. And the detective might have verified that Ms. McBee has a protection order against Defendant. Corroboration of these claims, in combination with Ms. McBee's accurate statement concerning Alecia Young, might have sufficed to show that Ms. McBee was reliable in her assertion that Defendant owns multiple firearms and "always" carries one on his person. But if Detective Finley pursued any of these avenues of corroboration, the affidavit fails to reflect those efforts. Instead, the affidavit showed corroboration of only a single, innocent fact, wholly unrelated to the suspected illegal activity and reported by an informant of otherwise unknown and unassessed credibility. Under the circumstances, the affidavit did not provide a substantial basis for finding that Ms. McBee's information about the firearms was reliable.

---

[29] *See J.L.*, 529 U.S. at 272; *cf. Jenkins*, 313 F.3d at 554–55 (finding sufficient indicia of reliability where the report showed the informant had a relationship with the suspect and where the detective had independently obtained information about the suspect's involvement in drug and firearm possession that was consistent with the informant's allegations of criminal activity).

[30] *See United States v. Weaver*, 99 F.3d 1372, 1379 (6th Cir. 1996) (finding an affidavit failed to establish probable cause, even though officers verified the suspect lived at a particular address, because the officers should have undertaken other "substantive independent investigative actions to corroborate [the] informant's claims"); *cf. United States v. Bishop*, 890 F.2d 212, 217–18 (10th Cir. 1989) (finding officers' reliance on a warrant objectively reasonable where the officers "presented the magistrate with as much factual corroboration of the informant's statements as a thorough investigation allowed").

2. Timeliness of Ms. McBee's Information

Defendant next contends that Ms. McBee's report about the firearms, in addition to being unreliable, was too outdated to justify the search warrant. Probable cause, Defendant observes, "cannot be based on stale information that no longer suggests that the item sought will be found in the place to be searched."[31]

The Government responds that Ms. McBee's report pertained to recent events. According to the Government, though Ms. McBee stated that Defendant had threatened her and her neighbor in December 2013, a police report shows that the threat actually occurred more recently, in January 2014.[32] And, the Government continues, Defendant carried out that threat using a firearm.[33] Detective Finley also testified at the suppression hearing that the threat Ms. McBee reported concerning her father and his employees occurred in December 2013. The Government thus argues that Defendant possessed a firearm in the months leading up to the apartment search and was seen with a gun as recently as twenty-five days before the magistrate issued the warrant.

The problem with the Government's assertions is that the affidavit itself provides no support for them. The affidavit relates Ms. McBee's report that Defendant had threatened her and her neighbor in December 2013, but nothing in the affidavit indicates that Defendant carried out that threat using a firearm. And though Ms. McBee stated that Defendant had threatened her father and his employees with a gun, her report, as recounted in the affidavit, contains no clue

---

[31] *United States v. Snow*, 919 F.2d 1458, 1459 (10th Cir. 2008) (citing *United States v. Shomo*, 786 F.2d 981, 983 (10th Cir. 1986)).

[32] Doc. 26 at 3 n.3, 10.

[33] *Id.* at 3.

about when that threat occurred. The affidavit also fails to show that Ms. McBee had a timely basis of knowledge for her assertion that Defendant "always carries a pistol in his pants and has numerous weapons": there is no indication of when Ms. McBee and Defendant split up, when they stopped living together, or when she obtained a protection order against him. Perhaps Ms. McBee had remained close with Defendant until he threatened her in December 2013; perhaps regular contact between the two had ceased long before then. It is possible, of course, that Defendant's reported possession of firearms coincided with some of the relatively recent events Ms. McBee described. But without this information, the magistrate could only guess whether Defendant possessed a firearm in the months leading up to the apartment search.

The Court accepts the Government's contention that those who possess firearms tend to keep them for extended periods of time.[34] The staleness doctrine, however, is not entirely inapplicable where a suspect has made a habit of carrying firearms in the past.[35] To support a finding of probable cause for a search, therefore, an affidavit must provide some factual basis for determining when the suspect was last known to possess a firearm. The affidavit's failure to do so in this case further weakens the inference that Defendant had a firearm on the day of the search.

3. Nexus Between the Firearm and the Apartment

Defendant also contends that even if Ms. McBee's information was reliable and up to

---

[34]*See, e.g.*, *United States v. Lester*, 285 F. App'x 542, 546 (10th Cir. 2008) (finding probable cause, in part, because possession of a firearm is a continuing offense and because the affidavit stated that firearm silencers are typically kept by owners for an extended period of time); *United States v. Rahn*, 511 F.2d 290, 293 (10th Cir. 1975) (finding probable cause where the defendant had previously commented that the firearms in his possession would appreciate in value if kept for several years).

