No. 17-3505

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Demontae Bell,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois
The Honorable James E. Shadid
Case No. 1:15-CR-10029

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT DEMONTAE BELL

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Demontae Bell, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Demontae Bell.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah Schrup (attorney of record), Clayton Faits (senior law student), and Matthew Freilich (senior law student) of the Bluhm Legal Clinic at the Northwestern Pritzker School of Law.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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JURISDICTIONAL STATEMENT

The government filed a four-count third superseding indictment against Demontae Bell on February 18, 2016, (R.55), charging him with violations of 18 U.S.C. § 924(c), 18 U.S.C. § 922(g), and 21 U.S.C. § 841(a)(1). Thus, the district court had jurisdiction over Mr. Bell's case pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." On March 7, 2017, Mr. Bell was tried at a bench trial, and on March 9, 2017, the court found him guilty on all four counts. (Trial Tr. III 551.)

On November 29, 2017, the district court sentenced Mr. Bell, and it entered its judgment on November 30, 2017. (R.153.) Mr. Bell filed his timely notice of appeal on December 11, 2017. (R.157.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction over "all final decisions of the district courts of the United States" to their courts of appeal, and 18 U.S.C. § 3742, which provides review of the sentence imposed.

STATEMENT OF THE ISSUES

I. Whether the district court denied Mr. Bell his constitutional and statutory speedy trial rights by repeatedly continuing the trial over Mr. Bell's objection, creating almost a two-year delay between indictment and trial.

II. Whether the district court erred in failing to suppress photographic evidence that would not have been obtained without violating Mr. Bell's Fourth Amendment rights.

STATEMENT OF THE CASE

I. Background

Demontae Bell was in and out of homelessness when Mark Turner approached him in November of 2014 with a proposal: if Mr. Bell would help him trade some stolen firearms in exchange for drugs and money, Mr. Bell could keep a portion of the proceeds. (Trial Tr. II 317–21.)[1] Turner had stolen the firearms the day before from his coworker's house in Pekin, Illinois, and he walked away with two AR-15 rifles, one AK-47 rifle, one Glock semi-automatic pistol, and a "sniper-style rifle" that turned out to be a pellet gun. (Trial Tr. I, II 173, 304.) Not only did Turner steal the firearms, but as a convicted felon, it was also illegal for him to possess them. (Trial Tr. II 304.)

Turner and his girlfriend, Sara Grandy, picked up Mr. Bell in Pekin and then drove to a house in Peoria. (Trial Tr. II 306, 314–16, 320–21, 334.) At the house, Turner with Mr. Bell's help carried the firearms inside and then traded three of the five guns in exchange for an unspecified quantity of drugs and money. (Trial Tr. II 335, 342.) Turner and Mr. Bell left the house with two unsold firearms (the AK-47 and the pellet gun), and Mr. Bell accepted them as part of his compensation for helping Turner arrange the transaction. (Trial Tr. II 343–45.)

[1] References to the sequentially paginated trial transcript are denoted as (Trial Tr. [Vol.] __) and references to the status conference transcripts as ([Date] Status Conf. Tr. __). References to the arraignment hearing are denoted as ([Date] Arraignment Hr'g Tr. __) and references to the post-trial hearing transcripts as ([Date] Post-Trial Hr'g Tr. __). All other references to the Record are denoted with the appropriate docket number as (R.__). References to the material in the appendices are denoted as (A__) or (B__).

The following month, Pekin Police arrested Turner for manufacturing methamphetamine and Turner entered into a proffer agreement with Special Agent Jason Nixon. (Trial Tr. II 302–04.) He admitted to manufacturing the methamphetamine as well as burglarizing his coworker's house. He claimed he had sold the guns for drugs and money to a drug dealer named "Jay," who turned out to be Demontae Bell. (Trial Tr. II 302–04.) The FBI and Peoria Metro Enforcement Group (PMEG) then targeted Mr. Bell for over four months attempting to recover the AK-47 rifle they believed Mr. Bell possessed. (Trial Tr. I 93.)

II. Investigation and Arrest

Nixon executed two controlled drug buys through Turner and Grandy as a cover for seeking information regarding the AK-47. (Trial Tr. I 30–31.) The first controlled buy was on February 13, 2015, and the second was on February 25, 2015. (Trial Tr. I 30–31.) Both controlled buys were recorded by largely unintelligible audio and video. (Trial Tr. I 34.)

After the first controlled buy, Nixon showed a video of it to a prisoner in the Peoria County Jail. Although the inmate identified Mr. Bell by name, he also claimed Mr. Bell went by a nickname, "Tay Tay," that was different from the one Turner had given ("Jay"). (B4; B13; R.72, Ex. O at 89.) During the second buy, despite the poor recording quality, it appeared that Turner talked with Mr. Bell about subwoofers, a "sniper rifle" that turned out to be a "pellet gun," and, briefly mentioned just once, "A-K's." (B22–32.) At one point, Mr. Bell mentioned a picture and Turner requested to see it. (B26.) Mr. Bell appeared not to know Turner's

number, and Turner said several numbers (apparently reciting his phone number) before Mr. Bell responded that he sent a picture. (B26.) After the exchange, Turner met with Nixon and showed a photo of an AK-47 on his phone. (B5; B14.) Turner claimed that this was the photo Mr. Bell texted him, but his phone showed no information about the photograph or its origin. (B1.) There was no timestamp or phone number from which the photo might have been sent. (B1.) In fact, nothing about the photograph indicated it had been sent by text at all. (B1.) Nearly two months later on April 8, 2015, Nixon submitted an affidavit for an arrest warrant for Mr. Bell. (B2.)

In his affidavit to support the arrest warrant, Nixon omitted the discrepancy between the pseudonym that the prisoner informant gave, "Tay Tay," and the pseudonym that Turner gave, "Jay." (B4; B13; R.72, Ex. O at 89.) Nixon also stated as fact that Mr. Bell admitted on tape to possessing and later selling the AK-47, despite the garbled recordings and incomplete transcripts. (B4; B13; B22–31.) He provided the magistrate with no recordings or transcripts of the controlled drug buys giving rise to that conversation. (B2–21.) Nixon also stated as fact that Mr. Bell texted a photo of the weapon to Turner and further asserted that Turner showed the photo to Nixon. The only proof that Mr. Bell texted this photo at all was Mark Turner's word. (B4; B13.) Additionally, Nixon gave no information about Turner's criminal history, credibility, or motive to lie. (B2–21.) Turner never appeared to testify before the magistrate judge, who issued an arrest warrant on April 8, 2015, based solely on Nixon's affidavit. (B2; Trial Tr. I 71.)

Peoria police arrested Mr. Bell on April 9, 2015 and took him back to the station. While the police kept Mr. Bell in the interrogation room, Officer Justin Sinks took Mr. Bell's phone and opened it. (B4.) At the time, the department had a policy directing officers not to view the contents of cell phones without a warrant. (4/13/16 Suppression Hr'g Tr. at 8–11.) Nevertheless, Sinks opened the flip phone to view its home screen, which displayed a photo of an AK-47. (B4.) Nixon later applied for two search warrants to seize Mr. Bell's phone. (B2; B11.) Nixon supported his affidavits primarily with the unintelligible audio recordings, his claim that he had viewed the photo on Turner's phone, and the fact that Officer Sinks had viewed the photo on Mr. Bell's phone. (B2; B11.) Nixon claimed the photo that he viewed and the photo that Officer Sinks viewed both depicted the stolen AK-47. (B4.) The magistrate judge granted the search warrants. (B10; B21; Trial Tr. I 73, 79.)

Before trial, Mr. Bell filed a motion to quash the arrest warrant and to suppress the cell phone photo as a product of an illegal search. (R.68.) In the motion to suppress, Mr. Bell pointed to omissions in the affidavit regarding Turner's credibility and the weakness of evidence corroborating Turner's information. (R.68.) He also filed a motion for a *Franks* hearing contesting the validity of Nixon's affidavits in support of the search warrants. (R.72.) The district court denied both motions. (A32.) In denying the motion for a *Franks* hearing, the district court concluded Mr. Bell failed to make a substantial showing that Nixon's omissions were reckless, intentional, or material. (A47.) It also concluded Sinks's search of the

phone violated Mr. Bell's Fourth Amendment rights, but that Agent Nixon's viewing of the photograph was an "independent source" of the evidence. The district court held that the evidence from the phone should not be excluded. (A48.)

III. Awaiting Trial

Mr. Bell waited in the Peoria County Jail for nearly two years until his eventual trial on March 7, 2017. (Trial Tr. I 1.) In the 686 days between the first indictment and trial, the court delayed the trial date twelve times. (B33; R.86; 12/16/2016 Status Conf. Tr. 6; A23.) On April 21, 2015, the government filed the original indictment charging Mr. Bell with one crime: being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (hereinafter "felon-in-possession"). (R.8.) The government went on to file three superseding indictments, each altering the charges against Mr. Bell but always including the felon-in-possession charge from the original indictment. (R.12; R.28; R.55.)

Mr. Bell's first scheduled trial date was July 27, 2015.[2] (5/7/2015 Arraignment Hr'g Tr. 3–4.) On July 22, 2015, the government filed its first superseding indictment, adding to the original felon-in-possession charge two counts of using a firearm in furtherance of a drug crime in violation of 18 U.S.C. § 924(c) (hereinafter "use-in-furtherance") and two counts of drug distribution in violation of 21 U.S.C. § 841(a). (R.8.) The government asked for a continuance,

[2] At a pretrial conference, Mr. Bell's attorney, Michelle Schneiderheinze, noted there was confusion regarding the trial date. (6/18/2015 Pretrial Conf. Tr. at 2.) She stated that the trial was originally set for June 29, 2015, but the defense and government mistakenly believed the trial was set for July 29, 2015. (6/18/2015 Pretrial Conf. Tr. at 2.) Schneiderheinze proposed a trial date of July 27, 2015. The district court vacated the June 29, 2015 trial and reset it for July 27, 2015. (6/18/2015 Pretrial Conf. Tr. at 2–3.)

requesting more time to review discovery on the four new charges. (A65.) Mr. Bell and his attorney, Michelle Schneiderheinze, were aware of the additional discovery. (A65.) Still, Schneiderheinze said she was prepared to go to trial on all counts on the originally scheduled date. (A62–63.) She had spoken to Mr. Bell earlier and he told her he did not want trial to be delayed. (A61–62.) Because all the charges arose out of the same core set of facts, defense counsel told the court she could ably defend all counts at trial the following week, including the new ones. (A62.) Upon hearing this, the government immediately moved for its own continuance, citing a need to summon witnesses and prepare for trial. (A65.) The district court responded, "[o]ver the objection of the defense and I believe in Mr. Bell's interest as well . . . I believe the government's motion is well taken." (A68.) The district court granted the continuance and set the case for trial on September 28, 2015. (A68.)

In granting the continuance, the court asked the government whether issuing the superseding indictment reset the Speedy Trial Act clock as to Count 3, the felon-in-possession count already charged in the original indictment. The government's interpretation was that granting a continuance reset the clock on the original indictment. (A66–67.) The district court asked whether it should sever the felon-in-possession count from the others and try it separately by August 10, 2015, which fell within 70 days of the first indictment. (A66.) The government stated it believed the felon-in-possession count was covered by § 3161(h)(1)(B) of the Speedy Trial Act. (A66.) Defense counsel "disputed" that interpretation. (A66–67.) The district court offered to try the entire case on August 10, 2015, to sever and try the felon-in-

possession count on August 10, 2015, or, if the government was "comfortable enough to believe in their position," the district court offered to set all five counts for trial on September 28, 2015. (A67.) The district court noted that if it set trial on all five counts for September 28, 2015, the defense might file a motion addressing the continuance. (A67.) The government responded, "we would prefer the September 28th date." (A67.) Over the defense's objection, the district court granted the government's request for a continuance, citing the interest of justice, and set all five counts for trial on September 28, 2015. (A67–68.)

Mr. Bell's trial, however, did not begin on September 28, 2015. The district court granted several more continuances and on October 20, 2016, Mr. Bell filed a motion to dismiss, asserting that the district court violated his speedy trial rights. (R.81.) In denying the motion, the district court found that each continuance had been properly granted. (A29–31.)

Mr. Bell objected to another continuance on January 26, 2017, at which point the trial was set for January 30, 2017. (A15.) At that hearing, the government reported that Mark Turner could not testify in person at trial due to a quarantine in the prison, but said he was available to testify by video teleconference for the trial. (A13–14.) The government stated it was not asking for a continuance. (A14.) Mr. Bell's attorney at the time, Hugh Toner, requested a continuance because he "would rather" cross examine Turner in person. (A14–15.) Mr. Bell stated adamantly that he wanted to proceed with the scheduled date, telling the court, "I want to go to trial on Monday, sir. I don't want no more continuances, I just want to go to trial

Monday, sir." (A15.) The district court explained that Toner preferred that Turner testify in person and if the trial started on January 30, Turner's testimony would be by video teleconference. (A15.) The district court asked if Mr. Bell understood, and, consistent with his previous assertion, he responded, "No, I don't, sir. I just want to go to trial on Monday." (A15.)

The district court again explained that Turner would only be available by video for the scheduled trial date and Toner "would prefer" to cross-examine Turner in person, asking if there was anything that Mr. Bell did not understand. (A16–17.) Mr. Bell responded, "Yes. I don't understand how – how that got anything to do with my trial. I had a speedy trial sir, and now I'm – thinking that exceed my speedy trial or whatever." (A17.) The district court said, "Well, if I'm unable, Mr. Bell, to have a conversation with you wherein you understand what is it that the issue is, then I'm gonna just rely on your attorney's representation and make my decisions based on that." (A17.) The district court said that if Mr. Bell wanted to go to trial next week then Turner would appear by video and explained, "Mr. Toner would prefer otherwise, and that would necessitate a few week continuance." (A17.) Then, the district court asked when the case could next be tried and discussed dates with Toner and the government without addressing Mr. Bell's request that trial proceed as scheduled on January 30. (A17.) The district court, government, and defense counsel agreed to a trial date of March 7, 2017. (A17; A23.) The district court excluded time, finding that Turner was an unavailable witness because his

whereabouts were known but he could not be obtained by due diligence, and it granted the continuance. (A22–23.)

Mr. Bell stood trial March 7, 2017. (B33; Trial Tr. I 1.) After a three-day bench trial, the court found Mr. Bell guilty on all four counts. (A1; Trial Tr. I 77–81.) In his amended motion for a new trial, Mr. Bell again asserted his speedy trial rights. (R.143.) The court denied this motion as well. (A9–10.) The district court sentenced Mr. Bell to 60 months on the use-in-furtherance conviction consecutive to 100 months on the other convictions for a total of 160 months' imprisonment. (A3.)

SUMMARY OF THE ARGUMENT

Demontae Bell's conviction arose from Speedy Trial Act and Fourth Amendment violations. Thus, this Court should vacate Mr. Bell's conviction or alternatively remand for resentencing.

First, the government and district court denied Mr. Bell his rights under the Speedy Trial Act and Sixth Amendment by causing the excessive delay he suffered awaiting trial. More than 70 days of unexcluded time elapsed between indictment and trial, but the district court incorrectly calculated the days without realizing that time had expired. The district court also erroneously interpreted two provisions of the Speedy Trial Act in excluding two periods of time from the 70-day clock, which together totaled 80 more days of time that should have counted toward it. On the first occasion, it granted an ends-of-justice continuance based on an interpretation of the Act contrary to this Court's precedent. On the second, it erred in interpreting the unavailable-witness provision of the Act. As a result, the non-excludable delay between indictment and trial ballooned to nearly twice the 70-day limit. Additionally, the nearly-two-year delay prejudiced Mr. Bell and denied him his Sixth Amendment speedy trial right, which also warrants dismissal of all counts with prejudice. And even if this Court opts not to dismiss all counts, Mr. Bell is nevertheless entitled to resentencing.

Second, the district court erred in failing to suppress a photograph obtained in violation of Mr. Bell's Fourth Amendment rights. Officer Sinks illegally searched the flip phone that Mr. Bell had when he was arrested, opening it and revealing the photograph on the home screen. Law enforcement may not search a cell phone

incident to arrest without exigent circumstances, and none were present here. Although the district court held that the search was illegal, it erroneously admitted the photograph on an independent-source theory. Reasoning that Nixon claimed to have seen the photograph on Turner's phone after Mr. Bell sent it by text message to Turner, it held that this viewing cured the previous illegal search.

The district court, however, did not acknowledge that Nixon had provided no information about Turner or his credibility as an informant in his affidavit. In fact, Turner was not a credible criminal informant. His past felonies, the fact he was an untested informant, and his motive to lie would all have cast doubt on the information he provided had the magistrate judge been aware of these circumstances. Turner eventually violated his proffer agreement by committing an additional burglary, further demonstrating his lack of credibility. Additionally, when Nixon saw the photo on Turner's phone, he did not see any information indicating where the photo came from, when it was taken, or even whether it had been texted from another cell phone. Finally, even if Nixon's information and his informant were fully credible, they did not constitute an independent source because the affidavit was already tainted by Sinks's illegal search. Sinks's illegal search and Turner's lack of credibility render these warrants invalid, and the evidence therefore should have been suppressed.