[35]*See, e.g.*, *Snow*, 919 F.2d at 1460 ("Ongoing and continuous activity makes the passage of time *less* critical." (emphasis added)).

date, the affidavit did not provide probable cause to believe a firearm would be found in the apartment at 431 Freeman. Probable cause for a search warrant requires "a nexus between the contraband to be seized or suspected criminal activity and the place to be searched."[36] A sufficient nexus exists where an affidavit "describes circumstances which would warrant a person of reasonable caution in the belief that the articles sought are at a particular place."[37]

Courts do not require "hard evidence or personal knowledge of illegal activity" to satisfy the nexus requirement.[38] It is well-established, however, that probable cause to search "does not arise based solely upon probable cause that the person is guilty of a crime."[39] Instead, "additional evidence" is needed to link the suspect's criminal activity to the place to be searched.[40] Magistrates may, for example, rely on the opinions of law enforcement officers as to where a suspect is likely to keep certain items.[41] "Additional evidence" connecting contraband to a place to be searched "may also take the form of inferences a magistrate judge reasonably draws from the Government's evidence."[42] One of these two types of "additional evidence" is generally required to show probable cause to search a particular place in the absence of direct evidence that contraband is located there.[43]

---

[36] *United States v. Gonzales*, 399 F.3d 1225, 1228 (10th Cir. 2005).

[37] *Id.* (quotation marks and citation omitted).

[38] *See id.* (quotation marks and citation omitted).

[39] *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998).

[40] *United States v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009).

[41] *Id.* at 1279.

[42] *Id.* at 1280.

[43] *See id.*

Here, the affidavit relates Ms. McBee's report that Defendant "always carries a pistol in his pants and has numerous weapons to include an AR15 assault type rifle and a Desert Eagle pistol." Ms. McBee did not state that she had seen a firearm in the apartment at 431 Freeman or that a firearm had ever been present in that apartment before. Thus, the affidavit does not purport to establish direct evidence or personal knowledge that a firearm was located in the apartment. Detective Finley, further, did not express an opinion in the affidavit as to where Defendant was likely to keep firearms. The Court will therefore consider whether the magistrate could reasonably infer from the facts presented in the affidavit that a firearm would be found in the apartment at 431 Freeman.

Most cases discussing inferences about where contraband might be found involve the search of a suspect's residence.[44] Those cases reaffirm the general principle that probable cause to believe a suspect is guilty of a crime does not automatically furnish probable cause to search the suspect's residence for evidence of that crime.[45] In *United States v. Rahn*,[46] however, the Tenth Circuit recognized that where probable cause exists to believe a suspect possesses firearms for personal use, it is reasonable to infer that he keeps those firearms in his residence.[47] Personal uses for firearms include hunting and home security; a suspect keeping firearms for such purposes is reasonably likely to store them where he lives.[48]

---

[44]*See, e.g.*, *Rowland*, 145 F.3d at 1204; *United States v. Medlin*, 798 F.2d 407, 409 (10th Cir. 1986); *Anthony v. United States*, 667 F.2d 870, 872–73 (10th Cir. 1981).

[45]*See, e.g.*, *Rowland*, 145 F.3d at 1204; *United States v. Rahn*, 511 F.2d 290, 293 (10th Cir. 1975).

[46]511 F.2d 290 (10th Cir. 1975).

[47]*See id.* at 293–94.

[48]*See id.*

This case is unlike *Rahn*, however, because Detective Finley's affidavit does not show that Defendant was residing in Alecia Young's apartment at the time of the search. The affidavit, in fact, does not even demonstrate that Defendant was spending a substantial amount of time at the apartment. Rather, the affidavit indicates only that Defendant was present in the apartment at some point on February 3, 2014, and then again on February 6, 2014. As far as the Court can discern from the affidavit, these might have been isolated visits lasting only a couple of hours each. Had circumstances indicated that Defendant was treating Ms. Young's residence as his own or that he had been staying with Ms. Young for an extended period of time, *Rahn* might have provided a substantial basis for the conclusion that Defendant was storing firearms and other possessions in the apartment. But probable cause to search does not arise under *Rahn* where, as here, the facts set forth in the affidavit do not establish a fair probability that a suspect is residing in the place searched.[49]

A reasonable inference concerning the location of contraband may also arise where an affidavit presents facts tending to exclude the possibility that a suspect stores contraband in a place other than the one to be searched. In *United States v. Medlin*,[50] for example, a reliable informant reported that he had sold the suspect approximately thirty stolen guns over the course of one year.[51] Because the investigating officers determined that the suspect had no place of business where he might otherwise keep so many weapons, the Tenth Circuit found it reasonable

[49]*See id.*

[50]798 F.2d 407 (10th Cir. 1986).