Because Nixon was aware of Turner's credibility issues and failed to disclose them to the court when seeking the search warrants, there is a reasonable possibility he deliberately or recklessly omitted that information. Because these

omissions were material and Mr. Bell made a substantial initial showing that they were deliberate or reckless, the district court erred in denying him a *Franks* hearing to challenge the validity of the warrants.

ARGUMENT

I. This Court should vacate Mr. Bell's conviction because the district court and government deprived him of his statutory and constitutional rights to a speedy trial.

This Court should vacate Mr. Bell's conviction because the 686-day delay between his indictment and eventual trial violated his rights under the Speedy Trial Act and Sixth Amendment. First, with respect to the Speedy Trial Act, 150 days of nonexcludable time elapsed between indictment and trial, surpassing the Act's 70-day limit. Additionally, this unusually long, unnecessary delay violated Mr. Bell's right to a speedy trial under the Sixth Amendment. The proper remedy for both the statutory and constitutional violation is dismissal with prejudice.

The district court's legal interpretations of the Speedy Trial Act are reviewed *de novo* and its decisions to exclude time from the 70-day clock are reviewed for abuse of discretion. *United States v. Hills*, 618 F.3d 619, 625 (7th Cir. 2010). Regarding the Sixth Amendment speedy trial claim, the district court's legal conclusions are reviewed *de novo* and its factual findings are reviewed for clear error. *Id.* at 629.

A. This Court should vacate Mr. Bell's conviction because 70 days of unexcluded time elapsed between indictment and trial, and the district court made two legal errors in excluding additional time.

This Court should vacate Mr. Bell's conviction because 70 days of unexcluded time elapsed between indictment and trial, and the district court relied twice on faulty interpretations of the Speedy Trial Act in its decisions to exclude 80 additional days. The Speedy Trial Act requires that a defendant be brought to trial within 70 days of the government filing and making public an indictment or the

defendant first appearing in court, whichever occurs later. 18 U.S.C. § 3161(c)(1). In certain limited circumstances defined in the statute, the district court may "exclude" delay from this 70-day clock, for example when the defendant is not competent to stand trial or when the court is considering a proposed plea agreement. *See* 18 U.S.C. § 3161(h). If 70 days of unexcluded delay elapse and the defendant raises the issue before trial, the defendant is entitled to dismissal. 18 U.S.C. § 3162(a)(2).

Absent one of the specific circumstances enumerated in the statute, the court may also exclude delay in granting a continuance and making a finding that the "ends of justice" served by excluding that delay from the 70-day clock would outweigh the defendant's and public's interests in a speedy trial. 18 U.S.C. § 3161(h)(7)(A). The ends-of-justice provision is not a catchall, however. The court cannot simply state that the ends of justice overpower the speedy trial right for just any reason. *See* 18 U.S.C. § 3161(h)(7)(B) (in deciding whether to exclude time between indictment and trial, the court must consider: (1) whether failing to do so would make continuing the proceedings impossible or result in a miscarriage of justice; (2) whether the case is too complex for the parties to prepare in time; and (3) whether failing to do so would unreasonably deny the parties continuity of counsel or adequate preparation time); *United States v. Larson*, 627 F.3d 1198, 1203 (10th Cir. 2010) (the ends-of-justice exclusion is "meant to be a rarely used tool for those cases demanding more flexible treatment.").

Here, the district court should have dismissed the indictment because exactly 70 days of *unexcluded* delay and 80 more days of *improperly excluded* delay elapsed from indictment to trial. First, even without counting all the time the district court excluded in granting twelve continuances in the pretrial period, exactly 70 days of time elapsed, so trial did not "commence within seventy days" from the filing and making public of the indictment. *See* 18 U.S.C. § 3161(c)(1). Furthermore, as detailed below, the district court on two occasions improperly excluded even more time, bringing the clock well over 70 days by the time trial began. When these two improperly excluded delays—44 and 36 days respectively—are added to the 70 days of unexcluded time that already elapsed, a total 150 days of non-excludable time passed before Mr. Bell's trial, requiring dismissal.

1. The indictment should be dismissed because 70 days of unexcluded time elapsed between the date the district court read Mr. Bell the original indictment and the first day of trial.

Even discounting all delay arising from the district court's continuances, exactly 70 days of unexcluded time elapsed in the pretrial period, which is impermissible under the Act and requires dismissal. Because the Speedy Trial Act itself does not explain how to compute time regarding the 70-day period, time is computed according to Rule 45 of the Federal Rules of Criminal Procedure. *United States v. Piasecki*, 969 F.2d 494, 502 n.5 (7th Cir. 1992). Under Rule 45, a period of days is counted by excluding the date on which the period begins but including the date on which the period ends. Fed. R. Crim. P. 45(a). This rule governs how to count the total number of days within the pretrial period as well as how to count the number of days in period of exclusion under the Act.

The clock began running on April 21, 2015, because that was the date the first indictment was read against Mr. Bell and this occurred after Mr. Bell's initial appearance on April 10, 2015. (A25; B33); *see* 18 U.S.C. § 3161(c)(1) (the clock begins ticking on the later date of the defendant first appearing before a judicial officer in the proceedings or the filing and making public of the indictment). Fifty-eight days ticked off the clock between this date and the first pretrial conference on June 18, 2015, when the district court began excluding time. (A30; B33); *see* Fed. R. Crim. P. 45(a) (April 21 is excluded as the first day of the period, but June 18 is included as the last day of the period—June 18 is not excluded as part of the continuance because it is also the first day of the continuance period and thus does not count as part of it under Rule 45).

From June 18, 2015, to when trial began nearly two years later on March 7, 2017, the district court excluded all delay before trial except two periods from June 8 to June 15, 2016, and from August 26 to August 31, 2016 that it crucially allowed to elapse, adding 12 additional days to the clock. (A29–30; B33.) Regarding the first period, the court granted seven overlapping continuances from the date of the first pretrial conference until June 8, 2016. (B33.) But the 7 days from June 9, 2016 to June 15, 2016, all count towards the clock, bringing it to 65 days. (B33); *see* Fed. R. Crim. P. 45(a) (June 8 is the last day of the continuance period beginning May 5, 2016 and so that date is excluded, but June 15 is counted because it is the first day of and thus not excluded as part of a new continuance period under Rule 45).

Furthermore, the 5 days from August 27 to August 31, 2016, also count toward the clock, bringing it to exactly 70 days. (B33); *see* Fed. R. Crim. P. 45(a) (August 26, 2016 is the last day of the continuance period beginning July 21, 2016 and so that date is excluded, but August 31 is counted because it is the "day of the event triggering" and thus not excluded as part of a new continuance period). So even if every continuance in the pretrial period were properly excluded from the calculation, the 70-day clock still would have expired by the first day of trial. (A30; B33.)

This time calculation applies to all charges in the indictment, not just the lone felon-in-possession charge from the original indictment. Judicial estoppel prohibits a party from persuading a court to adopt a position and later arguing an inconsistent position if doing so would give that party an unfair advantage. *Zedner v. United States*, 547 U.S. 489, 502 (2006); *Wells v. Coker*, 707 F.3d 756, 760 (7th Cir. 2013). Here, the government in its response to Mr. Bell's motion to dismiss took the position that as of November 2016, after Mr. Bell was charged with all counts of which he was eventually convicted, a single Speedy Trial Act clock stood at 58 days. (R.84 at 6.) The district court then adopted this position in its order denying the motion, also acknowledging the two additional unexcluded periods in June 2016 and August 2016.[3] (A30.)

[3] The district court made several day-calculation errors in its order. It wrote that 56 days of unexcluded time elapsed between the indictment being read against Mr. Bell on April 21, 2015, and the first pretrial conference on June 18, 2015. (A30.) As explained above, the actual count was 58 days. Additionally, the district court wrote that the unexcluded time periods in June 2016 and August 2016 added to the clock 6 and 4 days, respectively. (A30.) Again, as explained above, the actual counts should have been 7 and 5 days. Thus,

It would unfairly advantage the government to allow it to prevail on a claim that the clock stood anywhere else. The government argued earlier that the first superseding indictment reset the Speedy Trial Act clock on the felon-in-possession charge, that a single clock ran on all counts, and that they could all be tried together. (A66.) If the government were to now claim two clocks ran, the government would have it both ways—prevailing on the position there was one clock to get a continuance on July 22, 2015 and prevailing on the position there were two clocks now to avoid dismissal. *See Wells*, 707 F.3d at 760. The Speedy Trial Act clock hit 70 days of unexcluded time by trial and therefore expired.

2. The district court erred in excluding time based on its finding that the first superseding indictment reset the 70-day clock as to a charge already alleged in the original indictment.

The district court abused its discretion by relying on the government's mistaken interpretation of § 3161(h)(1)(B) to grant an ends-of-justice continuance excluding 44 days from the clock. Filing a superseding indictment does not reset the Speedy Trial Act's 70-day clock as to charges merely realleged from an earlier indictment. *United States v. Trudeau*, 812 F.3d 578, 587 (7th Cir. 2016); *United States v. Baker*, 40 F.3d 154, 159 (7th Cir. 1994) ("Whenever a superseding indictment merely charges offenses contained in the original indictment . . . the seventy-day period continues to run from the date of the original indictment, and all exclusions apply as if no superseding indictment had been returned."); *see also United States v. Thomas*, 788 F.2d 1250, 1260 (7th Cir. 1986) (holding that a second

correcting these errors, the clock at a minimum stood at 70 days when trial began on March 7, 2017. (B33.)

group of charges in a superseding indictment did not reset the 70-day clock as to the first group of charges already alleged in an earlier indictment and thus reversing convictions on the first group because the 70-day clock expired as to those charges). This rule prevents the government from circumventing the Speedy Trial Act by repeatedly dismissing and refiling charges against the defendant. *Baker*, 40 F.3d at 159.

The Speedy Trial Act contains a provision automatically excluding delay "resulting from trial with respect to other charges against the defendant." 18 U.S.C. § 3161(h)(1)(B). This Court has only ever interpreted this provision to allow exclusions for delays caused by other *trials*—generally trials in other jurisdictions—and has never interpreted it to cover new charges within the same trial. *See, e.g.*, *United States v. Oakley*, 944 F.2d 384, 388 (7th Cir. 1991) (delay caused by the defendant's transfer to Pennsylvania for unrelated charges pending there); *United States v. Montoya*, 827 F.2d 143, 148 (7th Cir. 1987) (delay caused by the defendant being held in Texas awaiting his unrelated trial there).

Here, the government's first indictment alleged just one count: a felon-in-possession charge. (R.8.) When it filed the first superseding indictment in July 2015, it re-alleged the felon-in-possession charge with no alterations and added four additional counts. (R.12); *see also* (A55) (district court informing Mr. Bell that "Count 3 realleges the original indictment against you, felon in possession of a firearm."). As noted above, on the date the district court read the indictment, 58

days had ticked off the speedy trial clock, which would have required a trial by August 8, 2015.[4] (B33.)

The district court inquired about the impact of the new indictment on the re-alleged felon-in-possession count. (A66.) The government asserted, "it's the government's reading of the Speedy Trial Act that even without an interest of justice finding that the time necessary to try additional counts is excludable." (A66.) It relied on the "other charges against the defendant" provision of the Act in reaching its conclusion. (A66.) Mr. Bell's attorney disagreed with the government's interpretation. (A66–67.) Still, the district court accepted the government's argument and moved the trial to just within 70 days from the filing of the superseding indictment. (A67.) Specifically, the district court stated that if the government "is comfortable enough to believe in their position," the court "could set the matter on all five counts for September 28." (A67.) When the government expressed a preference for that date, the district court, "over the objection [] of the defense," stated that it "believe[d] the government's motion [was] well taken" and set the case for the September trial date. (A67–68.) In so doing, the district court directly contravened this Court's precedent. In order to meet the requirements of the Speedy Trial Act, the district court was required to hold trial on the felon-in-possession count by August 8, 2015.

[4] The district court said in the hearing that Count 3 could have been tried on August 10, 2015. (A67.) This was also a calculation error. The 70-day clock stood at 58 days on July 22, 2015, and it would have begun running again July 28, 2015, the day after the continuance period ended (July 27, 2015). Thus, the 12 days left on the clock would have run out August 8, 2015.

After adopting the government's erroneous interpretation of the Speedy Trial Act, the district court asked if "the government believe[d] an interest of justice finding [w]as also required." (A68.) The government assented, stating its belief that "it is in the interest of Mr. Bell and of the public that this case be continued" until September 10, 2015, the date the district court had already set. (A68.) Yet just moments before, Mr. Bell's attorney stated she did *not* require a continuance. She maintained that she would be prepared to go to trial on all counts—including those added in the superseding indictment—on the original trial date of July 27. (A62.) Defense counsel noted that all counts centered on the same core transactions. (A62.) Mr. Bell, too, adamantly asserted his intent to have a speedy trial and specifically to proceed to trial on the original July 27 date. (A65.) At that point, the government asked for a continuance itself, claiming it needed time to prepare for trial on the new counts. (A65.) The district court then layered on an additional ends-of-justice exclusion based on the government's motion. (A68.)

The district court directly contradicted this Court's precedent when it held that the First Superseding Indictment reset the 70-day Speedy Trial Act clock as to the felon-in-possession charge against Mr. Bell, which was merely a realleged charge from the original indictment. The original indictment, read to Mr. Bell on April 21, 2015, only contained one count that charged Mr. Bell for being a felon in possession of a firearm. (R.8.) The district court read the First Superseding Indictment to Mr. Bell on July 22, 2015, after 58 days had ticked off the Speedy Trial Act's 70-day clock. (R.12.) The superseding indictment added four new counts

while realleging the felon-in-possession count from the original indictment, which it now listed as Count 3. (R.12; A55 ("Count 3 realleges the original indictment against you, felon in possession of a firearm.").)

The additional belt-and-suspenders exclusion was an error for four reasons. First, a defendant's speedy trial right belongs to him, not his attorney, and certainly not the government. *See United States v. Tigano*, 880 F.3d 602, 618 (2d Cir. 2018). The government chose to bring a superseding indictment, and if it "preferred" not to sever the ripe count, (A67), it should have been prepared to try all the counts within the requirements of the Speedy Trial Act.[5] Second, the district court's reliance on § 3161(h)(1)(B)—the "other charges against the defendant" provision of the Act—meant that time was automatically excluded. If so, there was no reason to make a more general ends-of-justice finding on top of it. *See United States v. Hernandez-Meza*, 720 F.3d 760, 764 (9th Cir. 2013) ("[I]n construing the broad language in subsection (h)(1) [of the Speedy Trial Act], we follow the specific-controls-the-general canon and avoid interpretations that render superfluous more specific STA provisions.") (citing *Bloate v. United States*, 559 U.S. 196, 203 n.9 (2010)). Third, one of the court's stated reasons for the delay—discovery review for the newly alleged counts—had nothing to do with the felon-in-possession count, which indicates that at least that count should have proceeded to trial. (A60–62.)

[5] Contrary to the government's assertion that this delay was in the public's interest, the public has an interest in accused individuals being tried promptly. *Zedner*, 547 U.S. at 501; *see* Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 2076 (1974) (stating that Congress enacted the Speedy Trial Act "[t]o assist in reducing crime and the danger of recidivism by requiring speedy trials . . .").

Finally, and most importantly, the district court's other reason for the delay—to "give [Bell's] attorney time to prepare his case" (A67–68)—wholly disregarded Mr. Bell's *and his lawyer's* express representations that they did not need additional time, (A62; A65). The parties already had three months to prepare for the felon-in-possession count, a simple one given that the only element truly at issue was whether Mr. Bell possessed the firearm. The district court abused its discretion when it failed to sever Count 3 and try it in a timely way and by imposing an ends-of-justice continuance that served neither the defendant nor the public, but rather solely the government. *See United States v. Toombs*, 574 F.3d 1262, 1271–72 (10th Cir. 2009) ("Simply identifying an event, and adding the conclusory statement that the event requires more time for counsel to prepare, is not enough [to grant an ends-of-justice continuance].").

Although continuing trial on the felon-in-possession charge was the most serious abuse of the district court's discretion, it was also an abuse to continue trial on the other charges. Among the factors the district court must consider in determining whether to grant an ends-of-justice continuance are the complexity of the case and necessity of additional preparation time. *See* 18 U.S.C. § 3161(h)(7)(B). Again, as Mr. Bell's attorney represented to the court, all the charges of which Mr. Bell was eventually convicted revolved around three discrete transactions, which both she and the government knew about for months: a trade in November 2014 and two controlled buys in February 2015. (A62); *see Larson*, 627 F.3d at 1206–07 (reversing an ends-of-justice exclusion of time made on the basis of giving counsel

additional preparation time as an abuse of the district court's discretion because the court did not state how much time defense counsel required to prepare or the extent to which he was already prepared). These transactions did not require nearly two years of additional "preparation" for the eventual three-day trial. *See United States v. Gonzales*, 137 F.3d 1431, 1435 (10th Cir. 1998) (reversing an ends-of-justice exclusion as an abuse of the district court's discretion because the complexity of the case—a three-day bank robbery trial—and necessity of preparation did not warrant it). Therefore, the entirety of the district court's ends-of-justice exclusion on July 22, 2015, was an abuse of discretion, and the 44-day delay it added to the pretrial period should not be excluded from the 70-day clock.