[51]*Id.* at 408.

to infer that the suspect kept the guns at his home.[52] Similarly, in *Anthony v. United States*,[53] the Tenth Circuit upheld the validity of a warrant authorizing officers to search a suspect's home for evidence of a wiretap device.[54] Since the affidavit showed that the suspect assembled the device himself, the magistrate was reasonable to infer that the suspect needed a private place to do so; the magistrate was also reasonable to infer that place was probably the suspect's residence.[55]

In *United States v. Rowland*,[56] by contrast, the Tenth Circuit found that an affidavit for an anticipatory warrant failed to establish a sufficient nexus between a suspect's residence and an illegal video tape the suspect had ordered to his post office box.[57] The affidavit in that case recounted police surveillance of the suspect and concluded that the suspect's usual practice was to pick up his mail at the post office box, take it back to the office building where he worked, then drive home after work.[58] Though the court deemed it reasonable to infer that the suspect would be unlikely to view or store the video where he worked, and though it was possible the suspect would transport the tape to his residence after retrieving it from his post office box, the court found that the suspect's home "was but one of an otherwise unlimited possible sites for viewing or storage."[59] Absent facts showing that the suspect's residence was at least a more

---

[52] *Id.* at 409.

[53] 667 F.2d 870 (10th Cir. 1981).

[54] *Id.* at 872–73.

[55] *Id.* at 874–75.

[56] 145 F.3d 1194 (10th Cir. 1998).

[57] *Id.* at 1205–06.

[58] *Id.*

[59] *Id.* at 1205.

likely storage place than the "otherwise endless possibilities," the inference that the suspect might take the tape home was insufficient to establish probable cause.[60]

Here, in contrast to *Medlin* and *Anthony*, Detective Finley's affidavit did not tend to reduce the probability that Defendant was storing firearms in some place other than the apartment at 431 Freeman.[61] Instead, as in *Rowland*, Defendant might have been keeping firearms at any one of an unlimited number of possible sites.[62] For reasons already expressed, in fact, the showing in this case is weaker than that in *Rowland*: Detective Finley's affidavit does not show that Defendant resided or spent a substantial amount of time at Alecia Young's apartment.[63] The affidavit reveals only that Defendant was present at the apartment on two occasions over the course of a four-day period, and the Government suggests no reason Defendant would be especially likely to store firearms at a third party's residence where he was an occasional daytime guest.[64] The affidavit, therefore, does not raise a reasonable inference that Defendant would store firearms at 431 Freeman rather than any other place Defendant happened to spend his time.

The Government contends the affidavit did not need to show probable cause that Defendant stored a firearm in the apartment. Rather, in the Government's view, probable cause

---

[60] *See id.* at 1205–06.

[61] *See Medlin*, 798 F.2d at 409; *Anthony*, 667 F.2d at 874–75.

[62] *See* 145 F.3d at 1205.

[63] *Cf. id.* (finding probable cause did not exist to search the suspect's residence).

[64] *See id.*; *see also United States v. Pope*, 330 F. Supp. 2d 948, 956–57 (M.D. Tenn. 2004) ("The only connection between Mr. Pope's criminal activity at Moccasin Creek and his Pope Circle property is the natural suspicion that criminals may maintain evidence of their crimes anywhere they spend time, a suspicion that has been held insufficient [to establish probable cause].") (citing *United States v. Schultz*, 14 F.3d 1093, 1097–98 (6th Cir. 1994)).

that Defendant "always" carries a firearm on his person, and that his person was in the apartment on the day of the search, automatically conferred probable cause to search the entire apartment for a firearm.[65] The Court disagrees. To accept the Government's argument would be to authorize a probable cause search of the entirety of whatever premises Defendant happens to occupy at any particular time, regardless of his purpose for being there or the amount of time he plans to stay. The Court declines to adopt that view. Moreover, as the Court has already discussed, probable cause did not exist to believe Defendant had a firearm on his person on the day of the search. The affidavit's failure to show that Ms. McBee provided reliable or timely information that Defendant possessed firearms further undermines the affidavit's already tenuous basis for linking firearms to the apartment at 431 Freeman. Thus, considering the deficiencies in the affidavit in light of one another,[66] the Court cannot find a substantial basis for concluding that probable cause existed to search the apartment for firearms. The Court holds the search warrant invalid.

B. Leon *Good-Faith Exception*

Although the search warrant was not supported by probable cause, the Court finds that the firearm seized in the apartment need not be suppressed because of the good faith exception to the exclusionary rule set forth in *United States v. Leon*.[67] In *Leon*, the Supreme Court held that the purpose of the exclusionary rule is to deter police misconduct and that "the suppression of

---

[65]Officers did not find the firearm on Defendant's person, but in a suitcase discovered in the apartment's master bedroom. Doc. 26 at 5–6.

[66]*See United States v. Soderstrand*, 412 F.3d 1146, 1152 (10th Cir. 2005) (stating that courts should consider the totality of the information presented in the affidavit).

[67]468 U.S. 897 (1984).

evidence obtained pursuant to a warrant should be ordered . . . only in those unusual cases in which exclusion will further the purposes of the exclusionary rule."[68] "Where an officer acting with objective good faith obtains a search warrant from a detached and neutral magistrate and the executing officers act within its scope, there is nothing to deter."[69]

The Supreme Court described four situations, however, in which an officer does not have reasonable grounds for believing a warrant was properly issued.[70] Defendant argues one of those situations applies here. Specifically, Defendant contends that the warrant was "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[71] The Tenth Circuit has held that an officer's reliance on a warrant is "entirely unreasonable only if the affidavit submitted in support of the warrant is *devoid* of factual support."[72] The Court's good-faith inquiry is limited "to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[73]

The affidavit at issue here is not devoid of factual support. First, like the tips provided in *Tuter* and *Danhauer*, Ms. McBee's report did contain some indicia of reliability.[74] A named

---

[68]*Id.* at 916.

[69]*United States v. Nolan*, 199 F.3d 1180, 1184 (10th Cir. 1999) (citing *Leon*, 468 U.S. at 920–21).

[70]*See Leon*, 468 U.S. at 922–23.

[71]*Id.* at 923 (internal quotation marks and citation omitted).

[72]*See United States v. Henderson*, 595 F.3d 1198, 1201 (10th Cir. 2010) (emphasis in original) (quoting *United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985)) (internal quotation marks omitted).

[73]*See Leon*, 468 U.S. at 922 n.3.

[74]*See Tuter*, 240 F.3d at 1300 (finding the good-faith exception to the exclusionary rule applied because the officers might have reasonably believed that corroboration of innocent, readily observable facts reported by the anonymous tipster was sufficient to confer probable cause); *Danhauer*, 229 F.3d at 1007 (finding the good-faith

informant, Ms. McBee could be held responsible for fabricated allegations; her report was therefore entitled to greater weight than that of an anonymous tipster.[75] The detective, moreover, corroborated some factual information Ms. McBee reported. Though the corroborated fact was an "innocent" one, it was not a fact that was "readily observable to anyone on the street."[76] Thus, considered with Ms. McBee's detailed description of the weapons Defendant reportedly carried, as well as Detective Finley's understanding that Ms. McBee was Defendant's ex-girlfriend, the detective was not unreasonable to conclude that Ms. McBee had a basis of knowledge for her statements and that the information she provided was generally reliable.[77] Under the circumstances, a reasonably well-trained officer could have relied on the magistrate's determination that further corroboration was unnecessary.

In addition, though the language in the affidavit failed to provide a substantial basis for determining when Defendant last possessed a firearm, Detective Finley clarified at the suppression hearing that Ms. McBee's allegations in fact related to recent events. According to the detective, Ms. McBee told him that both of the reported threats—including the threat involving Ms. McBee's father—occurred in December 2013. Detective Finley testified that the failure of the affidavit to reflect that fact was the result of inartful phrasing on the part of the

---

exception applied because the officers took some steps to corroborate the informant's tip and because the affidavit "contain[ed] more than conclusory statements based on the informant's allegation about the alleged criminal activity at the Danhauer's residence").

[75]*See Florida v. J.L.*, 529 U.S. 266, 270 (2000) ("Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." (internal quotation marks and citations omitted)).