3. The district court erred in concluding that Mark Turner was an unavailable witness and excluding time on that basis when he was available to testify by video teleconference on the scheduled trial date.

The district court clearly erred when it found that Mark Turner was an "unavailable" witness and excluded time from the Speedy Trial Act on that basis. *See* 18 U.S.C. § 3161(h)(3); *see also United States v. Greer*, 527 F. App'x 225, 229 (3d Cir. 2013) (establishing a clear error standard of review for exclusions of time under the Speedy Trial Act).[6] The district court's decisions directly contradicted the plain terms of the provision that allows courts to exclude delay resulting from the

[6] The district court had ruled on Mr. Bell's first motion to dismiss on speedy trial grounds two months earlier. (A25.) Although Mr. Bell did not *file* another motion until after trial, (R.119), he consistently renewed his objections to continuances at each intervening hearing they were granted and rigorously asserted his speedy trial rights. In fact, in the hearing at issue, he specifically flagged for the district court his belief that his speedy trial clock had expired. (A17) ("I had a speedy trial, sir, and now I'm – I'm thinking that exceeds my speedy trial or whatever.") This Court's dicta in *United States v. O'Connor* is not to the contrary. *See* 656 F.3d 630, 637 (7th Cir. 2011) (not applying the clear error standard when the defendant only raised a speedy trial claim in one motion to dismiss objecting to a single ends-of-justice continuance).

unavailability of an essential witness. A witness is only "unavailable," however, when his whereabouts are either unknown or "known but his presence for trial cannot be obtained by due diligence." 18 U.S.C. § 3161(h)(3). The district court applied this exception to exclude time when Mark Turner, a trial witness, was quarantined in an Illinois Department of Corrections facility. (A22.) It pointed to a case called *Patterson* to support its decision, and it did not make an ends-of-justice finding. (A22.)[7]

The government never claimed that Turner was unavailable and thus never even attempted to meet its burden to show he was unavailable. 18 U.S.C. § 3162(a)(2) (establishing it is solely the government's burden). In fact, the government told the court it was prepared to present him: "[I]f Mr. Bell wants to go to trial next week, we will make arrangements to have Mr. Turner appear by video teleconference." (A14.) Mr. Bell, too, insisted on going to trial to preserve his speedy trial rights. (A15) ("I just want to go to trial Monday, sir. I don't want no more continuances, I just want to go to trial Monday sir."). It was only the district court and defense counsel—over his client's objection—who supported the delay. (A17)

[7] The district court provided no additional information regarding the case it was referencing. It was likely referring to *United States v. Patterson*, a Fourth Circuit case interpreting § 3161(h)(3)'s language regarding unavailable witnesses whose whereabouts are known. *See* 277 F.3d 709 (4th Cir. 2002). That case is inapplicable here for three reasons: (1) there, a United States Marshall testified it would be a "hardship" to bring the witness to court on the scheduled date, unlike here where the government said it could make arrangements to have Turner testify by video; (2) the witness in that case was unavailable because he had been arrested and was awaiting state charges in another state; and (3) due to the state charges precluding the witness from flying commercially, the government would have had to charter a flight to get him to court. *Cf. United States v. Burrell*, 634 F.3d 284, 292 (5th Cir. 2011) (finding that the unavailable-witness exclusion was inapplicable because the government did not show there would have been hardship in bringing the witness to court by the scheduled trial date).

(district court noting the disagreement between Mr. Bell and his attorney and that the attorney would "prefer" a continuance rather than holding trial on the scheduled date).

The district court's reliance on this misinterpretation of the unavailable-witness provision excluded 36 days of delay from the Speedy Trial Act's 70-day clock. These 36 days combined with the 44 days improperly excluded in the July 22, 2015 continuance total 80 days of non-excludable time since July 22, 2015, the day the rest of the charges were filed against Mr. Bell. (B33.) The indictment therefore should have been dismissed.

4. The indictment should be dismissed with prejudice.

When the district court's two erroneous exclusions of time under the Speedy Trial Act are disregarded, at least 80 days of non-excludable time—and 70 more if the government is held to its pretrial representations, *see supra* page 20—elapsed as to all counts. As a result, the indictment should be dismissed in its entirety. First, 58 days of unexcluded time elapsed between the original indictment on April 21, 2015, and the beginning of the district court's uninterrupted ends-of-justice continuances, which began on June 18, 2015. (A30; B33.) Next, the 44 days the district court improperly excluded at the arraignment on the first superseding indictment on July 22, 2015, bring the count to 102 days on the felon-in-possession charge and 44 days on the other charges. The 12 days from two undisputed periods of unexcluded time from June 8 to June 15, 2016 and August 26 to August 31, 2016 bring the count to 114 days on the felon-in-possession charge and 56 days on the other charges. (A30.) Finally, the 36 days the district court improperly excluded

using the unavailable-witness provision on January 26, 2017, bring the count to 150 days on the felon-in-possession count and 80 days on the other counts.

The indictment should be dismissed with prejudice because the circumstances that caused the delay were particularly egregious and Mr. Bell suffered prejudice as a result of the delay. The decision whether to dismiss the indictment with or without prejudice is typically made by the district court, but the appellate court may make the requisite findings itself if the answer is clear. *See United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983).

In determining whether to dismiss with prejudice, the court considers: (1) the seriousness of the offense; (2) the facts and circumstances leading to dismissal; and (3) the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice. 18 U.S.C. § 3162(a)(2); *United States v. Smith*, 576 F.3d 681, 689 (7th Cir. 2009). Although not explicitly listed in the statute, the court also sometimes considers the extent to which a defendant was prejudiced as a result of the violation. *See United States v. Sykes*, 614 F.3d 303, 309 (7th Cir. 2010).

These factors weigh in favor of dismissing the indictment with prejudice. First, Mr. Bell's convictions, though serious, were all nonviolent and therefore relatively less serious than offenses in other cases that this Court has held warranted dismissal without prejudice. *See Sykes*, 614 F.3d at 305 (involving a bank robbery); *Smith*, 576 F.3d at 689 (same). Second, the nearly two-year delay between indictment and trial alongside the multiple continuances granted against Mr. Bell's repeated and explicit wishes displays a profound neglect for his speedy

trial rights. Similarly, the administration of justice would not be well-served by reprosecuting Mr. Bell because no "mitigating factors" were present; Mr. Bell never sat on his hands and the delay was due to deliberate decisions by the court, not clerical oversight. *See Janik*, 723 F.2d at 546 (listing these factors as weighing against dismissal with prejudice). On the contrary, Mr. Bell repeatedly told the court he did not want any more continuances, and the district court consciously—and twice erroneously—granted them. Finally, Mr. Bell suffered prejudice as a result of the Speedy Trial Act violation because of the extensive additional delay of trial and witnesses' diminished recollections of events. *See, e.g.*, (Trial Tr. I 137) (Agent Hitchcock saying he "can't remember" when Mr. Bell first attracted his attention because it had been "two years since that case started"); (Trial Tr. I 173) (Joel Weakley "having a really hard time remembering all of the details" regarding the firearms stolen from him, saying "it has been a while"); (Trial Tr. II 408) (Mark Turner unable to answer defense counsel's question regarding the names of people at the house on New York Street, saying he "might have been able to remember a first name or a nickname two years ago, but not now."). Thus, the indictment should be dismissed with prejudice.

Even if this Court holds that only the felon-in-possession charge—Count 3 in the first superseding indictment—should have been dismissed under the Speedy Trial Act, Mr. Bell is at a minimum entitled to a resentencing because eliminating that conviction disrupts the district court's sentencing scheme. Resentencing is required when the 70-day clock expires as to some but not all counts of an

indictment due to the district court's improper exclusion of time and thus alters the sentencing calculus. *See Thomas*, 788 F.2d at 1260.

Mr. Bell was sentenced to 60 months' imprisonment for the use-in-furtherance conviction, which ran consecutive with his convictions on the other counts. (11/29/17 Sentencing Hr'g Tr. 14.) He was assigned a total offense level of 24, (11/29/17 Sentencing Hr'g Tr. 14), because the adjusted offense level of the felon-in-possession conviction was higher than the adjusted offense level for the grouped drug-distribution counts, (R.148 at 10). Mr. Bell's criminal history category was VI. (R.148 at 24.) Based on his total offense level for the felon-in-possession conviction (24) and his criminal history category, his suggested sentencing range according to the Sentencing Guidelines was 100–125 months. (11/29/17 Sentencing Hr'g Tr. 14.)

Without the felon-in-possession conviction, Mr. Bell still would have been sentenced to 60 months in prison for the use-in-furtherance conviction to run consecutive with the drug-distribution convictions. But the grouped drug-distribution convictions carried only a total offense level of 12. (R.148 at 10.) The Guideline range for an offense level of 12 and criminal history category of VI is 30–37 months, a significantly lower range than the 100 months that the district court imposed. Because the felon-in-possession charge should have been dismissed and Mr. Bell's conviction on that charge increased his sentence under the Guidelines, he is entitled to a resentencing. *See Thomas*, 788 F.2d at 1260.

B. This Court should vacate Mr. Bell's conviction because the government violated Mr. Bell's constitutional right to a speedy trial as guaranteed by the Sixth Amendment.

The 686-day delay between Mr. Bell's indictment and his eventual trial violated his Sixth Amendment right to a speedy trial. *See* U.S. Const. amend. VI. A defendant's Sixth Amendment speedy trial right is violated when: (1) he suffers an uncommonly long delay awaiting trial; (2) the delay prejudices him; (3) he asserts his right to a speedy trial; and (4) he is less responsible for the delay than the government. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Gearhart*, 576 F.3d 459, 463 (7th Cir. 2009). Because all four of these conditions were met in this case, Mr. Bell's Sixth Amendment right to a speedy trial was violated and his conviction should be vacated.

Mr. Bell faced a 686-day delay—almost two years in jail—from when the government first indicted him to his trial on March 7, 2017. Under this Court's law, such a delay is "presumptively prejudicial." *United States v. White*, 443 F.3d 582, 589–90 (7th Cir. 2006). This delay was also uncommonly long. The government filed three superseding indictments mostly realleging the same conduct all while Mr. Bell waited in jail for his trial to begin. (R.8; R.12; R.28; R.55.) Mr. Bell formally asserted his right to a speedy trial twice: first in his October 20, 2016 motion to dismiss, (R.81), and again in his amended motion for a new trial, (R.143). He orally reiterated his desire for a speedy trial in court hearings over and over. (A65) (Mr. Bell telling the court he is prepared to go to trial without delay even after being thoroughly admonished by the court); (12/2/15 Pretrial Conf. Hr'g Tr. 7–9) ("I would like to go to trial sometime in January . . . I'm just sitting here, you know, and being

prolonged, Your Honor"); (12/16/16 Status Conf. Tr. 2, 6–7) ("I would like to have my trial Monday, so I'm not agreeing to no speedy trial . . . I feel like my speedy trial rights have been violated, but I guess I don't have a choice to sit here now for another two months"); (A15; A17) ("I want to go to trial Monday, sir. I don't want no more continuances, I just want to trial Monday, sir . . . I had a speedy trial, sir, and now I'm—I'm thinking that exceeds my speedy trial or whatever."). Mr. Bell also suffered prejudice as a result of the delay. As discussed above, *see supra* page 30, several trial witnesses could not fully recollect events because they took place nearly two years before.

Finally, Mr. Bell was less responsible for this delay than the government. Most of the delay was due to the government repeatedly filing indictments—a total of four—and being unprepared for set trial dates. *See, e.g.*, (A65) (government requesting additional time to prepare and call witnesses); (3/1/16 Hr'g Tr. 6–9) (trial delayed due to the government "get[ting] officers lined up"). These are not valid excuses for continued delay. *See Doggett v. United States*, 505 U.S. 647, 652–53 (7th Cir. 1992) (explaining that the government's "lethargy" in preparing a case for trial weighs in favor of the defendant). Moreover, many of the other delays took place at Mr. Bell's attorney's request but over Mr. Bell's own objection. *Compare* (12/2/15 Hr'g Tr. 6) (defense counsel telling the district court that a suggested trial date would not work because his "wife likes to take long vacations"), *with* (12/2/15 Hr'g Tr. 7, 9) (Mr. Bell telling the court he "wasn't looking forward to a continuance" and that he feels he is "just sitting here . . . and being prolonged"). *Compare also*

(12/16/16 Hr'g Tr. 3) (defense counsel requesting a continuance for family reasons), *with* (12/16/16 Hr'g Tr. 3) ("[Mr. Bell:] Sorry to hear about this, but, you know, I also have a family, and, you know, I went through several family emergencies while I was here, and I would like my trial to continue on the 19th.").

Mr. Bell continued to assert his rights while his attorney offered flimsy reasons for the delay. For example, trial was delayed due to Mr. Bell's attorney's vacation. (12/2/2015 Hr'g Tr. 6) (Mr. Bell's attorney telling the court a date won't work because his "wife likes to take long vacations"); (3/1/16 Hr'g Tr. 6–9) (trial initially delayed three weeks but then extended two months because of the court's and attorneys' scheduling conflicts). Trial was delayed further over Mr. Bell's objection when his attorney wished to cross examine Mark Turner in person even though Turner was available to testify by video. (A23.) The attorney's preferences were beside the point because a defendant's constitutional speedy trial right belongs to him, not his attorney. *See Tigano*, 880 F.3d at 618. This Court should vacate Mr. Bell's conviction on Sixth Amendment grounds as well.

II. This Court should vacate Mr. Bell's conviction because it was based on a cell phone photograph that law enforcement only obtained by violating Mr. Bell's Fourth Amendment rights.

Mr. Bell's felon-in-possession and use-in-furtherance convictions relied heavily on a photograph of an AK-47 found on Mr. Bell's cell phone when he was arrested. Because law enforcement only obtained that photograph by violating Mr. Bell's Fourth Amendment rights, it should have been suppressed at trial. FBI Agent Jason Nixon sought two search warrants for that cell phone, each supported by affidavits he wrote and signed. (B2–21.) Those affidavits contained two

justifications for probable cause: (1) that Officer Sinks of the Peoria police had seen a photograph of a gun on the phone; and (2) that Mark Turner, a criminal informant, had shown Agent Nixon a copy of that photograph that Mr. Bell had texted him. (B2–21.) These justifications were flawed, and both affidavits omitted the critical information that Sinks's search violated Mr. Bell's Fourth Amendment rights and that Mark Turner suffered from serious credibility issues. Because these omissions were material to the warrant application, the evidence taken from the phone should have been suppressed at trial. And because Agent Nixon omitted that information intentionally or recklessly, the district court should have granted Mr. Bell a *Franks* hearing to challenge the validity of the warrants.

A. The district court erred when it failed to suppress a photograph taken from Mr. Bell's cell phone because law enforcement obtained it only by violating Mr. Bell's Fourth Amendment rights.

There are three steps courts follow in analyzing Fourth Amendment claims: first, the court determines whether law enforcement's actions constituted a search; second, it determines whether an exception to the warrant requirement excuses that search; and third, it determines whether excluding the evidence is the appropriate remedy. A district court's factual findings underpinning a denial of a motion to suppress are reviewed for clear error and its legal conclusions are reviewed *de novo*. *United States v. Rainone*, 816 F.3d 490, 495 (7th Cir. 2016) (citing *United States v. Glover*, 755 F.3d 811, 815 (7th Cir. 2014)). In this case, the district court correctly held that Sinks's opening Mr. Bell's cell phone constituted a search and that no warrant exception applied, but it erred as a matter of law in

concluding that an "independent source" still rendered the evidence admissible at trial. (A32.)

1. Officer Sinks's warrantless search of Mr. Bell's cell phone was unreasonable, and any evidence gathered from it should have been excluded under the Fourth Amendment.

Police generally must have a warrant to search a cell phone. An act constitutes a search when it violates a place where the subject has a subjective expectation of privacy and that expectation is objectively reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see* U.S. Const. amend. IV. Ordinary cell phone users have a powerful expectation of privacy in their devices because the data stored on them—including photographs, videos, location data, and much more—are often extensive and deeply personal. *See Riley v. California*, 134 S. Ct. 2473, 2489 (2014) ("The term 'cell phone' is itself misleading shorthand . . . They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."). Because this expectation of privacy is so strong, the Fourth Amendment requires that any search of a cell phone be *reasonable*, which "generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

There are exceptions to the warrant requirement for extenuating circumstances, such as when a warrantless search is necessary to ensure officer safety or when there is a risk that a suspect may destroy evidence. *Chimel v. California*, 395 U.S. 752, 762–63 (1969). These circumstances generally do not apply to cell phone searches, however. *Riley*, 134 S. Ct. at 2484–85. Cell phones pose no

danger to officer safety, and suspects are not readily able to destroy evidence stored on them once the phone is seized incident to arrest.[8] *Id.* Therefore, absent extreme and unusual circumstances, law enforcement officers may not search a cell phone without a warrant.

When Officer Sinks arrested Mr. Bell, he took a flip-style cell phone from Mr. Bell's pocket. (B4.) Officers transported Mr. Bell and the phone back to the Peoria police station where Sinks opened the cell phone outside an interrogation room and viewed the image stored as the home screen background. (B4.) This act was a search because Sinks accessed data stored on Mr. Bell's cell phone, where Mr. Bell had an expectation of privacy. Even without the special protection *Riley* affords to cell phones, the fact Sinks had to physically manipulate the phone by opening it before accessing the information rendered this a search because the information was not in plain view. *See Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (holding that manipulating an object to see a part not otherwise visible constituted a search).

The district court correctly held that Sinks committed an illegal search when he opened the flip phone. (B34.) The judge elaborated, "the Court sees no reason to allow law enforcement to circumvent the warrant requirement in every case under the guise that they discovered evidence when they opened the phone or turned on the screen to turn the phone off." (R.71 at 7.) Furthermore, there was no applicable

[8] Although the Court in *Riley* acknowledged both that third parties could potentially remotely wipe data stored on a cell phone and that some modern cell phones may have encryption features that effectively bar law enforcement's access to the data stored on them, it also noted that neither problem is prevalent enough to create a warrant exception. *Riley*, 134 S. Ct. at 2846.

exception to the presumptive warrant requirement, and therefore the photograph on Mr. Bell's cell phone was obtained through an illegal search, and the district court should have excluded it from evidence. *See Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (holding that evidence resulting from Fourth Amendment violations should be excluded at trial).

2. The district court erred when it found that Agent Nixon's viewing of a photograph on a criminal informant's cell phone with no identifying information or corroboration constituted an independent source of the tainted evidence.

Although even illegally-obtained evidence may be admissible if it is obtained from an untainted independent source, *Murray v. United States*, 487 U.S. 533, 538 (1988), the government bears a heavy burden to establish the independence of that source. *See United States v. Velasco*, 953 F.2d 1467, 1473–74 (7th Cir. 1992). In cases like this one, where the purported "independent source" appeared alongside the tainted source in the same affidavit in support of a search warrant, the exclusionary rule still applies. *Brock v. United States*, 573 F.3d 497, 502 (7th Cir. 2009) ("[T]he exclusionary rule would still apply if the warrant was tainted by the previously discovered evidence that was illegally obtained."). In reviewing decisions to grant warrants, courts do not evaluate whether probable cause existed independent of the tainted source, but rather how the illegally-acquired information *actually* affected the magistrate judge. *United States v. Markling*, 7 F.3d 1309, 1316 (7th Cir. 1993).

In this case, Nixon's affidavit included Sinks's illegal search alongside his own account of seeing a photo on Turner's phone. This Court does not step into the

magistrate's shoes to re-evaluate the warrant application, but it does evaluate the subjective effect the illegal evidence would have had on that magistrate. *See id.* Nixon claimed to have seen the photograph in February, but Mr. Bell was arrested in April—significantly closer in time to the first warrant application. Furthermore, Nixon's belief that the photograph came from Mr. Bell's phone was supported only by Turner's information. The photograph he saw on Turner's phone did not include any information to corroborate the fact that it was sent via text message at all, much less from Mr. Bell's phone. Sinks's illegal search, on the other hand, provided more current and credible information because it took place when Mr. Bell was arrested and showed with certainty that the photo was located on Mr. Bell's cell phone. Thus, Sinks's search, which was more recent and involved an officer viewing Mr. Bell's phone directly, would have been far more persuasive to the magistrate judge than Nixon's more attenuated viewing of the photo combined with an untested informant's claims about its origins.

Importantly, the magistrate judge knew *nothing* about Turner when he issued the warrant. Nixon did not provide his identity, his presence, or even a recitation of his credibility as an informant. As this Court has noted, the omission of such information in a warrant application is a "serious" problem because without it, "a judge lacks the opportunity to assess the reliability of the information relied upon to authorize a highly intrusive search." *United States v. Musgraves*, 831 F.3d 454, 460 (7th Cir. 2016) (explaining the seriousness of omitting of the informant's

criminal record, his prior deception of law enforcement, and his expectation of payment).

Such was the case here. Turner was cooperating with law enforcement as a criminal informant under a proffer agreement. (Trial Tr. I 27–28.) There were obvious indicators that Turner was not a credible informant—he had several felony convictions on his record, including prior drug offenses, and he was suspected in a November 2014 burglary of five firearms from the home of one of his coworkers. (Trial Tr. I 29.) Turner was motivated to inform on Mr. Bell because he faced serious charges including burglary, use of a firearm in furtherance of drug trafficking, being a felon in possession of a firearm, and multiple drug offenses including manufacturing methamphetamine. Turner went on to violate his proffer agreement by committing another burglary and other crimes. (Trial Tr. I 84.) As a result, Nixon terminated Turner's criminal-informant arrangement at the end of April 2015. (Trial Tr. I 84.)

Nixon filed his first application for a search warrant on April 15, 2015. (B2.) Although the record does not indicate when exactly Nixon broke off his criminal-informant relationship with Turner or when exactly he learned Turner had committed further crimes in violation of his proffer agreement, he almost certainly knew that Turner's credibility was questionable when he applied for that warrant. Still, he disclosed none of this information to the court when he sought a warrant based on Turner's information.

When an informant is not a credible source, his information can only supply probable cause for a search warrant if there are additional indicators that it is accurate. *Musgraves*, 831 F.3d at 460. Factors that can bolster an incredible informant's information include: "(1) the level of detail; (2) the extent of firsthand observation; (3) the degree of corroboration; (4) the time between the events reported and the warrant application; and (5) whether the informant appeared or testified before the magistrate." *Id.* (quoting *Glover*, 755 F.3d at 815) (internal quotations omitted).

None of these factors weighed in favor of issuing a warrant—here, the only critical information Turner provided was that Mr. Bell texted him a photograph of the AK-47 Mr. Bell allegedly possessed. First, Turner's information was insufficiently detailed: he did not identify Mr. Bell's cell phone number to verify that Mr. Bell did indeed send the photo via text message. (Trial Tr. I 66.) Second, Nixon's firsthand observation did not pass muster; his observation was actually via recordings and transcripts full of unintelligible dialogue and unclear information. (Trial Tr. I 34.) Also, as noted above, the photo Turner showed him simply does not indicate that it came in via text from any phone, let alone a phone belonging to Mr. Bell. (B1.) Third, Turner's claims remained uncorroborated because nothing in the photo on Turner's phone corroborated his claim that Mr. Bell had texted it to him. (B1.) The corroboration that the district court found compelling had nothing to do with Turner or the information that he provided. (R.71 at 14–15.) Rather, the district court found Mr. Bell's criminal history significant, even though it did not

corroborate any of the information Turner provided. (R.71 at 15.) The court also erroneously noted that "[a] separate informant confirmed that 'Jay' was Demontae Bell," (R.71 at 15), even though that informant had in fact identified Mr. Bell as "Tay Tay," (B4; B13; R.72, Ex. O at 89). Finally, and most tellingly, Nixon did not seek a search warrant for two full months, at which time Turner failed to testify before the magistrate judge.

Turner's credibility issues only could have been overcome by other circumstances strongly indicating that his information was reliable, and those circumstances did not exist. Sinks's illegal search was the most persuasive portion of the warrant application, and Nixon's observation alone was not an independent source of the evidence. The cell phone photograph therefore should have been excluded at trial.

B. Mr. Bell should have been afforded a *Franks* hearing because he made a substantial preliminary showing that Agent Nixon had deliberately or recklessly misrepresented and omitted facts when seeking an arrest warrant and two search warrants.

Nixon's two affidavits, which provided the basis for both search warrants of Mr. Bell's cell phone, omitted or distorted key details about Mr. Bell's arrest and the events leading up to it. As noted above, most of Nixon's information came directly from his criminal informant, Mark Turner, a convicted felon with substantial credibility issues Nixon failed to disclose in his affidavits. Omitting or misrepresenting such material information was necessarily knowing or reckless. The information was critical to the magistrate judge's understanding of the case, and each distortion or omission skewed the facts in favor of finding probable cause

to search. A denial of a *Franks* hearing is reviewed for clear error, and legal determinations that factored into the ruling are reviewed *de novo*. *Glover*, 755 F.3d at 815.

In the district court, Mr. Bell made a substantial initial showing that Nixon had recklessly or deliberately misrepresented facts in seeking his search warrants, and thus the district court clearly erred in denying him a full *Franks* hearing on whether the evidence stemming from those warrants should have been excluded. A *Franks* hearing enables a defendant to challenge the validity of a warrant and suppress evidence obtained from it under the theory that law enforcement deliberately or recklessly provided the issuing court with false material information. *United States v. McMurtrey*, 704 F.3d 502, 508 (7th Cir. 2013). District judges have discretion to hold a "pre-*Franks*" hearing in order to determine whether a defendant has made a "substantial preliminary showing" that police procured a warrant with deliberate or reckless misrepresentations in affidavits. *Id.* at 509. A substantial preliminary showing of police recklessness or intent can be made by showing factual discrepancies between affidavits. *Id.* at 512.

Nixon misrepresented or omitted three key facts in each affidavit, and these omissions significantly increased his chance of successfully obtaining the warrants. First, as discussed above, Nixon failed to disclose any information about his criminal informant's credibility and therefore impeded the magistrate judge's ability to evaluate probable cause. (B2–10.) Second, Nixon misrepresented what he saw on Turner's phone by claiming he had seen a photograph of an AK-47 that Mr.

Bell had texted to Turner when his only basis for believing that was information that Turner provided him. (B5.) Third, in his first affidavit, Nixon omitted any details that might have indicated that Sinks had illegally searched Mr. Bell's phone, and in the second, Nixon omitted the illegal search altogether. (B14–15.) The misrepresentations were material, and therefore they warrant an inference that his conduct was reckless or intentional. Including all of this information would have been fatal to both warrant applications, and therefore should have led to a *Franks* hearing and the exclusion of the evidence obtained as a result of the warrants.

Nixon was aware of Turner's criminal history (which included multiple felonies), the charges he was facing when he became a criminal informant under a proffer agreement (which included burglary, manufacturing methamphetamine, and being a felon in possession of a firearm), and the subsequent crimes he committed that violated the agreement (which included an additional burglary as well as other charges). (Trial Tr. I 27–28, 84.) Despite the fact that a criminal informant's credibility is critical when evaluating whether his information can establish probable cause, *Musgraves*, 831 F.3d at 460, Nixon disclosed none of this information in either of his affidavits. (B2–21.)

Additionally, Nixon *stated as facts* that Mr. Bell was recorded telling Turner that "he sold the AK-47," that he "advised C/S-1 [Turner] he had a photo of the AK-47 and offered to send the photo to C/S-1 via text message from his cellphone," that "C/S-1 received the photo," and that "Nixon subsequently viewed the photo." (B5.) However, Nixon failed to include the transcript of those recordings, which is far

more ambiguous than Nixon indicated. The recordings contain large portions that are unintelligible, and critically, the letters "AK" appear only twice—brought up for the first time by Turner, not Mr. Bell. (B27.) Although Mr. Bell does discuss selling a "thing," (B30–31), there is nothing to indicate that he is referring to an AK-47. Nixon also claims to have seen a photograph Mr. Bell texted to Turner, but the photograph that Nixon saw had no information suggesting that it had been sent via text message or indicating the phone number that sent it—he only had Turner's word it was sent from Mr. Bell's phone. (B1.) As far as Nixon could have known, Turner was showing him a photograph he had taken himself. Nixon disclosed none of these ambiguities and failed to attach the transcript or photograph, thereby preventing the magistrate from accurately assessing whether they established probable cause.

Finally, Nixon omitted the fact that Sinks's search of Mr. Bell's cell phone violated his Fourth Amendment rights. In the first affidavit, Nixon only stated that "officer Sinks observed the 'home' and/or 'lock screen' photo" on the cell phone, but not that Sinks physically manipulated the phone or that he had done so without Mr. Bell's consent. (B5.) Nixon's second affidavit omits Sinks's observations entirely, indicating he recognized the problem with the search. (B14–15.)

Each of these omissions or misrepresentations involved vital information potentially fatal to the warrant application. Because of the number of omissions and their seriousness, any reasonable court would have inferred that Nixon had made them deliberately or at least recklessly. Mr. Bell pointed out these omissions and

misrepresentations, which established the preliminary showing required to receive a full *Franks* hearing. (A32.) The district court therefore erred in denying Mr. Bell's request.

CONCLUSION

For the foregoing reasons, Appellant Demontae Bell respectfully requests that the Court vacate his conviction and dismiss the indictment with prejudice, reverse and remand for a new trial without the illegally-obtained evidence, or at a minimum, remand his case to the district court for resentencing.

Dated: November 28, 2018

Respectfully Submitted,

Demontae Bell
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
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DEMONTAE BELL

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 12,357 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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DEMONTAE BELL

Dated: November 28, 2018

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Demontae Bell, hereby certify that I electronically filed this brief and appendices with the clerk of the Seventh Circuit Court of Appeals on November 28, 2018, which will send notice of the filing to counsel of record in the case.

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CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for Defendant-Appellant, Demontae Bell, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

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Dated: November 28, 2018

No. 17-3505

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Demontae Bell,
Defendant-Appellant.

ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT DEMONTAE BELL

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DEMONTAE BELL

RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA

v.

Demontae Bell

JUDGMENT IN A CRIMINAL CASE

Case Number: 15-10029-001

USM Number: 19830-026

William Holman
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) 1sss, 2sss, 3sss, 4sss
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §924(c) & 2	Possession of a Firearm in Furtherance of a Drug Crime	11/6/2014	1sss
18 USC § 922(g)	Felon in Possession of a Firearm	11/6/2014	2sss

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

11/29/2017
Date of Imposition of Judgment

s/ James E. Shadid
Signature of Judge

James E. Shadid, Chief U.S. District Judge
Name and Title of Judge

11-30-17
Date

DEFENDANT: Demontae Bell
CASE NUMBER: 15-10029-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 USC §841(a)(1), 841(b)(1)(C), & 18 USC §2	Distribution of a Controlled Substance	2/13/2015	3sss
21 USC §841(a)(1), 841(b)(1)(C) & 18 USC §2	Distribution of a Controlled Substance	2/25/2015	4sss

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Ct. 1sss: 60 months consecutive to Cts 2sss, 3sss, & 4sss;

Cts. 2sss, 3sss, & 4sss: 100 months per count to be served concurrently with each other and consecutive to Ct 1sss.

☑ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant serve his sentence in a facility as close to his family in Peoria, Illinois, as possible. It is further recommended that he serve his sentence in a facility that will maximize his exposure to educational and vocational opportunities.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Cts. 1sss, 2sss, 3sss, & 4sss: 3 years per count to be served concurrently with each other

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the following conditions:

1. The defendant shall not knowingly leave the judicial district without the permission of the court or probation officer.

2. The defendant shall report to the probation officer in a reasonable manner and frequency directed by the court or probation officer.

3. The defendant shall follow the instructions of the probation officer as they relate to the defendant's conditions of supervision. Any answers the defendant gives in response to the probation officer's inquiries as they relate to the defendant's conditions of supervision must be truthful. This condition does not prevent the defendant from invoking his Fifth Amendment privilege against self-incrimination.

4. The defendant shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.

5. The defendant shall permit a probation officer to visit him at home or any other reasonable location between the hours of 6 a.m. and 11 p.m., unless investigating a violation or in case of emergency. The defendant shall permit confiscation of any contraband observed in plain view of the probation officer.

6. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

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

ADDITIONAL SUPERVISED RELEASE TERMS

7. You shall not purchase, possess, use, distribute, or administer any controlled substance or psychoactive substances that impair physical or mental functioning except as prescribed by a physician. You shall, at the direction of the U.S. Probation Office, participate in a program for substance abuse treatment including not more than six tests per month to determine whether you have used controlled substances. You shall abide by the rules of the treatment provider. You shall pay the costs of the treatment to the extent you are financially able to pay. The U.S. Probation Office shall determine your ability to pay and any schedule for payment, subject to the court's review upon request.

8. The defendant shall not knowingly meet, communicate, or otherwise interact with any person whom he knows to be a convicted felon or to be engaged in, or planning to engage in, criminal activity, unless granted permission to do so by the probation officer.

9. The defendant shall not knowingly possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. §921(a)(4) or any object that you intend to use as a dangerous weapon as defined in 18 U.S.C. §930 (g)(2).

10. You shall attempt to obtain a GED within the first 24 months of supervision, if you have not already obtained one while in custody.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: Demontae Bell
CASE NUMBER: 15-10029-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 400.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Demontae Bell
CASE NUMBER: 15-10029-001

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Docket No. 15-cr-10029
Plaintiff,	)	
vs.	)	Peoria, Illinois
	)	November 29, 2017
DEMONTAE BELL,	)	
Defendant.	)	

RECORD OF PROCEEDINGS
SENTENCING HEARING
BEFORE THE HONORABLE JAMES E. SHADID
UNITED STATES DISTRICT JUDGE

THE APPEARANCES

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On behalf of the Plaintiff

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On behalf of the Defendant

Nancy Mersot, CSR, RPR
United States District Court Reporter
100 N.E. Monroe Street
Peoria, IL 61602

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

The remaining allegations all related essentially to the sufficiency of the evidence, and, Your Honor, the government respectfully would request a denial of that motion as there was sufficient evidence presented to find Mr. Bell guilty on all four counts. Thank you.

THE COURT: Mr. Holman, your response?

MR. HOLMAN: No, Judge.

THE COURT: All right. The Rule 33 requiring a new trial in a number of situations in which trial errors or omissions have jeopardized the defendant's substantial rights, I do not believe that occurred. I believe the motions should be respectfully denied in part for the following reasons:

One, as it pertains to any -- receiving a fair trial, denying due process, not directing a verdict, and denying the pretrial motions; those have been addressed and sufficiently addressed on the record during the course of the proceedings before and during trial and after trial.

With regard to the ineffective assistance of counsel claims, I observed Mr. Toner. He was effective. He was as effective as he could be.

I found corroboration, otherwise the verdict

may very well have been different, which I did point out on the record and the record is clear on that. The corroboration consists of phone calls, photographs, surveillance videos, video recordings, data received from the phone, text messages, controlled substances, proof of purchase and ownership of firearms, testimony of law enforcement, recorded buys. So, there was corroboration that substantiated the findings that I made.

With the matter of failure to call witnesses, again, those were addressed pretty regularly as I recall. They were for strategy reasons. They were reasoned decisions.

So for those reasons, and as others are set out in the government's response, the motions are respectfully denied.

With that in mind then are the parties ready to proceed to sentencing?

MR. HANNA: Yes, Your Honor.

MR. HOLMAN: Yes, Judge.

THE COURT: A PSR has been prepared. The parties have received one. There are a number of objections.

Are the parties prepared to go through the objections?

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	15-CR-10029
	)	
VS.	)	PRE-TRIAL CONFERENCE
	)	
DEMONTAE BELL,	)	PEORIA, ILLINOIS
	)	
DEFENDANT.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES E. SHADID
UNITED STATES DISTRICT JUDGE

JANUARY 26, 2017

A P P E A R A N C E S:

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
(NONE.)				

E X H I B I T S

GOVERNMENT'S EXHIBIT NUMBER	IDENTIFIED	ADMITTED

DEFENDANT'S EXHIBIT NUMBER	IDENTIFIED	ADMITTED

P R O C E E D I N G S

* * * * * * * * * * *

THE COURT: Good morning. This is United States versus Demontae Bell, 15-CR-10029. Mr. Bell is present with Mr. Toner. Mr. Hanna present for the Government.

This matter was just set for status today as it's set for jury trial on Monday -- or I mean bench trial on Monday. Just Court checking to see if the parties are still ready for trial or if there are any issues that need to be addressed.

MR. HANNA: Judge, the Government is otherwise ready to proceed to trial on Monday. However, yesterday afternoon we received notice from the United States Marshals Service that a key witness in this case, Mark Turner, who is housed in the Illinois Department of Correction's Shawnee facility, U.S. Marshals are unable to produce him for trial due to a notice they've received of a quarantine that has locked down the entire facility until the very least February 1st, although it was unclear, speaking later in the day with someone from the facility, whether they would even be able to produce him in person before February 10th.

I -- when I found that out, I conveyed that to

Mr. Toner. There's an option where the Department of Corrections would be able to provide a video appearance of Mr. Turner, as long as they have some advance notice.

The Government can do that, if Mr. Bell wants to go to trial next week, we will make arrangements to have Mr. Turner appear by video teleconference. That would probably be on Tuesday afternoon.

But we are otherwise not asking for a continuance because we are -- we're prepared to proceed.

THE COURT: Mr. Toner.

MR. TONER: Judge, couple things.

Mr. Bell has consistently talked to me about being able to confront his accusers. I -- I recognize that I suppose in theory that probably might pass muster about that. I think, however, from my perspective, I would rather see a person live in court certainly; number one.

Number two, I would indicate to the Court, and Mr. Hannah and I had discussed this just before the Court got on the bench, that it would be a logistical nightmare because, in my cross-examination, I would be showing him exhibits like transcripts, videos, things like that, that I'm

not going to be able to do in the fashion described by a teleconference.

So for that reason, we would ask for a convenient date with the Court. I would make myself available at the earliest convenience. But I want Mr. Turner here.

THE COURT: Okay. Mr. Bell, you heard what both sides, what Mr. Hannah and Mr. Toner said. You agree with Mr. Toner? You want Mr. Turner here?

THE DEFENDANT: I want to go to trial Monday, sir. I don't want no more continuances, I just want to go to trial Monday, sir.

THE COURT: All right. So do you -- you understand that Mr. Toner would prefer to have Mr. Turner present in open court for cross-examination, as opposed to by video. If we go to trial by -- on Monday, it appears that Mr. Turner's testimony could be by video. Do you understand that?

THE DEFENDANT: No, I don't, sir. I just want --

THE COURT: What is it --

THE DEFENDANT: -- to go to trial on Monday.

THE COURT: What is it you don't understand

about that?

THE DEFENDANT: I don't understand why -- why I'm here basically anyway. And he --

THE COURT: I understand that. We've been through that, Mr. Bell. And we'll go through it again today if you wish. But let's try to limit the conversation today right now to as it pertains to Mr. Turner.

The Government is going to call him as a witness. They would prefer to call him live, but the -- he can't be transported here due to issues at the prison, so they would make him available by video.

Mr. Toner would prefer that he were here live so that the cross-examination of Mr. Turner would be in open court, and Mr. Toner believes he might be better able to make the points that he wishes to make.

I've asked you your thoughts because that would require -- to have him here, it sounds like that would require a couple week continuance. If you wish to have the matter go to trial next week, then it appears that Mr. Turner would be a witness by video.

So is there anything about that, what I just

said, that you don't understand?

THE DEFENDANT: Yes. I don't understand how -- how that got anything to do with my trial. I had a speedy trial, sir, and now I'm -- I'm thinking that exceeds my speedy trial or whatever. So --

THE COURT: Well, if I'm unable, Mr. Bell, to have a conversation with you wherein you understand what it is that the issue is, then I'm gonna just rely on your attorney's representation --

THE DEFENDANT: I don't --

THE COURT: -- and make my decisions based on that.

So if you want your trial next week, it appears that Mr. Turner would have to be a witness by video. If you insist on your trial next week, then that would be the case. Mr. Toner would prefer otherwise, and that would necessitate a few week continuance.

When is the next time we could try this case? Davis is set for February 6th and may go into the week of February 13th. What is -- what is set on February 20th?

This case is gonna take what, two and a half days to try?

MR. TONER: Probably.

MR. HANNA: Yes.

MR. TONER: May I address the Court, Judge?

THE COURT: Hm-mm?

MR. TONER: The week of the 14th, I leave on Wednesday for an important trustees meeting for a college that I'm on. And the following Tuesday, because Monday is a holiday, I have a setting in Tazwell County where they're bringing a witness in from Florida.

THE COURT: On what day?

MR. TONER: I think it's the -- day after President's Day, on Tuesday.

THE COURT: All right. Well, while we're thinking about what we're gonna go here, are there any other issues that we need to address?

MR. TONER: Just would indicate, Judge, that Mr. -- in the last round of discovery there was an indication in a video that was provided to me concerning Mr. Bell's satisfaction with my representation. And I wanted to bring that to the Court's attention.

I don't have a problem with Mr. Bell. I am going to represent him and -- the best of my abilities, with or without his input. Because he's in the Peoria County jail, he can call my office for

free, and I am available. And I put that on the record.

THE COURT: All right. Mr. Bell, you have any comment on that?

THE DEFENDANT: No, sir.

MR. TONER: And if I may, Judge, one further thing, going back. To be very blunt, the entire -- not the entire, but the bulk of my defense case is going to involve the cross-examination of Mr. Turner at length. And I think that would be put into grave disadvantage were I not to be able to be in the same room with he.

THE COURT: All right. So, Mr. Hannah, what you're saying is the Marshals can't produce Mr. Turner for the trial because he's in a -- currently in a prison where there's been a quarantine. And at least at this point, he can't be produced until sometime later down the road. Do you have any idea how long that period is?

MR. HANNA: Your Honor, I inquired this morning with Department of Corrections, with the facility, who indicated that the quarantine is at least until February 1st. And they -- the woman that I spoke with just wrote me an e-mail that says, (as read:) We will not know anything until sometime

on Monday, January 30th. And that is to even verify that the quarantine will be released by February 1st.

THE COURT: And February 1st is a Wednesday?

MR. HANNA: Correct.

THE COURT: So if we're assuming it would be -- if he were even released on that day, what prison is that?

MR. HANNA: Shawnee.

MR. TONER: Shawnee.

MR. HANNA: Approximately four hours south.

THE COURT: Four to five hours south of here. So at the earliest, that would mean Thursday. And in your case-in-chief, you're at -- contemplating Mr. Turner to be on the second day?

MR. HANNA: Correct.

THE COURT: Because last thing I want to do is start a trial and not knowing if Mr. Turner is even going to be available, and then push it down the road. Now -- although this is a bench trial, so I guess --

It doesn't make sense to start it, go one day, and then kick it out for three weeks when this is a bench trial and we can just do it all in two and a

half days anyway.

MR. HANNA: And I would state, Your Honor, that the woman I spoke to described this as kind of a fluid situation, where they've got a number of people who are sick. They're not sure -- at this time, Mr. Turner is not ill, but they have people with fevers up to 104 degrees. And Mr. Turner could become ill in the next couple of days under this quarantine.

So I wouldn't want to, I guess, set it over for that reason and then have him actually be not capable of being transported because he's ill.

THE COURT: All right. February 22nd is a Wednesday. Any reason we couldn't try this Wednesday and Thursday the 22nd and 23rd? And then if we need to go into Friday morning, we would?

MR TONER: Judge, if -- other than the fact if I'm doing that trial in Tazwell.

THE COURT: Okay. That's -- so that wasn't just an appearance, that was a trial setting?

MR TONER: No. That's a trial.

THE COURT: All right. What about March 6th and 7th?

MR TONER: May I call my office?

THE COURT: Yeah.

MR TONER: Judge, can you go the 8th and 9th of that week? The 6th is not good for me, but I could probably do it the 7th or 8th, and move things around.

THE COURT: We can do that. 7th, 8th, and then 9th if we need to. Is that okay with you, Mr. Hannah?

MR. HANNA: Yes, Your Honor.

THE COURT: All right. I find that given the representation of Mr. Hannah, and Mr. Toner's belief that in-person cross-examination is crucial to his client's defense, and that much of the defense is going to be based upon the cross-examination of the Government witnesses, that this time would be excludable as a witness being unavailable. The witness unavailable -- a witness is unavailable when his whereabouts are known but his presence cannot be obtained by due diligence. I think the representations today would indicate that.

United States versus Patterson, at least, addressed a case where time was excludable when the Marshals Service was faced with considerable hardship in timely producing the Government witness. There are other cases that talk about producing witnesses for transfer requiring notice, but I think

that this representation would apply.

So I would continue the matter to March 7th at 9:30 for bench trial. We'll have the 8th and the 9th available if need be. I find the time between now and then excludable for purposes of speedy trial.

Is there anything else that we need to address today?

MR TONER: Judge, as a point of housekeeping, last time we were here, Mr. Bell indicated that he wished a bench trial. The Court admonished him and asked to provide a written waiver. I have that here for Mr. Bell's review and signature.

THE COURT: Okay. While waiting on that, the Court will order subpoenas previously made to remain in effect.

MR TONER: Approach?

THE COURT: You may.

Anything else we should address?

MR TONER: Not on behalf of the defendant, Your Honor.

THE COURT: On behalf of the Government?

MR. HANNA: Nothing for the Government, Your Honor.

THE COURT: All right. Thank you. Everyone.

THE CLERK: Court is in recess.

(Court was recessed in this case.)

I, KATHY J. SULLIVAN, CSR, RPR, CRR, Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

This transcript contains the digital signature of:

Kathy J. Sullivan, CSR, RPR, CRR
License #084-002768

Friday, 04 November, 2016 02:10:51 PM Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-10029
	)	
DEMONTAE BELL,	)	
	)	
Defendant.	)	

ORDER AND OPINION

This matter is now before the Court on Defendant Bell's Motion [81] to Dismiss. For the reasons set forth below, Defendant's Motion [81] to Dismiss is DENIED.

BACKGROUND

Demontae Bell was arrested on April 9, 2015, and made an initial appearance on April 10, 2015. On April 21, 2015, Defendant was charged by way of an indictment with one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). He was arraigned on May 7, 2015. On June 18, 2015, the Court granted Defendant's motion for a continuance and made an interest of justice finding excluding the time between June 18, 2015, and July 27, 2015. On July 21, 2015, Defendant was charged by way of a five count superceding indictment alleging violations of 18 U.S.C. §§ 924(c), 922(g), and 2, and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). At his July 22, 2015, arraignment on the superceding indictment, the Court granted the Government's motion for a continuance over Defendant's objection. The Court also made an interest of justice finding excluding the time between July 22, 2015, and the trial scheduled for September 28, 2015, reasoning that Defense counsel needed additional time to review the extensive discovery turned over to Defense counsel at the hearing.

On September 10, 2015, the Court granted Defendant's motion for continuance and made an interest of justice finding excluding the time between the September 10, 2015, and the trial scheduled for January 19, 2016. A second superseding indictment was filed on September 22, 2015, and an arraignment was held on September 29, 2015. Thereafter, Defendant's counsel withdrew and a new attorney was appointed to represent Bell. On December 2, 2015, the Court granted Defendant's motion to vacate the January trial date and made an interest of justice finding excluding the time between December 2, 2015, and the scheduled trial for March 7, 2016. Defendant filed a motion to suppress on January 5, 2016, and the Court scheduled a hearing on the motion for March 1, 2016. On January 27, 2016, Defendant moved to withdraw the motion and filed new motions to suppress, dismiss, and sever. An amended motion to suppress was filed on February 2, 2016.

On February 17, 2016, a third superceding indictment was filed. At the March 1, 2016, arraignment, the Court continued the hearing date for the suppression motion and made an interest of justice finding excluding the time between March 1, 2016, and the trial scheduled for May 9, 2016. On April 4, Defendant filed a motion to quash. The Court held a motion hearing on April 13, 2016, took the motions to suppress and quash under advisement, vacated the trial date and made an interest of justice finding excluding the time between April 13, 2016, and the pretrial conference set for May 5, 2016. On April 20, 2016, the Court denied Defendant's motion to suppress in a written order. On May 4, 2016, Defendant filed a second motion to suppress. At the pretrial conference on May 5, 2016, the Court set a motion hearing on the motion to suppress for June 8, 2016, and made an interest of justice finding excluding the same. On May 19 and May 24, 2016, Defendant filed motions to continue, the latter of which was granted. At a status conference on June 15, 2016, the Court granted Defendant's oral motion to continue, scheduled a

pretrial conference for July 21, 2016, and made an interest of justice finding excluding the time between June 15, 2016, and July 21, 2016.

At the status conference on July 21, 2016, Defendant requested that his current counsel be removed and that another attorney be appointed to represent him. The Court appointed new counsel for Defendant and made an interest of justice finding excluding the time between July 21, 2016, and the scheduled status conference on August 26, 2016. A status conference was held on August 31, 2016, where Defendant's newly appointed counsel adopted the pending motions to suppress. The Court scheduled a pretrial conference for November 3, 2016 and set trial for December 19, 2016. On October 12, 2016, a status conference was held in response to a motion to continue arising out of a dispute between Defendant and his counsel. On October 20, 2016, the Court held a motion hearing on Defendant's motions to suppress and motion to quash, and Defendant filed the instant motion to dismiss the same day. The Court took the motions under advisement and ordered the Government to respond to the motion to dismiss within 14 days. A pretrial conference was held on November 3, 2016. On November 4, 2016, the Court issued a written Order denying Defendant's motions to suppress and quash.

LEGAL STANDARD

A defendant must go to trial within 70 days of either the date of the issuance of an indictment or a defendant's first appearance before a judicial officer, whichever is later. 18 U.S.C. § 3161(c)(1); *Blake v. United States.*, 723 F.3d 870, 884 (7th Cir. 2013). An indictment against a defendant must be dismissed if the defendant is not brought to trial within the 70-day period. *Id*. However, § 3161 sets forth a number of statutorily permitted exclusions that do not count against the 70-day clock. *Id*.; § 3161(h)(1)-(8).

Under § 3161(h), periods of delay are excluded for:

> **(1)** Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
> **(A)** delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
> **(B)** delay resulting from trial with respect to other charges against the defendant;
> **(C)** delay resulting from any interlocutory appeal;
> **(D)** delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
> **(E)** delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;
> **(F)** delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;
> **(G)** delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and
> **(H)** delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.
>
> 18 U.S.C. § 3161(h)(1)

Additionally, the Act excludes:

> **(7)(A)** Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> 18 U.S.C. § 3161(h)(7)

ANALYSIS

Defendant's motion to dismiss argues that his right to a speedy trial was violated when the Court granted the Government's motion to continue at the pretrial hearing on July 22, 2015. At the pretrial hearing, Defendant was arraigned on a five count superceding indictment. The Government turned over about a thousand pages of new discovery and eight hours of recorded discovery. See ECF Doc. 81-1, at 12. Despite the new discovery, Defendant did not want to continue the trial set for July 27, 2015, and his counsel at the time stated that she "would be prepared to go to trial with the caveat that I don't know what's on that disk," and wished to reserve "the ability to seek a continuance if there is something on that disk I wasn't aware of." *Id*. at 13. The Government argued that the time necessary to try additional counts and the interest in trying all counts against the Defendant in a single trial justified the continuance. The Court granted the continuance over Defendant's objection, and made an interest of justice finding excluding the time between July 22, 2015, and September 28, 2015, because a continuance was in the best interest of Defendant and necessary to give his attorney adequate time to prepare his case. *Id*. at 18-19.

Here, the 70-day clock commenced on April 21, 2015, when the first indictment was issued. 18 U.S.C. § 3161(c)(1). 15 days elapsed between the indictment of April 21, 2015, and the arraignment on May 7, 2015. 41 days elapsed between the arraignment on May 7, 2015, and the pretrial conference on June 18, 2015. The Court made interest of justice findings excluding the following dates from the speedy trial clock:

June 18, 2015, through July 27, 2015;
July 22, 2015, through September 28, 2015;
September 10, 2015, through January 19, 2015;
December 2, 2015, through March 7, 2016;
March 1, 2016, through May 9, 2016;
April 13, 2016, through May 5, 2016;

May 5, 2016, through June 8, 2016;
June 15, 2016, through July 21, 2016;
July 21, 2016, through August 26, 2016;
August 31, 2016, through December 19, 2016

Apart from the 56 days of unexcluded time between the indictment and pretrial conference, the only times not specifically excluded under 18 U.S.C. § 3161(h)(7)(A) were June 8, 2016, to June 15, 2016, (6 days) and August 26, 2016, to August 31, 2016 (4 days). Even without considering any of the automatic exclusions under § 3161(h)(1), Defendant would have accumulated only 66 days of time by his December 19, 2016 trial date. Moreover, those two periods are automatically excluded under § 3161(h)(1)(D) because Defendant's motion to suppress was still pending. See ECF Doc. 72; *United States v. Souffront*, 338 F.3d 809, 835 (7th Cir. 2003).

Defendant takes issue with the Court's decision to grant the Government's motion to continue on July 22, 2015. However, § 3161(h)(7)(A) allows the judge "to grant the continuance and exclude it from the Speedy Trial Act computation on his own motion, provided that he places in the record his reasons for doing so." *United States v. Asubonteng*, 895 F.2d 424, 427 (7th Cir. 1990). "The Act does not require the consent of the defendant or his counsel." *Id*. Here, the Government argued that the time necessary to try additional counts and the interest in trying all counts against the Defendant in a single trial justified the continuance. The Court found the Government's motion well taken and made an interest of justice finding excluding the time between July 22, 2015, and September 28, 2015. In doing so, the Court reasoned that a continuance was in the best interest of Defendant and necessary to give his attorney adequate time to prepare his case. ECF Doc. 81-1, at 18-19. Those reasons were "permissible considerations" under § 3161(h)(7)(A). See *Asubonteng*, 895 F.2d at 427 ("In granting the continuance the magistrate noted that "a single trial will permit the more efficient and effective

use of judicial time, and avoid the unnecessary and duplicative expenditure of effort, expense, witness and juror time, and the like which would result from two trials." These are permissible considerations under § 3161(h)(8)(C)"). Accordingly, Defendant's motion to dismiss must be denied.

CONCLUSION

For the reasons stated above, Defendant's Motion [81] to Dismiss is DENIED.

Signed on this 4th day of November, 2016.

s/ James E. Shadid
James E. Shadid
Chief United States District Judge

Friday, 04 November, 2016 02:09:12 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-10029
	)	
DEMONTAE BELL,	)	
	)	
Defendant.	)	

ORDER AND OPINION

This matter is now before the Court on Defendant Bell's Motion [68] to Quash Arrest Warrant and to Suppress Evidence and Motion [72] for *Franks* Hearing. For the reasons set forth below, Defendant's Motion [68] to Quash and Motion [72] for *Franks* Hearing are DENIED.

BACKGROUND

On November 6, 2014, the Pekin Police Department responded to a report of a burglary where a Glock pistol, two AR-15 style rifles, an air rifle, and an AK-47 style rifle were stolen from a residential building in Pekin, Illinois. The resident reported a name to the police who he believed stole the firearms. The police interviewed that person, ("C/S-1" or "Turner") who had been arrested on charges related to the manufacture of methamphetamine. C/S-1 admitted to stealing the firearms, and told the police that he sold them in Peoria to a drug dealer known as "Jay" for money and cocaine.

After the interview, the informant began working with the FBI and Illinois State Police as part of a proffer agreement in order to recover the firearms. The agents and C/S-1 arranged a controlled purchase of a small amount of cocaine from "Jay," where video and photographs were taken of the suspect. Later, an FBI agent interviewed an inmate at Peoria County Jail. After the

agent showed the inmate photos taken during the controlled buy, the inmate recognized Defendant as Demontae Bell, or "Tay Tay." The agent accessed the Peoria County Jail's online record system after the interview and printed a photo of Bell without any identifiers. When the agent showed the photo to C/S-1, the informant confirmed that the individual in the photo was "Jay." On February 23, 2015, the FBI agent searched Bell's criminal history and found a prior felony conviction for delivery of controlled substances.

On February 25, 2015, the FBI and State Police conducted a second controlled buy of cocaine from Bell, again recording audio and video of the transaction. Bell entered C/S-1's vehicle and conversed with the informant about attempts to locate magazines for the stolen AK-47 rifle, and Bell informed C/S-1 that he sold the weapon. Bell told C/S-1 that he had a photo of the AK-47 on his phone, which he sent to C/S-1 via picture message and the FBI agent later viewed. A warrant for Bell's arrest was issued on April 8, 2015. Bell was arrested the next day for possession of the stolen AK-47 and charged with being a felon in possession of a firearm in violation of Title 18 United States Code, Section 922(g).

A black mobile flip phone was found on Bell's person upon his arrest. Bell was then transported to the Peoria Police Department and placed in an interview room. Before Bell was given a *Miranda* warning, Officer Sinks entered the room after picking up Bell's cell phone from a container outside of the door. Sinks opened the flip phone in front of Bell and showed him the home screen depicting the rifle with an inquisitive look. In response to Officer Sinks' gesture, Bell allegedly made a statement indicating he downloaded the picture of the firearm from the internet.

Bell previously moved to suppress the picture, arguing that it was obtained as the result of an unconstitutional warrantless search, and that the two subsequent cell phone search warrants

(issued on April 17 and October 20, respectively) were not supported by probable cause. Specifically, Defendant argued that: (1) the affidavit submitted in support of the warrant application relied on a confidential source who did not testify before the issuing judge and whose reliability was not established; (2) the recording and transcripts were not provided to the issuing judge; (3) the affidavit did not state whether the confidential source or the theft victim confirmed that the firearm depicted in the photograph was the same firearm that was stolen and later sold to the Defendant; and (4) the affidavit did not state the telephone number associated with the February 25, 2015 picture message was the same number as the one assigned to the cell phone seized from Defendant. The first application for warrant contained a paragraph reciting Officer Sinks' observation of the picture on the home screen of Bell's cell phone.

On April 20, 2016, the Court issued an Opinion finding that Officer Sinks conducted an unconstitutional search of Bell's cell phone. However, the Court denied the motion to suppress the picture because (1) both of the subsequent search warrants provided detailed, collaborated information from which the issuing judge reasonably concluded there was a fair probability that contraband or evidence of a crime would be found on Defendant's cell phone, *Gates*, 462 U.S. at 238; (2) omitting the first search warrant affidavit's reference to the officer opening the phone did not alter the probable cause determination; and (3) the picture of the AK-47 on Bell's cell phone was not discovered inadvertently through the warrantless search because the officers knew that Bell had a picture of the gun on his phone before the search ever took place. Thus, the Court found that the picture should not be suppressed because it would have been discovered despite Officer Sinks' search.

Defendant now brings a *Franks* motion challenging the veracity of affidavits in support of the arrest and search warrants, and a motion to quash the arrest warrant. On October 20, 2016,

the Court held a "pre-*Franks*" hearing where Defendant was allowed to develop his arguments and the Government was limited to arguing that Defendant has not met the requirements for a *Franks* hearing based on the information contained in the affidavits.

LEGAL STANDARD

In order to obtain a *Franks* hearing, a defendant must first make a substantial preliminary showing that a false statement was knowingly or intentionally, or with reckless disregard for the truth, included by the affiant in the warrant affidavit. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Next, the defendant must show that the alleged false statement was essential to the establishment of probable cause. *Id*. If the warrant affidavit, stripped of the allegedly false information, still suffices to establish probable cause, no hearing is required. *United States v. Souffront*, 338 F.3d 809, 822 (7th Cir. 2003).

If a defendant makes such a showing, the Fourth Amendment entitles him to an evidentiary hearing to challenge the constitutionality of the search. *United States v. Spears*, 673 F.3d 598, 604 (7th Cir. 2012). At a *Franks* hearing, the court first determines whether the defendant has shown by a preponderance of the evidence that false information was intentionally or recklessly included in the affidavit. If the defendant makes such a showing, the court then determines whether the affidavit, stripped of the false information, is nevertheless sufficient to establish probable cause. *Id*.

The defendant is not limited to challenging affirmative statements appearing in the warrant affidavit; omissions from the affidavit may also be challenged. *United States v. McNeese*, 901 F.2d 585, 594 (7th Cir. 1990) overruled on other grounds, *United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001); *United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984). The defendant bears a substantial burden with respect to such omissions. He must offer direct

evidence of the affiant's state of mind or inferential evidence that the affiant had obvious reasons for omitting the facts disregarded. *Souffront*, 338 F.3d at 822. The mere fact that the affidavit omitted information about the informant's criminal background or a motive to provide information against the defendant will not destroy the probable cause determination where the remainder of the affidavit establishes reliability. *United States v. Taylor*, 471 F.3d 832, 840 (7th Cir. 2006).

District Courts may hold a "pre-*Franks*" hearing to determine whether the preliminary showing can be met. Such preliminary hearings can aid the court's determination by giving defendants an opportunity to develop their arguments or elaborate on their original submissions. *United States v. McMurtrey*, 704 F.3d 502, 509 (7th Cir. 2013). However, courts should not consider "the government's explanation of the contradictions and discrepancies" at the pre-*Franks* hearing. *Id*. Rather, a court should "limit[] its consideration of new information to the defense's evidence tending to refute probable cause." *Id*.

ANALYSIS

A. DEFENDANT'S MOTION FOR FRANKS HEARING

1. The Nixon Affidavit

On April 8, 2015, FBI Special Agent Nixon presented an affidavit in support of an arrest warrant for Demontae Bell to Magistrate Judge Hawley. Under the heading of "probable cause," the affidavit included the following paragraphs:

> 3. On November 6, 2014, the Pekin Police Department responded to a burglary at the residence of Joel Weakley, 1915 Windsor Street, Pekin, Illinois. Among the items stolen were included one Glock pistol, two AR-15 style rifles, one Polish AK-47 style rifle, and one air rifle with a scope. Upon being interviewed by Pekin Police officers, Weakley advised a probable suspect for the burglary was a co-worker named [NAME REDACTED - hereinafter referred to as C/S-1], who Weakley believed had knowledge of his gun collection and was "into selling guns."

4. On January 7, 2015, Pekin Police officers interviewed C/S-1 in the presences of his/her attorney and pursuant to a proffer agreement after C/S-1 had been arrested on charges related to manufacture of Methamphetamine. During the interview, C/S-1 confessed to committing the above burglary. Further, C/S-1 advised after taking possession of the firearms, C/S-1 transported them to Peoria, Illinois and sold them to a drug dealer by the street name "Jay" for money and cocaine.

5. Subsequent to the above events, C/S-1 began providing assistance to the FBI as a Confidential Human Source involving the investigation into the whereabouts of the stolen firearms in cooperation with Illinois State Police's Peoria Multi County Narcotics Enforcement Group (PMEG). On February 13, 2015, FBI and PMEG conducted a controlled purchase of a small amount of cocaine from Jay by C/S-1. During the operation, both video and photographs of Jay were taken.

6. On February 17, 2015, SA Nixon interviewed an inmate at the Peoria County Jail named [Redacted] during the interview [Redacted] was shown a portion of the above video and one of the photographs taken during the controlled drug purchase which depicted Jay. [Redacted] immediately recognized Jay as Demontae Bell. [Redacted] was asked "on a scale of one ten how confident are you the person in the photo is Bell?" [Redacted] replied, "ten."

7. Subsequent to the above interview, SA Nixon accessed Peoria County Jail's online record system justice.peoriacounty.org, booking number 1407736, and downloaded the booking photo of Demontae Bell, taken September 16, 2014. The photograph was printed on plain paper without Bell's name or any information to otherwise identify him. On February 23, 2015, SA Nixon showed the photograph to C/S-1 and asked if he/she recognized the individual. C/S-1 positively identified the individual in the photograph, saying "Yeah, that's Jay."

8. On February 23, 2015, SA Nixon requested a query of Demontae Bell's criminal history. Included in the query return was listed an arrest on December 5, 2002 for charges related to Delivery of Controlled Substances and a felony sentence disposition stating "3 YEARS."

9. On February 25, 2015, FBI and PMEG conducted a second controlled drug purchase from Demontae Bell A/K/A Jay involving the use of a concealed audio/video recording device. During the purchase Bell entered C/S-l's vehicle and engaged C/S-1 in conversation, including discussion about C/S-1's attempts to locate magazines for the AK-47 rifle. At the conclusion of the operation, C/S-1 advised SA Nixon Bell no longer had possession of the AK-47 rifle. Subsequent review of the video recording confirmed C/S-1's statement. In the recording Bell advises C/S-1that he sold the AK-47. Additionally on video, Bell advised C/S-1 he had a photo of the AK-47 and offered to send the photo to C/S-1 via text message. C/S-1received the photo. SA Nixon subsequently viewed the photo.

10. On April 7, 2015, SA Nixon interviewed Joel Weakley who provided a receipt for the original purchase of the stolen AK-47 indicating its serial number as

> 196000103 and that it had been purchased from Pekin Gun & Sporting Goods, Inc. in Pekin, Illinois. SA Nixon then made contact with Daniel Barth, manager of Pekin Gun & Sporting Goods, Inc. Barth advised the AK- 47 was a model 1960 and was imported from Poland by Century Arms, Inc.
>
> 11. Subsequent to the above interview, SA Nixon contacted Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Special Agent Frank Cecchinelli, a court certified expert in establishing firearms interstate nexus. SA Cecchinelli advised the gun had positively moved in interstate commerce based on the make, model, and importer information provided.
>
> ECF Doc. 72-1.

2. The Alleged Omissions from the Nixon Affidavit

Defendant argues that information was omitted from the affidavits, that the information was material to finding probable cause, and that the information was omitted by SA Nixon deliberately or with reckless disregard for the truth. Defendant asserts the following facts were intentionally omitted from the affidavit in support of the arrest warrant.[1]

> a) The "Reporting Officer Narrative" states that Joel Weakley, the victim of the burglary, reported that four firearms were missing from his residence and he believed Mr. Turner (C/S-1) stole them. Mr. Turner initially denied knowledge of the theft. After entering into a cooperation agreement with the government, Turner admitted that he and his brother broke into Weakley's house and stole a handgun, two big black guns, one gun that looked like an AK-47, and one camouflage sniper rifle. Mr. Turner claimed they "sold all of the guns" to the Defendant "very soon after the burglary" but made no mention of any other persons involved with the sale of the guns. Mr. Turner does not explain how he stole four guns, but sold five.
>
> b) On February 2, 2015, Turner met with Agent Nixon and informed him that at least three of the guns were sold to unnamed black males at 1630 New York. Turner observed six or seven males, cocaine and scales. Turner claimed the remaining two guns were taken to 1515 Monroe in Peoria. This would leave only one firearm stolen from Weakley unaccounted for and not in Defendant's possession.

Defendant first argues that the affidavit states four firearms were stolen from Weakley's residence, but Turner claimed he sold five guns. The discrepancy can be explained by looking to

[1] Defendant argues that all three affidavits contained the same omissions. The assertions in the arrest warrant affidavit that are relevant to Defendant's motion are common to the assertions in the later search warrants. For the sake of simplicity, the Court refers only to the arrest warrant affidavit unless otherwise indicated.

the paragraph 3 of Agent Nixon's affidavit, which states that "[a]mong the items stolen included one Glock pistol, two AR-15 style rifles, one Polish AK-47 style rifle, and one *air rifle* with a scope." ECF Doc. 72-1, ¶ 3 (emphasis added). Thus, five items were stolen from Weakley's residence, but one of them was a pellet gun. The affidavit does not omit this fact. Regardless, the alleged discrepancy about the number of firearms, without more, does not require a *Franks* hearing. See *United States v. Smith*, 576 F.3d 762, 765 (7th Cir. 2009); *United States v. Norris*, 640 F.3d 295, 302 (7th Cir. 2011).

Second, Defendant asserts that the affidavit omits or misstates the number of firearms C/S-1 allegedly sold to Defendant. The report Defendant references states that C/S-1 "made a deal with Jay [Demontae Bell] and his cousin/brother to sell all five of the guns to them for $500 cash, approximately 10 grams of powder cocaine, and a couple grams of crack" and "both the long black guns (Agent note: AR-15s) and the loaded pistol were kept at this [1630 New York] address." ECF Doc. 72-8. The AK-47 and the "sniper rifle" i.e., the pellet gun, were taken with Bell and C/S-1 to 1515 Monroe. Defendant argues that "this would leave only 1 firearm stolen from Mr. Weakley unaccounted for and not in Defendant's possession." It is unclear what information Defendant claims was omitted from the affidavit, or how the alleged omission was material to the probable cause determination. In other words, Defendant does not explain how possession of one firearm instead of two would alter the probable cause analysis. See *Smith*, 576 F.3d at 765; *Norris*, 640 F.3d at 302.

> c) There exists no evidence to link the Defendant to either 1630 New York or 1515 Monroe in Peoria. Surveillance was conducted outside of 1515 Monroe for only one hour. Defendant was not seen. A drive-by was performed past 1630 New York and Defendant was not seen. The FBI did not associate either of these addresses with the Defendant when preparing to arrest him.

> d) On February 3, 2015, Mr. Turner was shown a photo lineup of persons associated with the residence located at 1630 New York, but Mr. Turner claimed not to know any of the persons depicted.
>
> e) On February 11, 2015, Mr. Turner drove with Agent Nixon past 1630 New York in Peoria, again stating that this was the residence in which at least 3 guns were sold. Mr. Turner and Agent Nixon also drove past 1515 Monroe, during which time Mr. Turner described this residence as a place where Defendant would buy crack. There was no mention of Defendant living at this address. In previous meetings, Mr. Turner stated Defendant lived in the Taft Homes or on Green Street in Peoria.

Defendant's next three arguments are directed to the affidavit's omission of two residences identified by C/S-1 as the location where the guns were allegedly sold to Defendant (1630 New York) and where Defendant allegedly took two of the guns (1515 Monroe). He claims that no evidence existed that associated Bell with the two residences. Defendant also questions C/S-1's credibility by pointing out that C/S-1 was not able to identify any of the people associated with the 1630 New York residence in a photo lineup, and that C/S-1 described the Monroe residence as the place where Defendant buys drugs, not where he lives. The affidavit in support of the arrest warrant does not mention either address.

Defendant cannot show the two residences were omitted from the warrant affidavit intentionally or with reckless disregard for the truth. To the contrary, if Defendant's claim that "the FBI did not associate either of these addresses with Defendant when preparing to arrest him," is taken as true, Agent Nixon would have opened the door to a *Franks* hearing for including a false statement linking the residences to Defendant in the affidavit. In other words, an affiant cannot intentionally omit a fact he or she did not have knowledge of. See *Guzman v. City of Chicago*, 565 F.3d 393, 396 (7th Cir. 2009).

Defendant also argues that the affidavit omits that C/S-1 was a shown a photo lineup of six individuals associated with the 1630 New York residence and claimed not to recognize any of

the persons depicted. However, the photographs of Bell and his cousin were not included in the lineup. See ECF Doc. 72-12. Moreover, there is no indication that the six individuals "associated with the 1630 New York residence" were the same individuals that were present during the alleged firearms sale. Police are not required to "provide every detail of an investigation, []or describe every wrong turn or dead end they pursued." *McMurtrey*, 704 F.3d at 513.

> f) On February 13, 2015, an alleged controlled buy was arranged between the Defendant, Mr. Turner and Sara Grandy, Mr. Turner's girlfriend. This meeting was secretly recorded. The United States prepared a transcript of the recording. During this meeting Mr. Turner was vague, asking if Defendant remembered "those things" and if the Defendant "still got that one?" To this questioning, the Defendant answered, "No." The conversation continues where the Defendant states "you're talking about the one I got." This conversation made Agent Nixon reasonably aware that 3 of the 4 firearms were likely sold to unnamed persons at 1630 New York, not the Defendant. This information was omitted from Agent Nixon's Affidavit.
>
> g) In addition, Mr. Turner and Ms. Grady appear to be covering up some information, as set forth on pages 9 and 10 (Bates 1157 and 1158). In part the parties were recorded making the following statement after Defendant exited the vehicle: [See ECF Doc. 72-14]

First, Defendant argues that C/S-1's vague references and Bell's statement regarding "the one I got" should have led Agent Nixon to believe that Bell purchased only one firearm and that the rest were sold directly to others at the 1630 New York residence. See ECF Doc. 72-14. However, whether or not Defendant was *still* in possession of all of the stolen firearms on February 13, 2015, is irrelevant to the issue of whether there was probable cause to believe that Defendant *had possessed* one or more firearms. See *Norris*, 640 F.3d at 302. Agent Nixon could reasonably believe that Bell purchased all the firearms in order to resell them. Moreover, the affidavit states that C/S-1 and Bell discussed one firearm in particular, and also discloses that Defendant was no longer in possession of the firearm. In sum, Defendant has not shown how the

allegation amounts to a knowing or reckless omission, or how the omission impacted the magistrate's probable cause determination.

Defendant also points to the transcripts of the recordings to argue that C/S-1 and his girlfriend were trying to cover up information. The transcript indicates Turner grabbed Ms. Gandy's elbow and said "Just stop talkin' about that right now." ECF Doc. 72-14. Yet Defendant does not explain what Turner is allegedly "covering up," how it relates to Nixon's affidavit, or how it affects the existence of probable cause for Bell's arrest. Police are not required to "provide every detail of an investigation." *McMurtrey*, 704 F.3d at 513. Without additional information indicating the significance of C/S-1's alleged "cover up," Defendant cannot show that Agent Nixon deliberately omitted information or that the alleged omission was material to the magistrate's probable cause determination.

> h) On February 17, 2015, Agent Nixon interviewed an inmate at the Peoria County jail. Until the time of this interview, Agent Nixon was unaware of this Defendant's name, as Mr. Turner claimed to be unaware of Defendant's name, referring to him as "Jay." In reports prepared prior to this meeting, Defendant was referred to as "Jay." The affidavits all refer to Defendant as "Jay." However, at the February 17, 2015 meeting, an unknown inmate viewed images taken on February 13, 2015 during a controlled buy between Mr. Turner and Defendant. The inmate refers to Defendant as "Demontae Bell." However, the inmate contradicts Mr. Turner and states the Defendant goes by the street name of "Te Te" or "Tay Tay."

Here, Defendant claims that the affidavit omitted the fact that the person who C/S-1 knew as "Jay" was identified by another as Demontae Bell, or "Tay Tay." ECF Doc. 72-15. Yet Defendant overlooks the fact that the inmate positively identified the photograph of the suspect as Demontae Bell. "Jay" is similar to "Tay," and Defendant does not explain how the discrepancy between "Tay Tay," rather than "Jay," is material. See *Souffront*, 338 F.3d at 821 (a technical contradiction does not reveal a disregard of the truth); *United States v. Maro*, 272 F.3d 817, 822 (7th Cir. 2001).

> i) On February 25, 2015, a second alleged controlled buy was arranged between the Defendant, Mr. Turner and Sara Grandy, Mr. Turner's girlfriend. This meeting was also secretly recorded. The United States prepared a transcript of the recording. See Exhibit "P". Agent Nixon debriefed Mr. Turner after the alleged controlled buy. Mr. Turner told Agent Nixon that the Defendant claimed he did not have the firearm (singular), that the resident of 1630 New York had the other firearms and that Defendant believed that one of the firearms sold was a pellet gun. See Exhibit "Q". Mr. Weakley confirmed for Agent Nixon that one of the guns was a pellet gun. None of this information was contained in the Affidavits.

Here, Defendant simply rehashes the same argument made in paragraph f. The alleged omissions are the result of Defendant misstating the information contained in the affidavit. Paragraph 9 of the affidavit states that a second controlled buy was conducted and recorded, the C/S-1 and Bell discussed attempts to locate magazines for the AK-47 rifle, and Bell advised C/S-1 that he sold the rifle. ECF Doc. 72-1, at ¶ 9. Defendant fails to make a sufficient showing for a *Franks* hearing because he does not allege that a false statement was included in the affidavit or that information was omitted. See *McMurtrey*, 704 F.3d at 509 ("The defendant must identify specific portions of the warrant affidavit as intentional or reckless misrepresentations.").

> j) On April 21, 2016, Mr. Turner and Ms. Grandy reported a theft at their home, located at 1504 Hamilton in Pekin. See Exhibit "R". Scott and Melissa Weatherington, Mr. Turner's neighbors, also reported a theft, including a stolen firearm. See Exhibit "S". Mr. Weatherington believed Mr. Turner may have committed the theft. See Exhibit "T". Pekin Police checked LEADS, learning Mr. Turner and Ms. Grandy pawned property similar to that which was stolen from Mr. Weatherington. See Exhibit "U". Mr. Turner was interviewed and confronted with these facts. Mr. Turner lied and claimed other persons likely committed the thefts. Ultimately, Mr. Turner confessed to the theft, filing a false report and selling the stolen firearm. See Exhibit "V".

> k) The FBI cut ties with Mr. Turner as an informant and indicated as much in a related Affidavit, yet the extent of Mr. Turner's actions was not disclosed. See Exhibit "W". The government advised this Court that Mr. Turner "had recently began using drugs again and had been involved in commission of several crimes." The government downplayed Mr. Turner making another false police report and yet again wrongfully accusing others of criminal activity.

Defendant makes two related arguments regarding the confidential source. First, Defendant claims that C/S-1 was not a credible source because he stole property from a neighbor's residence and then lied about it. Next, he argues that the affidavits in support of the warrants omitted the extent of C/S-1's subsequent criminality. Recall that the arrest warrant was issued on April 8, 2015, and executed the next day. The first search warrant was issued on April 17 and executed April 30, 2015; the second was issued on October 20 and executed on October 22, 2015. Defendant cannot claim that the April 8 arrest warrant affidavit or April 17 search warrant affidavit omitted information—C/S-1's theft on April 21, 2015—that had not yet occurred.

Although the first search warrant was issued before C/S-1's arrest, it was executed after Agent Nixon knew that C/S-1 had been arrested for the same conduct that led to his cooperation against Bell. Defendant's argument implies that Agent Nixon had a duty to return to the judge after the search warrant had issued in order to disclose C/S-1's arrest. Information learned after issuance but before execution of a warrant can sometimes invalidate the warrant. These issues generally arise when a warrant is ambiguous, i.e., "where the place to be searched contains multiple living units and the warrant fails to identify with precision which unit is to be searched." *Cooper v. Dailey*, 2010 WL 1415986, at *4 (N.D. Ill. 2010); *Guzman v. City of Chicago*, 565 F.3d 393, 396 (7th Cir. 2009). However, unfavorable information about a confidential informant's credibility that comes to light after a warrant has issued falls outside the scope of a *Franks* motion. *Guzman*, 565 F.3d at 396 ("Information that emerges after the warrant is issued has no bearing on this analysis.") *Jones v. City of Chicago*, 2016 WL 1730647, at *4 (N.D. Ill. 2016); *U.S. v. Glover*, 755 F.3d 811, 817 (7th Cir. 2014). Because probable cause determinations are not viewed with hindsight, "the validity of the warrant is assessed on the basis of the

'information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate.'" *Guzman*, 565 F.3d at 396.

Impeaching information regarding a confidential source that is obtained after a warrant has issued may be so significant that it alters the probable cause determination. However, that is not the case here. Significantly, the first search warrant made no reference to C/S-1's reliability, and it put the issuing judge on notice that C/S-1 stole the weapons from his neighbor and he had been arrested on charges related to manufacture of methamphetamine. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238–39 (U.S. 1983). Here, Agent Nixon did not rely solely on C/S-1's information, but collaborated that information by having another source confirm Bell's identity, and by recording two controlled buys where Bell discusses the firearm and sends a picture of it to C/S-1. Together, these statements provided the issuing judge with a substantial basis for concluding that probable cause existed.

Defendant also points out that the Government obtained a search warrant for C/S-1's phone on April 30, 2015. Officer Sinks' affidavit in support of that warrant disclosed that C/S-1 was arrested on April 24, 2015, "by the Pekin Police Department on charges related to possession of stolen property. SA Nixon subsequently interviewed C/S-1, at which time C/S-1 advised he/she had recently began using drugs again and had been involved in the commission of several crimes. Due to this admission, C/S-1 is no longer an active FBI Confidential Human Source." ECF Doc. 23, ¶ 11. The warrant, which largely tracked the language used in Bell's prior arrest and search warrants, was granted by Magistrate Judge Hawley. The fact that the issuing judge concluded that probable cause existed despite C/S-1's subsequent criminality is fatal to Defendant's argument that the alleged omission—which developed after the first search warrant

was issued—was material to the probable cause determination. Moreover, when the Government sought a search warrant for C/S-1's phone six days after they became aware of his arrest, they included that information in the affidavit. This suggests that C/S-1's subsequent criminality was not intentionally or recklessly omitted in order to deceive the issuing judge.

While Defendant is correct that the October search warrant omits information regarding C/S-1's subsequent criminal conduct, the application for the arrest warrant was not based solely off of C/S-1's information, but also included collaborating information obtained during the two controlled buys, collaborating information regarding the AK-47 from Weakley, and independent identification of Defendant from an inmate at Peoria County Jail. Viewed together, this information supports a determination of probable cause for Bell's arrest.

> l) On March 5, 2015, a month before Agent Nixon ever sought any warrants, Mr. Turner told him that Marquis Heywood was likely the black male Mr. Turner had sold at least 3 of the guns to at 1630 New York. See Exhibit "X". On the same day as Defendant's arrest, a search warrant was executed on 1630 New York revealing nothing illegal. See Exhibit "Y".

Finally, Defendant argues that the arrest affidavit omits that C/S-1 identified Haywood as one of the individuals present when the guns were sold at the 1630 New York residence, and that a search warrant for the residence was executed but did not reveal anything illegal. Again, Defendant misstates the information contained in the report. The report states that C/S-1 said "I'm about 90% sure that's the dude from the New York house." No reference is made to C/S-1 selling some of the firearms to Heywood. Moreover, whether Defendant possessed one firearm or multiple firearms is immaterial to the probable cause determination, because possession of *a firearm* by a felon is a crime. See *United States v. Norris*, 640 F.3d 295, 302 (7th Cir. 2011) (finding that the exact quantity of drugs was immaterial because possession of even a small amount of cocaine is a crime).

In conclusion, Defendant has failed to make a "substantial preliminary showing" that information was intentionally or recklessly omitted from the warrant affidavits or that the alleged omissions were material to the probable cause determination. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). As such, he is not entitled to a *Franks* hearing.

B. DEFENDANT'S MOTION TO QUASH ARREST

Defendant previously moved to quash the arrest warrant and suppress evidence. Defendant's motion argues that: (1) the affidavit submitted in support of the warrant application relied on a confidential source who did not testify before the issuing judge and whose reliability was not established; (2) the recording and transcripts were not provided to the issuing judge; (3) the affidavit does not state whether the confidential source or the theft victim confirmed that the firearm depicted in the photograph was the same firearm that was stolen and later sold to the Defendant; and (4) the affidavit lacks information regarding the confidential source's reliability or how he was able to identify the Defendant. ECF Doc. 68.

The Court's prior Opinion denying Defendant's motion to suppress provided an extensive analysis regarding the existence of probable cause in relation to the search warrants for Bell's cell phone. See ECF Doc. 71, at 12-16. That Opinion stated:

> Here, the issuing judge had a substantial basis for determining the existence of probable cause, and omitting the offending paragraph about the officer opening the phone does not alter that conclusion. Defendant argues that the affidavit in support of the warrant relied on a confidential source who did not testify in front of the issuing judge, and who cooperated with law enforcement as part of a proffer agreement for drug charges. True, but the veracity of an informant is only one factor among many that Courts consider when making a probable cause determination. See *Gates*, 462 U.S. at 238. And while veracity, reliability, and basis of knowledge are highly relevant, those considerations should not "be understood as entirely separate and independent requirements to be rigidly drawn in every case." *Id.* at 230. Moreover, "[t]he reliability or veracity of an informant in a particular case can also be shown by corroboration of the information he provides through independent police investigation." *United States v. Mitten*, 592 F.3d 767, 774 (7th Cir. 2010). The fact that the confidential source was

> "motivated by a desire to lessen the consequences [he] would likely suffer for [his] own crimes . . . does not make the information [he] provide[d] inherently unreliable." *Id*. (quoting *United States v. Olson*, 408 F.3d 366, 371 (7th Cir. 2005)).
>
> Here, the confidential source was implicated by the victim of the firearm burglary, who the victim believed had knowledge of his gun collection and sold guns. When law enforcement interviewed C/S-1, he admitted he sold the guns to a Peoria drug dealer with the alias "Jay." A separate informant confirmed that "Jay" was Demontae Bell. A search of Bell's criminal history revealed that he had a prior felony conviction for delivery of a controlled substance. The two controlled purchases between Bell and C/S-1 were recorded. The affidavit summarizes (accurately) the conversations between Bell and C/S-1, including admissions by Bell that he sold the AK-47. Significantly, the affidavit states, and the transcript supports, the fact that Bell used his cell phone to send C/S-1 a picture of the firearm, and that SA Nixon viewed the picture on C/S-1's phone shortly after it was sent.
>
> From these facts, the affidavit submitted in support of the warrant application provided detailed, collaborated information from which the issuing judge reasonably concluded there was a fair probability that contraband or evidence of a crime would be found on Defendant's cell phone. *Gates*, 462 U.S. at 238.

ECF Doc. 71, at 14-15.

Defendant's instant motion simply rehashes the arguments in support of his prior motion attacking the search warrants. The reasoning behind the denial of Defendant's prior motion is equally applicable to the motion to quash—the affidavit submitted in support of the arrest warrant application provided detailed, collaborated information from which the issuing judge reasonably concluded there was probable cause to believe that Defendant illegally possessed a firearm. See *Gates*, 462 U.S. at 238. Accordingly, Defendant's motion to quash is denied.

CONCLUSION

For the reasons stated above, Defendant's Motion [68] to Quash and Motion for *Franks* Hearing [72] are DENIED.

Signed on this 4th day of November, 2016.

s/ James E. Shadid
James E. Shadid
Chief United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Docket No. 15-cr-10029
Plaintiff,	)	
vs.	)	Peoria, Illinois
	)	July 22, 2015
DEMONTAE BELL,	)	
Defendant.	)	

RECORD OF PROCEEDINGS
STATUS CONFERENCE/SUPERSEDING ARRAIGNMENT
BEFORE THE HONORABLE JAMES E. SHADID
UNITED STATES DISTRICT JUDGE

THE APPEARANCES

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

(Proceedings were held in open court.)

THE COURT: Good afternoon, everybody.

This is the United States v. Demontae Bell, 15-cr-10029.

Mr. Bell is present with Miss Schneiderheinze.

And the government present by Mr. Chambers.

Please be seated, I'm sorry.

This matter is set today for status. A superseding indictment was filed yesterday charging Count 1, use, carry, and possession of a firearm during a drug trafficking crime.

Count 2, use, possession, carrying of a firearm during a drug trafficking crime.

Count 3, felon in possession of a firearm.

Count 4, distribution of a controlled substance.

Count 5, distribution of a controlled substance.

And then there are forfeiture provisions.

Is the Court correct that it appears that from the original indictment, which is felon in possession of a firearm, that is now Count 3 of the superseding indictment?

MR. CHAMBERS: Correct, Your Honor.

THE COURT: Other than that there are four new counts?

MR. CHAMBERS: Yes, sir.

THE COURT: Okay. Well, when we last visited, there was a discussion about this occurring. It has now occurred. The question is, first, to, I believe, we could arraign on the superseding, and then the second is we could address any issues of whether there would be a resulting continuance or not.

Do the parties wish to proceed in any other fashion?

MS. SCHNEIDERHEINZE: No, Your Honor.

MR. CHAMBERS: Could I have just a moment?

THE COURT: All right.

(Pause in proceedings.)

MR. CHAMBERS: No, Your Honor. We will recommend that also.

THE COURT: Okay. First of all, Miss Schneiderheinze, you were previously appointed, and so you will remain appointed to represent Mr. Bell.

Have you received a copy of the superseding indictment?

MR. CHAMBERS: Yes. I received it before

the hearing.

THE COURT: Do you wish for a few minutes to go over it with Mr. Bell?

MS. SCHNEIDERHEINZE: He is still reviewing it and he is asking for additional time to talk to me about it.

THE COURT: All right. We will be in recess a few minutes then.

(A recess was taken from 1:45 p.m. to 1:50 p.m.)

THE COURT: Mr. Bell, did you have a chance to review the superseding indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Miss Schneiderheinze, have you had a chance to go over the superseding indictment with Mr. Bell?

MS. SCHNEIDERHEINZE: Yes, Your Honor.

THE COURT: You have been Mr. Bell's attorney throughout including on the preceding indictment, not the superseding indictment, so you are appointed to remain in the case on the superseding please.

Do you wish to have any further reading of the indictment?

MS. SCHNEIDERHEINZE: My client would like

for the judge to read the full indictment.

THE COURT: Okay. Very good.

Superseding indictment says in Count 1, use, carry and possession of a firearm during a drug trafficking crime.

That it's alleged that in or about late 2015 to April -- 2014 to April 2015, in Peoria County, within the Central District, you knowingly used and carried firearms, two AR-15 semiautomatic rifles, and one Glock semiautomatic pistol, during and in relation to a drug trafficking crime, namely distribution of a controlled substance, cocaine, a Schedule II controlled substance, and knowingly possessed the same firearms in furtherance of the same drug trafficking crime.

In violation of Title 18, United States Code, Sections 924(c) and 2.

In Count 2 it is alleged that use, carry, and possession of a firearm during a drug trafficking crime.

In or about late 2014 to April 2015 in Peoria County, Illinois, within the Central District of Illinois, that you knowingly used and carried a firearm, AK-47 rifle, during and in relation to a drug trafficking crime, namely distribution of a

controlled substance, cocaine, a Schedule II controlled substance, and knowingly possessed the same firearm in furtherance of the same drug trafficking crime.

In violation of Title 18, United States Code, Sections 924(c) and 2.

Count 3 realleges the original indictment against you, felon in possession of a firearm.

In or about late 2014 to April of 2015, in Peoria County, in the Central District of Illinois, that you did knowingly possess a firearm, an AK-47 rifle, which had previously traveled in interstate commerce, knowing having been previously convicted under the laws of the State of Illinois of a crime punishable by imprisonment for a term exceeding one year.

In violation of Title 18 United States Code, Section 922(g).

County 4 alleges distribution of a controlled substance.

On or about February 13, 2015, in Peoria County, in the Central District of Illinois, that you did knowingly distribute a controlled substance, cocaine, a Schedule II controlled substance.

In violation of Title 21, United States

Code, Sections 841(a)(1), 941(b)(1)(C), and Title 18, United States Code, Section 2.

Count 5 alleges distribution of a controlled substance.

On or about February 25, 2015, in Peoria County, in the Central District of Illinois, you did knowingly distribute a controlled substance, cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and Title 18, United States Code, Section 2.

There are forfeiture allegations that set forth as follows:

The allegations contained above in the superseding indictment are hereby realleged and incorporated by reference for purpose of alleging forfeitures pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

Upon conviction of the offenses in violation of Title 18, United States Code, Section 922(g) and Title 18, United States Code, Section 924(c) set forth in this superseding indictment that you shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d) and Title 28,

United States Code, Section 2461(c), any firearms and ammunition involved in the commission of the offense, including, but not limited to: two AR-15 semiautomatic rifles, one Glock semiautomatic pistol, and one AK-47 rifle.

If any property described above, as a result of any act or omission of the defendant:

cannot be located upon exercise of due diligence;

has been transferred or sold to, or deposited with a third party;

has been placed beyond the jurisdiction of the court;

has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty, the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

This is all pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

All right. By way of potential penalties, before the superseding indictment in Count 3, your

only count, which is now Count 3, carried up to ten years in prison; $250,000 fine; three years of supervised release; and a $100 special assessment.

If you are an armed career criminal, it was 15 years to life; up to $250,000 fine; no more than three years of supervised release; and $100 special assessment.

As you sit here today now the current counts under the superseding indictment, Counts 1 and 2, use, carrying, possession of a firearm during and in relation to and in furtherance of a drug trafficking crime carries a penalty of no less than five years and up to life in prison running consecutive to any conviction -- to a conviction on any other charge; up to $250,000 fine; up to three years of supervised release; and $100 special assessment.

Count 3 is the one that I read to you previously, which was the only count in the bill of indictment.

Counts 4 and 5, distribution of a controlled substance. For a first offense, no more than 20 years in prison, no more than $1 million fine, no less than three years of supervised release; and a $100 special assessment.

For a second offense, no more than 30 years

imprisonment, no more than $2 million fine, no less than six years supervised release, and a $100 special assessment.

Therefore, as you sit here today under the superseding indictment, you can face a total of -- a total from all counts of five years to life in prison, up to life supervised release, up to $3,750,000 fine, $500 special assessment.

And if you're found to be an armed career criminal, it would be 15 years to life in prison, up to life supervised release, up to $3,750,000 fine, and a $500 special assessment.

Mr. Chambers?

MR. CHAMBERS: Your Honor, I noticed on Count 1 and 2, if there are no records -- if he is convicted of both Count 1 and Count 2, Count 1 would carry the penalty or the first count, first 924(c) would carry the penalty outlined here, but the second one would carry a consecutive 25 years.

The first 924(c) would be five years consecutive to any other charge.

The second 924(c) would be an additional 25 years consecutive to any other charge.

THE COURT: All right. We will make that statement part of the record then.

Mr. Bell, do you understand the charges against you?

THE DEFENDANT: No, Your Honor, I don't.

THE COURT: Well, I read them to you. Did you understand what I said?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand the potential penalties?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. Then Miss Schneiderheinze, does Mr. Bell want to enter a plea to Counts 1 through 5?

MS. SCHNEIDERHEINZE: Your Honor, the defendant pleads not guilty to all counts and requests a trial by jury.

THE COURT: All right. Currently, a jury trial is scheduled for July 27th as to what is now Count 3.

Miss Schneiderheinze, what is the position of the defendant as to that trial date and/or another trial date given the new charges?

I assume, Mr. Chambers, there will be additional discovery; is that correct?

MR. CHAMBERS: Your Honor, we turned over this afternoon right before the Court came on the

bench about a thousand pages of additional new discovery and about eight hours of recorded discovery to go with the new indictment. And there will be additional discovery yet even beyond that.

THE COURT: Okay. Miss Schneiderheinze, have you had a chance to visit with Mr. Bell about that?

MS. SCHNEIDERHEINZE: Your Honor, I have had an opportunity to visit with Mr. Bell about whether he wants the trial continued. Obviously, I have not had a chance to review discovery that I just received with him.

THE COURT: My question was have you made him aware now that there is a thousand pages of additional discovery and eight hours of additional video?

MS. SCHNEIDERHEINZE: I have made him aware that there is additional discovery, and per his request, I have offered to attempt to schedule a visit with him this afternoon at the Peoria County Jail. Now I need an in-person room and that's not always easy to facilitate in order for him to review that. And if I can't get it today, I will try to get -- attempt to get it in the next two years (sic), but my client's position is that he does not

want a continuance of the trial date.

THE COURT: Let me just ask you then, given the additional discovery in terms of the documents and the video, could you possibly be prepared to represent him as to all five counts by July 27th?

MS. SCHNEIDERHEINZE: Your Honor, I believe based on the information that I have that all of these counts arise from the same transaction that I was previously aware of, so I don't think that there are new occurrences that I am not aware of. So with that being said, I would be prepared to proceed with the caveat that I don't know what's on that disk. So I would have to reserve the right to -- the ability to seek a continuance if there is something on that disk that I wasn't aware of. These are discrete -- three discrete occurrences, that we were aware of the facts, these allegations, and the facts surrounding those occurrences.

THE COURT: I understand, but realistically given that this is Wednesday, July 22, given the difficulty in scheduling at any county jail the time necessary to go over each page and each video, do you believe that you would be able to do that with Mr. Bell and be prepared to try the case on July 27th? Because my concern is that if you're

unable to do so and take for granted that this all arises out of the same information and that there would be some information that might come up, that you might not be prepared for, and then Mr. Bell will look to you and not anybody else as ineffective.

MS. SCHNEIDERHEINZE: I understand.

THE COURT: So I'm just looking for an honest answer from you, then I will address Mr. Bell here in a moment.

MS. SCHNEIDERHEINZE: I will review the materials and dedicate as much time as I can to the case to get it to trial on Monday per my client's request.

THE COURT: Mr. Bell, do you understand that?

THE DEFENDANT: Yes, sir, I do, Your Honor.

THE COURT: So you understand what you're putting your lawyer in a position of trying a case for you wherein you could be sentenced, if found guilty on all counts, it looks like if just convicted of Counts 1 and 2 you would have 25 years consecutive to the five in Count 1, that would be 30 years. Let's just say, potentially, you could potentially be sentenced to 30 years in prison and

you're asking your lawyer to prepare the case within five days. Is that what you're asking?

THE DEFENDANT: Correct, Your Honor.

THE COURT: Do you understand everything that I discussed this morning?

THE DEFENDANT: Yes, I do.

THE COURT: I'm just wondering are you taking any prescription medication?

THE DEFENDANT: No, I didn't.

THE COURT: Are you being treated for any illness?

THE DEFENDANT: No, I don't.

THE COURT: Or addiction to narcotic drugs?

THE DEFENDANT: No, I don't.

THE COURT: Have you been treated recently for my mental illness illnesses?

THE DEFENDANT: No, I am not.

THE COURT: Do you have any reason to think that you're not competent to stand trial?

THE DEFENDANT: No, I do not.

THE COURT: How far did you go in school?

THE DEFENDANT: 8th grade.

THE COURT: So, why is it that you wish to -- I'm not going to ask you why, I'm just going to say as long as I -- just to make sure that I

understand the position that you're putting your lawyer in, because with me questioning you like this, if I said, okay, let's go to trial and she is surprised by something because she hasn't had a chance to prepare for it and you are -- and you suffer the consequences of it, I would think that it would be very difficult for you to allege ineffective assistance of counsel as some sort of an argument on appeal if you are well aware that she cannot be properly prepared for trial.

Do you understand what I'm saying?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: With that in mind, do you still wish to proceed to trial by July 27th?

THE DEFENDANT: Correct.

MR. CHAMBERS: Your Honor, the government is going to move for a continuance. The state of the record as it is such now and the fact that we just -- he's just been arraigned this afternoon. Within the last ten minutes on these additional charges, that we will need to bring witnesses here for -- we are going to ask for reasonable time to prepare for the trial from the date of arraignment which is today. So --

THE COURT: Do you believe that the

superseding indictment gives you another 70 days?

MR. CHAMBERS: It does, Your Honor.

THE COURT: Now, what I'm concerned about is Count 3, because the superseding indictment doesn't necessarily affect the running of time on charges that were in the original indictment.

MR. CHAMBERS: Your Honor, it's the government's reading of the Speedy Trial Act that even without an interest of justice finding that the time necessary to try additional counts is excludable time and would be excludable against the speedy trial.

THE COURT: But what about Count 3 or should that be severed out and tried separately?

MR. CHAMBERS: Your Honor, I think we are covered on Count 3 under I'm -- looking for that provision -- under 3161(1)(B), any delay in resulting from trial with respect to other charges against the defendant -- so it is the government's position that we would just as soon try this case once, have to bring all of witnesses here just once. And that Count 3, the speedy trial is now, basically, and the superseding runs alongside of Counts 1 through 5.

MS. SCHNEIDERHEINZE: Your Honor, for the

record, we would dispute that.

THE COURT: 3161 --

MR. CHAMBERS: Your Honor, 3161(h)(1)(B).

THE COURT: Oh, (B).

MR. CHAMBERS: Yes "B" as in boy.

THE COURT: Okay. Then I may have a couple of dates here. First of all, if it doesn't reset the running speedy trial then the matter -- this matter has until August 10th for -- up and through August 10th to start the trial, if it doesn't reset.

If it does reset, then we have until September 28th. I believe maybe the safest thing to do would be -- but I don't want to do this, I don't want to sever and try a case twice -- either try it all the week of August 10th or try Count 3 August 10th, or if the government is comfortable enough to believe in their position, knowing that it could result in a motion filed from the defense that we would address, it could set the matter on all five counts for September 28th.

MR. CHAMBERS: Your Honor, we would prefer the September 28th date.

THE COURT: Okay. Over the objection then of the defense and I believe in Mr. Bell's best interest as well, it will give his attorney time to

prepare his case, adequately, I believe the government's motion is well taken.

We will continue this matter to September 10, 2015, at 10:00 a.m. for pretrial and jury trial for September 28, 2015, at 9:00 a.m. and vacate the July 27th trial setting.

Does -- under the circumstances, does the government believe an interest of justice finding is also required?

MR. CHAMBERS: We do, Your Honor. We believe that it is in the interest of Mr. Bell and of the public that this case be continued until that date.

THE COURT: I believe it is in the interest of justice as well and that finding will be made.

THE COURT: Okay. Anything else that needs to be addressed today?

MR. CHAMBERS: Nothing for the government.

MS. SCHNEIDERHEINZE: I have nothing, Your Honor.

THE COURT: All right. Thank you. We will be in recess.

(Which were all of the proceedings had in this case on this date.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Nancy Mersot Date: ^

Court Reporter