[76]*Cf. United States v. Soto-Cervantes*, 138 F.3d 1319, 1323 (10th Cir. 1998).

[77]*See United States v. Jenkins*, 313 F.3d 549, 555 (2002) (finding an informant's report was entitled to some weight because some of the facts corroborated were not readily observable, but rather tended to show that the informant and the suspect had a relationship).

Johnson County assistant district attorney who, pursuant to county protocol, drafted the affidavit for the detective. Detective Finley also testified that the attorney did not detail in the affidavit every piece of information the detective obtained during his investigation. One omitted piece of evidence, according to the Government, was a police report showing Defendant had threatened Ms. McBee and her neighbor only twenty-five days before the search.[78] The Court notes that Detective Finley was permitted to rely on the expertise of the assistant district attorney in applying for the search warrant.[79] And though the detective perhaps should have reviewed the affidavit more carefully before signing it, he believed in good faith that the affidavit reflected his understanding that Defendant was seen with a firearm in the months leading up to the search. In light of case law suggesting that firearm owners typically keep their weapons for an extended period of time,[80] Detective Finley had reason to think the relevant facts detailed in the affidavit were not stale.

Finally, the affidavit was not devoid of facts suggesting that Defendant stored a firearm at Alecia Young's apartment. As just explained, the detective had reason to credit Ms. McBee's statement that Defendant "always" carried a firearm on his person and that he owned several guns. The affidavit also shows that Defendant was present at Ms. Young's apartment on the day of the search and that he had been there on at least two of the four days preceding the search. The affidavit, further, reflects the fact that Defendant was a fugitive in need of a place to stay.

---

[78]Doc. 26 at 3 n.3.

[79]*See Tuter*, 240 F.3d 1292, 1299–1300 (finding good faith, in part, because an officer relied on the opinion of an attorney in the United States Attorney's office that there existed probable cause for a search warrant).

[80]*See, e.g.*, *United States v. Lester*, 285 F. App'x 542, 546 (10th Cir. 2008); *United States v. Maxim*, 55 F.3d 394, 397–98 (8th Cir. 1995).

Under the circumstances, it was not unreasonable for Detective Finley to conclude that Defendant might choose to stay with a friend—perhaps one with whom Defendant had been in regular telephone communication and to whose apartment his cell phone had recently been traced. And, if Defendant was indeed living in Ms. Young's apartment, it was reasonable to think he had stored at least one of his several firearms in the apartment as well.[81] In the Court's view, of course, further investigation was necessary to establish probable cause that Defendant was treating Ms. Young's residence as his own at the time of the search. But the affidavit was not totally devoid of facts raising that inference. The Court, therefore, cannot say that it was entirely unreasonable for Detective Finley to rely on the magistrate's authorization to search the apartment for firearms. The Court finds that Detective Finley relied on the warrant in good faith.

C. Overbreadth of the Warrant

Defendant also asserts, without explanation, that the warrant's authorization to search for "[f]irearms" was constitutionally overbroad.[82] But the Tenth Circuit, like several other circuits, has found that where an affidavit states the suspect is a felon, a search for "any firearms" is not overbroad: general references are permissible where the sole purpose of the search is to seize illicit property or contraband.[83] Because the affidavit at issue here revealed that Defendant was a felon, and because any firearm found in his possession would therefore be contraband, the Court

---

[81]*See United States v. Rahn*, 511 F.2d 290, 293–94 (10th Cir. 1975) (finding that where probable cause existed to believe the suspect possessed firearms for personal use, it was reasonable to infer that he would store those firearms at his home).

[82]Doc. 23 at 4.

[83]*See, e.g.*, *United States v. Jimenez*, 205 F. App'x 656, 662 (10th Cir. 2006) (citing *United States v. Campbell*, 256 F.3d 381, 389 (6th Cir. 2001)); *see also United States v. Smith*, 62 F. App'x 419, 422 (3d Cir. 2003); *United States v. Morris*, 977 F.2d 677, 680–81 (1st Cir. 1992). Though *Jimenez* is an unpublished decision, the Court finds its reasoning persuasive.

finds that the warrant was not overbroad.

IT IS THEREFORE ORDERED that Defendant's Motion to Suppress Evidence (Doc. 23) is denied.

Dated: January 6, 2015

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

March 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEMEL T. KNOX,

Defendant - Appellant.

No. 16-3324

ORDER

Before **BRISCOE**, **EBEL**, and **MATHESON**, Circuit Judges.

Appellant's petition for panel rehearing is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk