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

REPLY BRIEF OF DEFENDANT-APPELLANT DEMONTAE BELL

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ARGUMENT

I. The indictment should be dismissed because the 686-day pretrial delay deprived Mr. Bell of his speedy trial rights.

Mr. Bell waited for almost two years in the Peoria County Jail from indictment to his March 2017 trial. The charges against him arose out of events known to the government and defense counsel from the beginning. The case was delayed many times, often over Mr. Bell's objection, sometimes at his request, and twice—crucially—in legal error. This 686-day delay between Mr. Bell's indictment and trial ran afoul of both the Speedy Trial Act and Sixth Amendment.

A. The district court's two improper exclusions of time caused more than 70 days of non-excludable delay in violation of the Speedy Trial Act.

Mr. Bell's indictment should have been dismissed because the district court erroneously excluded time on July 22, 2015 and on January 26, 2017. Either error would have tipped the Act's pretrial clock past the 70-day limit. Together they push the clock well beyond it.

As a threshold matter, the government, pointing to the pending motions exclusion, (Gov't Br. 35–37); *see* 18 U.S.C. § 3161(h)(1)(D), disputes Appellant's math regarding the two periods in June 2016 and August 2016. On May 24, 2016, Mr. Bell's attorney asked the district court to hold various motions "in abeyance," (R.78), which the district court granted, (A26); *see also Abeyance*, *Black's Law Dictionary* (10th ed. 2014) (defining abeyance as "[t]emporary inactivity; suspension"). Statements in the July 21, 2016, hearing, however, indicate that the district court believed that the motions remained pending. (7/21/16 Status Hr'g Tr. 2–6) (stating that the court was ready to proceed on the motions); *see also* (7/21/16

Status Hr'g Tr. 6–8) (stating that Mr. Bell's new lawyer could adopt or supplement the motions). The record is cloudy on this point, but Appellant no longer believes he can unequivocally assert that the two periods in June and August 2016 count toward the 70-day clock if, in fact, the district court considered the motions pending throughout.[1] That said, however, Appellant firmly maintains his position that the district court reversibly erred in making two other exclusions of time that nonetheless pushed the Speedy Trial Act clock well above its 70-day limit.

1. The government never claimed or tried to show that Mark Turner was unavailable, so the district court erred in excluding time on that basis.

Turning first to the most obvious misstep, on January 26, 2017, the district court erred in finding Mark Turner unavailable despite the government: (1) never claiming he was; (2) telling the court it could produce him by video at the scheduled trial date; (3) never so much as attempting to meet its burden of proving Turner unavailable. Instead, the district court relied on defense counsel's preference—over Mr. Bell's objections—for cross-examining Turner in person. This error resulted in 40 additional days of delay, which when added either to Appellant's clock calculation of 62 days or the government's acknowledged count of 57 days, *see* (Gov't Br. 36), pushes the trial date well past the 70-day cutoff.

[1] The district court held a short hearing June 15, 2016, but did not mention the motions at all. (6/15/16 Status Hr'g Tr. 1–3.) Even if this Court were to count the five days in June when the motions were actually in abeyance, however, the clock does not reach 70 days unless the August days are counted as well. This Court would have to find it improper for a district court to hold fully briefed motions in limbo for nearly six months in order to count the August days toward the clock.

The government now contends that this Court should find that Mr. Bell waived this issue for the purposes of appeal. It relies primarily on a case in which the defendant failed to raise a speedy trial claim *at all* during the trial. *See* (Gov't Br. 27) (citing *United States v. White*, 443 F.3d 582, 589 (7th Cir. 2006)). Here, Mr. Bell repeatedly raised his speedy trial rights, both orally and twice in writing. (12/2/15 Pretrial Motion Hr'g Tr. 7–9; 12/16/16 Status Hr'g Tr. 2, 6–7; A15–17; R.81; R.143.) Importantly, he specifically raised his speedy trial rights in this very hearing. *See* (A15–17) (Mr. Bell protesting the delay, telling the court he "[didn't] want anymore continuances" and "just want[ed] to go to trial Monday").

The government also relies on a D.C. Circuit decision in which the court found any period not specifically included in a motion to dismiss waived. *See United States v. Taplet*, 776 F.3d 875, 879–80 (D.C. Cir. 2015). Notably, this Court in dicta has asked the same question, but never squarely decided it. *See United States v. O'Connor*, 656 F.3d 630, 637–38 (7th Cir. 2011). Mr. Bell's case shows precisely why such a hyper-technical waiver rule—based exclusively on the phrasing of a motion to dismiss—would be inappropriate. First, Mr. Bell filed a motion to dismiss on speedy trial grounds just a few months before this incident. Thus, he triggered the threshold requirement in the Act. *See* 18 U.S.C. § 3162(a)(2). Yet it had been done with his foot-dragging attorney, *see* (10/18/16 Hr'g Tr. 2), so any filing deficiencies should not be pinned on Mr. Bell, nor should any failure to file another motion to dismiss after the court's ruling that Turner was unavailable. Having begrudgingly

filed the first, it was unlikely Mr. Bell's attorney would entertain filing a second, particularly because he was the one who wanted the delay. *See* (A14–15.)

Juxtaposed against this are Mr. Bell's repeated oral requests for a speedy trial. Because of these, the court and government were surely on notice of potential violations. Furthermore, the district court actually addressed in its ruling several periods of delay the government now claims as waived. (A29–31.) Finally, Mr. Bell even renewed his speedy trial objections in his motion for a new trial, which the government did not address on the merits, nor did it claim was waived. (R.151.) Because of cases like Mr. Bell's, a rule that blindly finds waiver depending on whether a period was contained in a written motion to dismiss would work unfairness and undermine the purpose of the Act.

Turning to the merits of the ruling, the district court clearly erred. Its sole rationale for excluding time was the Speedy Trial Act's unavailable-witness provision, 18 U.S.C. § 3161(h)(3); *see* (A22–23). The unavailability exclusion applies only if the witness's whereabouts are unknown or his whereabouts are known but the witness cannot be made present for trial by the government's due diligence. 18 U.S.C. § 3161(h)(3). Mr. Bell's attorney had much to say about how and when Turner should testify. *See* (A14–15) (defense counsel expressing his preference to cross-examine Turner in person). In that hearing, however, the government did not even attempt to show that Turner was unavailable. It in fact did the opposite when it told the court it could "make arrangements to have Turner appear by video teleconference." (A14.) The government's brief on appeal, when read closely, also

does not suggest that Turner was actually unavailable as defined by the Act. (Gov't Br. 37–39) (not addressing 18 U.S.C. § 3161(h)(3)'s definition of "unavailable" and instead relying on the "importance of cross-examination" as a reason to affirm the district court's decision). The delay caused by this continuance should have counted toward the 70-day clock.

2. The district court necessarily relied on the government's incorrect reading of the Speedy Trial Act in granting a continuance at the July 22, 2015, status conference.

The district court also erred when it granted a continuance based on the government's inaccurate belief that the Speedy Trial Act clock reset with its filing of a superseding indictment. The government now protests that its position below did not affect the district court's ruling, (Gov't Br. 33), but the record belies that position.

At the July 22, 2015 status hearing, Mr. Bell and his attorney informed the district court that they were prepared to go to trial on the scheduled date. (A61–62.)[2] The government immediately moved to continue, citing the new discovery, the fact Mr. Bell had just been arraigned, and its need to prepare witnesses for trial. (A65.) The court expressed concern that the speedy trial clock on Count 3, the restated felon-in-possession charge from the original indictment, might expire, and

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[2] The district court ensured that Mr. Bell understood the consequences of this decision. (A63–65) (stating that Mr. Bell would have a "very difficult" time alleging ineffective assistance of counsel should he choose to go to trial, and Mr. Bell stating that he understood but still wanted to go to trial.) Thus, it is curious that the government now asserts that the district court's continuance was justified in order to head off a future *Strickland* claim. *See* (Gov't Br. 42–43) (stating that Mr. Bell "undoubtedly" would have raised such a claim if there had been no continuance). The district court's colloquy with Mr. Bell would have made such a claim nearly impossible.

then suggested severing it for an earlier trial. (A66.) In response, the government incorrectly told the court that under 18 U.S.C. § 3161(h)(1)(B), the superseding indictment gave it an additional 70 days to try Mr. Bell on Count 3, despite more than 50 days already having ticked off the clock on that count. (A66–67); *see* (Gov't Br. 11) (not contesting that this representation was incorrect).

After hearing the government's position, the court offered "a couple of" potential trial dates. (A67.) The district court posited that if the government had *incorrectly* interpreted the Speedy Trial Act, holding trial August 10 might be the "safest thing to do." (A67.) Alternatively, the district offered to hold the trial on all counts on September 28 if the government was "comfortable enough to believe" in its position. (A67.) The government responded that it "preferred" September 28, and the court picked that date, finding the government's motion "well taken." (A67–68.) The district court necessarily accounted for the government's representations in its ruling; had it not, the court would have set trial for August 10, which it had only just identified as the "safest" course of action.

Tellingly, *after* adopting the government's interpretation, the district court misused the ends-of-justice exception in an attempt to insulate this ruling. (A68) (district court asking the government, "[U]nder the circumstances, does the government believe an interest of justice finding is *also required*?") (emphasis added). But as noted in the opening brief, the facts the district court must consider in granting an ends-of-justice continuance were not satisfied here. (Br. 16) (discussing the factors listed in 18 U.S.C. § 3161(h)(7)(B)). Having had months to

prepare and with defense counsel ready to proceed, the government's "new discovery" and "trial preparation" rationales do not suffice. (Gov't Br. 32.) In fact, the primary effect of the continuance was to allow more preparation time for the *government*, the only party who claimed it needed additional time. (A65); *see* 18 U.S.C. § 3161(h)(7)(C) ("No continuance . . . shall be granted because of . . . lack of diligent preparation . . . on the part of the attorney for the Government.").

Finally, contrary to the government's claim, (Gov't Br. 34), the district court's opinion denying Mr. Bell's motion to dismiss adds no meaningful post-hoc support to its decision to grant the continuance; it virtually repeats the same reasons it provided a year earlier, which, as discussed above, were not enough. *See* (A29–31.) The district court's order did mention efficiency concerns for the first time, (A30–31), but these cannot override Mr. Bell's right to stand trial—at the very least on Count 3—on July 27, 2015, almost two years before he actually did. The government's reliance on *United States v. Asubonteng* for this proposition, (Gov't Br. 34), is misplaced—in that case, the defendant *consented* to the consolidation of his trials and never objected to the continuance. 895 F.2d 424, 426–27 (7th Cir. 1990). In short, the district court granted the July 22, 2015, continuance because it adopted the government's legal error, which in turn meant that it failed to properly weigh the factors required by the statute for an ends-of-justice continuance. *See* 18 U.S.C. § 3161(h)(7)(B).

Because either of these improper exclusions of time, combined with the time already elapsed, pushes the Speedy Trial Act clock beyond 70 days, the indictment

should be dismissed. And because Appellant has demonstrated legal error, excessive government delay, and actual prejudice, the indictment should be dismissed with prejudice. *See* (Br. 29–30); *United States v. Janik*, 723 F.2d 537, 546–47 (7th Cir. 1983).

B. This unreasonably long, prejudicial delay in the proceedings violated Mr. Bell's Sixth Amendment right to a speedy trial.

Mr. Bell, armed with only an eighth-grade education, (12/9/16 Status Hr'g Tr. 3), unequivocally and repeatedly invoked his right to a speedy trial. It does not matter that Mr. Bell did not also utter the words "under the Speedy Trial Act" and "under the Sixth Amendment" while asserting his rights. *See United States v. Oriedo*, 498 F.3d 593, 596 n.2 (7th Cir. 2007) (evaluating the defendant's claim after he invoked his speedy trial right twice when opposing continuances without mentioning the Speedy Trial Act or the Sixth Amendment, but once referencing his constitutional right in a motion to sever).

In fact, the government construed Mr. Bell's motion to dismiss as raising both Speedy Trial Act *and* constitutional claims, addressing both on the merits. (R.84 at 4–5) ("[T]his response addresses the merits of a speedy trial argument by presupposing that Defendant adequately pleaded a motion seeking dismissal under both the Speedy Trial Act and the Sixth Amendment to the United States Constitution."). Thus, it should not now on appeal suggest that Mr. Bell failed to raise a constitutional claim, either for issue-preservation purposes or for the assertion-of-the-right requirement under the *Barker* test. *See* (Gov't Br. 39, 43.)

The Supreme Court's test for constitutional error contains four prongs, *Barker v. Wingo*, 407 U.S. 514 (1972), but a defendant is not required to satisfy all of them in order to obtain relief. *See United States v. Macino*, 486 F.2d 750, 753 (7th Cir. 1973) (finding Sixth Amendment violation even where one of the Barker factors—invocation of the right—was missing); *see also Burkett v. Fulcomer*, 951 F.2d 1431, 1446 (3d Cir. 1991) (finding Sixth Amendment speedy trial violation because three of the four *Barker* factors weighed heavily in petitioner's favor, even though his evidence regarding *Barker*'s prejudice prong was "less than overwhelming"). Mr. Bell amply satisfies the *Barker* test.

First, under prong one, a delay of more than a year is presumptively long enough to trigger Sixth Amendment scrutiny. *White*, 443 F.3d at 589–90. Here, Mr. Bell waited in the Peoria County Jail for nearly two years from indictment to trial. *See also* U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Justice Statistics, 2009, 12, tbl. 9 (6.5 months is the median length of time "from filing to disposition" for defendants prosecuted in federal court—15 when a defendant is convicted—compared to here where more than 31 months passed between indictment and sentencing).

He also satisfies prong two because the government (and the district court) bore significant responsibility for the delay. The government filed three superseding indictments and requested continuances to prepare for set trial dates. (A55–57) (requesting time to prepare officers). Although Mr. Bell requested new attorneys, which added to the delay in this case, the government's excuses of unpreparedness

and its general laxness in pursuing the case substantially weigh against the government. *See Barker*, 407 U.S. at 532. In addition, there were 686 total days between Mr. Bell's indictment and eventual trial; 124 of these days are attributable either to the government or district court for legal errors or causing confusion among counsel. *See* (6/18/15 Pretrial Conf. Tr. 2–3 (district court misspoke at the May 7 arraignment, telling defense counsel trial was set for July but actually setting it for June, causing 34 days of delay); A65–67 (district court relied on the government's mistaken interpretation of 18 U.S.C. § 3161(h)(1)(B) to exclude time, causing 50 days of delay); A22–23 (district court improperly excluded time for Mark Turner's unavailability when the government said it could obtain his presence for the scheduled trial date, causing 40 days of delay)).

Regarding prong three, Mr. Bell repeatedly invoked his speedy trial rights during the hearings and in two formal motions: a motion to dismiss and a motion for a new trial. (12/2/15 Pretrial Conf. Tr. 7–9 ("With all due respect . . . I would like to go to trial sometime in January."); 12/16/16 Status Hr'g Tr. 2, 7–8 ("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."); A17 ("I had a speedy trial, sir, and now . . . I'm thinking that exceeds my speedy trial."); R.81 (motion to dismiss); R.143 (motion for a new trial)).

Turning to the final prong, Mr. Bell suffered prejudice. As the Supreme Court has recognized, the speedy trial right was designed to protect defendants' liberty interests against oppressive pretrial incarceration and the anxiety that

accompanies it. *Barker*, 407 U.S. at 532. Mr. Bell spent two years in the Peoria County Jail simply awaiting trial.

In addition, this delay resulted in diminished recollections of key witnesses at trial. The government's claim that such a loss of memory could have been helpful to Mr. Bell (by allowing him more opportunities to impeach the witnesses) is wholly speculative. *See* (Gov't Br. 44); *see also Doggett v. United States*, 505 U.S. 647, 655 (1992) ("[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."); *Barker*, 407 U.S. at 532 ("Loss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown."). This was a bench trial; although a jury might be inclined to discount a witness's credibility due to failed memory, a judge easily parses through that in search of hard facts that go to the elements and the government's burden.

Because the *Barker* factors weigh in Mr. Bell's favor, this Court should reverse, vacate the sentence, and dismiss the indictment with prejudice. *See Lorea v. United States*, 714 F.3d 1025, 1027 (7th Cir. 2013) (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)) (unlike Speedy Trial Act violations, Sixth Amendment speedy trial violations always require dismissal with prejudice); *Barker*, 407 U.S. at 522.

II. The district court erred in failing to suppress evidence illegally obtained from Mr. Bell's cell phone.

The government repeatedly tries to justify its use of unconstitutionally obtained evidence. None of its efforts withstand individual scrutiny and taken

collectively they fare no better. The bottom line is that Agent Nixon bolstered an inadequate warrant application using uncorroborated information from an unreliable informant and evidence obtained from an illegal search. That is improper in the first instance and undermines any post-hoc claim of good faith.

A. The government has failed to meet its burden of showing that this evidence was or would have been obtained without an illegal search.

The government raises two related arguments: (1) that this cell phone photograph was discovered by legal means independent of the unconstitutional search; or (2) in the alternative, that it would inevitably have been discovered by legal means. *See* (Gov't Br. 46–48.) Both arguments fail because the government has not met its burden of establishing a legal basis for obtaining this evidence in the absence of Sinks's unconstitutional search. That illegal search colored the entire warrant application, confirming and strengthening evidence that was in fact unreliable and uncorroborated. Without it, the application lacks enough facts to support probable cause, *see infra* Section II.C, and it is anything but inevitable that the government could or would have sought a warrant in its absence.

1. The illegally obtained evidence so contaminated the warrant application as to taint the remaining information.

The government bears a heavy burden to prove the existence of an independent source for illegally-obtained evidence. *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992). First, to clarify, the "tainted source" in this scenario is Officer Sinks, who impermissibly searched Mr. Bell's phone and saw the photo of the AK-47. The "independent source" in this case was *not* Agent Nixon, as the government claims, (Gov't Br. 47), but rather Mark Turner, an untested and

unreliable informant. Nixon possessed no actual knowledge of any connection between Mr. Bell and the AK-47 except through Turner's words and acts. Turner's role in the warrant-seeking process becomes more important in the probable-cause and good-faith discussions below, *see infra* Sections II.B, II.C, but it also matters here. An unreliable source presented alongside illegally obtained evidence should never be deemed an independent source. Even assuming for the sake of argument that either Turner was a sufficient independent source or that Nixon could bootstrap Turner's exclusive knowledge in order to serve as an independent source, the government cannot satisfy the independent-source test.

For the independent-source doctrine to apply, the government must show that the illegally obtained evidence did not: (1) affect the judge's decision to issue the search warrant; or (2) prompt law enforcement to seek a warrant. *Brock v. United States*, 573 F.3d 497, 502–03 (7th Cir. 2009). Here, the government ignores its heavy burden and fails on both prongs.

In analyzing the first prong, common sense says that a judge who is told that an arresting officer has viewed the weapon on the defendant's phone will attribute nothing less than dispositive weight to that fact. *Cf. Velasco*, 953 F.2d at 1474 (a tainted source with "mere tangential influence," for instance, may be overcome by an independent source). It cannot be said that an officer's reporting of an AK-47 on Mr. Bell's phone just days before the warrant application would have had a tangential impact on the judge's decision.

Turning to the second prong, the government must establish that the illegally obtained information did not prompt law enforcement to seek a warrant. Significantly, Nixon did not seek a warrant based on Turner's information alone, which he had in his possession on February 25, 2015. Instead, he waited for Sinks's illegal search—six weeks later—to confirm that the photo was there. Far from independent, the decision to seek this warrant hinged on Sinks's confirmatory (and illegal) viewing. For both these reasons, the legally obtained information contained in the warrant affidavit was not independent of the illegal search.

2. The government failed to prove by a preponderance of evidence that law enforcement would have inevitably discovered this evidence.

The government on appeal also pins its hopes to an argument that earned no more than a fleeting reference in the district court: that the illegally obtained cell phone photograph is admissible because officers would have "inevitably discovered" it through lawful means. *See* (Gov't Br. 47.) But any such argument would need to have been proven below by a preponderance of the evidence, as the government acknowledges. *See* (Gov't Br. 47); *see also United States v. Stotler*, 591 F.3d 935, 940 (7th Cir. 2010). The government addressed inevitable discovery in just a single remark during a status hearing, (4/13/2016 Status Hr'g Tr. 92); it neither briefed nor legitimately argued, let alone proved by a preponderance of the evidence, that officers would have inevitably searched the phone.

To establish inevitable discovery, it is not enough for the government to show that it *could* have obtained a warrant—it must show it *would* have obtained a warrant. *United States v. Pelletier*, 700 F.3d 1109, 1116 (7th Cir. 2012). The

government claims that discovery was inevitable even without Sinks's illegal search because Nixon "knew" there was a photograph of the AK-47 on Mr. Bell's cell phone. But, again, Nixon only "knew" that because of Turner's questionable, out-of-date, and uncorroborated information. As a result, it cannot prove that it would have obtained a warrant based solely on the Turner information.[3] The first warrant, based on Sinks's illegal search, was tainted. The second warrant was also tainted; the only new information that supported it arose from the first deficient warrant and was therefore fruit of the poisonous tree.

B. Because Agent Nixon omitted key facts from his affidavits, the good faith exception does not apply and Mr. Bell should have been granted a *Franks* hearing.

1. The good faith exception does not apply in this case.

When an officer misleads the issuing judge with a knowing or reckless disregard for the truth, the good faith exception does not apply. *United States v. Glover*, 755 F.3d 811, 818 (7th Cir. 2014). Nor does it apply when the issuing judge has "wholly abandoned the judicial role." *Id.* at 818–19 (citing *United States v. Leon*, 468 U.S. 897, 922–23 (1984)). Here, Nixon acted in bad faith and showed a reckless disregard for the truth by omitting key details about Sinks's illegal search and Turner's reliability and credibility as an informant. In the first warrant

[3] That Nixon obtained a second warrant without mentioning Sinks does not establish independent source or inevitable discovery. First, it is impossible to separate the issuance of the first warrant from the issuance of the second. Information in the second warrant application necessarily depended on Sinks's illegal search via the first deficient warrant. Second, as detailed in the opening brief, (Br. 39–42), and below, *see infra* II.C, the judges considering the warrant applications did so based on incomplete information about this confidential informant, which removed probable cause.

application, Nixon stripped his description of Sinks's search of any detail that might have indicated that it was illegal. He vaguely described the photograph as being on the "home and/or lock screen" of Mr. Bell's cell phone, (B5), but the photo was not in plain view—Sinks had to physically manipulate the phone in order to see it.

The second warrant application was even more troubling. Nixon's choice to omit Sinks's illegal search was significant—it implies that he knew the search was problematic. Rather than describing Sinks's actual illegal search, the second affidavit amorphously mentioned that a photograph of an AK-47 "was found" on Mr. Bell's cell phone after the first search, that Joel Weakley had viewed a printout of the photograph of the AK-47, and that he had identified it as his stolen weapon. (B14.) Significantly, Nixon prepared these two applications knowing that they would go to two different judges. *Compare* (B10) (application filled out for Judge McDade) *with* (B19) (application filled out for Magistrate Judge Hawley). So, in his first, weaker affidavit, Nixon included Sinks's illegal search with no indication that it was illegal in order to strengthen the appearance of probable cause. In the second application, Nixon omitted details regarding Sinks's problematic search and substituted only the *results* of the first search, which served the same purpose of bolstering his otherwise-lacking case for probable cause. Nixon ostensibly chose not to disclose key information from the judges evaluating his warrant applications. Such knowing or reckless disregard for the truth amounts to bad faith.

Even if Nixon did not act in bad faith, the two judges who reviewed Nixon's warrant applications were denied the opportunity to act as informed and

independent arbiters. Omitting credibility and reliability information about an informant—“clearly material” information—“undermine[s] the issuing magistrate’s role in the probable cause determination.” *Glover*, 755 F.3d at 818, 820. Here, Nixon omitted such information regarding Turner’s credibility, including the extent of his criminal history and his lack of any track record of reliable cooperation with law enforcement. And, again, as detailed above, each judge was presented with different information regarding the illegal search. Because the affidavits were reviewed by different judges, neither was able to evaluate the continuity between them or the significance of Nixon’s decisions in preparing them. As a result, they were unable to fulfill their judicial roles.

2. Nixon’s material omissions are sufficient to support a reasonable inference of recklessness, and therefore the district court should have granted Mr. Bell a *Franks* hearing.

To obtain a *Franks* hearing, a defendant must make a substantial preliminary showing that law enforcement deliberately or recklessly disregarded the truth via a material falsity or an omission that affected the probable cause analysis. *Glover*, 755 F.3d at 820. The defendant bears only the burden of production and is not required to prove his claim by a preponderance of the evidence until the *Franks* hearing itself. *Id.* An officer’s knowing omission from an affidavit of substantial adverse information about an informant’s credibility supports a reasonable inference of recklessness and *requires* the district court to hold a *Franks* hearing. *Id.*

As a threshold matter, Mr. Bell did not waive his right to argue that Nixon’s omissions in his affidavits warranted a *Franks* hearing. The case the government

relies on—*United States v. Brodie*, 507 F.3d 527 (7th Cir. 2007)—dealt with the "good cause" requirement of Federal Rule of Criminal Procedure 12 after a defendant moved to suppress one piece of evidence at trial but then sought to challenge a completely different body of evidence on appeal. *Id.* at 531. That standard does not govern the request for a *Franks* hearing. Mr. Bell's motion encompassed the entire test—falsities and omissions. (R.72)

In the seven pages the government devotes to the *Franks* issue, only in its penultimate paragraph does it address the key fact that Nixon intentionally or recklessly omitted information vital to the probable cause analysis. *See* (Gov't Br. 53–59.) The government devotes the rest of those pages to inconsequential details, including that Nixon's affidavits never "vouched for Turner's reliability" and that they included some cursory information about Turner's most recent criminal history. *See* (Gov't Br. 55.) The government points out that Turner's motive to lessen his consequences does not make his information inherently unreliable. *See* (Gov't Br. 55.) These issues are beside the point. Mr. Bell was only required to make a substantial showing that Nixon recklessly omitted material information from his affidavits.

Agent Nixon omitted the extent of Turner's criminal history, his untested background as an informant, and his motive to lie. He also omitted all information that indicated that Sinks's search of Mr. Bell's cell phone was illegal, saying instead that the photo was on the "home and/or lock screen" of Mr. Bell's phone, implying that it was visible (which it was not). The government even concedes that Nixon

could have included information to give the issuing judges a “more comprehensive view” of the facts. (Gov’t Br. 58.) Nixon’s material omissions, like those in *Glover*, support a reasonable inference of recklessness and demonstrate that the district court erred in denying Mr. Bell’s request for a *Franks* hearing.

C. Even viewed independently, the remaining information in the warrant application does not amount to probable cause.

On appeal, the government argues that other information in the affidavit was both “untainted” by Sinks’s illegal search and sufficient on its own to constitute probable cause. (Gov’t Br. 48.) It teases out sentence by sentence, over several pages of its brief, all of the background information provided in the warrant application. *See* (Gov’t Br. 49–51.) But that background information did not serve as the basis for finding probable cause, and it would not have sufficed even if it had. Much of this information is irrelevant to whether there was probable cause that Mr. Bell possessed an AK-47 or that there was evidence of that crime on his cell phone. The detailed description of Turner’s burglary of several firearms; the fact that Joel Weakley, their owner, identified Mark Turner (but not Mr. Bell) as a suspect in that crime; the recitation of Turner’s recent (though not entire) criminal history and proffer agreement; and the fact that Mr. Bell allegedly engaged in controlled drug buys with Turner do nothing to implicate Mr. Bell in the stolen AK-47.[4] (B3–5.)

[4] The government did not charge Mr. Bell with any drug-related offense until the first superseding indictment on July 21, 2015, and there was no indication that drug-related evidence was present on Mr. Bell’s cell phone. The probable cause analysis, therefore, focuses only on information relevant to the gun charge.

As noted above, it was Turner, not Agent Nixon, who served as the source of much of the information supporting a finding a probable cause. It was *Turner* who claimed that he sold the AK-47 to "Jay" and that Mr. Bell texted him a picture of that gun. (B3–5.) Those claims were not corroborated by independent information. Given Turner's pivotal role in providing information to law enforcement, his credibility and reliability were paramount in the probable cause inquiry: facts from incredible or unreliable informant cannot serve as the basis for a warrant. *Glover*, 755 F.3d at 818.

Yet Nixon provided scant information about Turner as an informant or about his criminal history. He disclosed only the most recent parts of Turner's criminal history that pertained to his cooperation agreement. (B3–5.) Turner was an untested informant with a history of cocaine and methamphetamine use, multiple felony convictions, and a powerful motive to lie. (Trial Tr. II 300–02.) Combined with the low level of detail Turner provided in the affidavit and the lapse of several months between the events Turner reported and the warrant application, the omission of Turner's history and character was even more significant for probable cause purposes.

Although strong corroborative facts can sometimes overcome the failure to provide an informant's history, *United States v. Koerth*, 312 F.3d 862, 868 (7th Cir. 2002), the additional information that Nixon provided did not make the Turner-based facts regarding the AK-47 any more certain or true. The government points to three pieces of information, (Gov't Br. 55–56), but two go to marginalia (Mr. Bell's

identity and the fact that he sold drugs) and the third was the fruit of Sinks's illegal search (Weakley viewing a printout of the photo Sinks found on Mr. Bell's phone). Importantly, the government heavily relies on a jail inmate who viewed photos and video, and then identified Mr. Bell by his given name and as "Tay Tay." *See* (Gov't Br. 56 n.7.) Turner, however, knew neither Mr. Bell's given name nor the "Tay Tay" nickname; he could only identify Mr. Bell as "Jay." The government's observation that people often have more than one nickname, (Gov't Br. 56 n.7), is unhelpful. Although that may be true, the government doesn't account for the fact that the discrepancy here means that Turner remains uncorroborated.

As for the drug deal where Turner and Mr. Bell supposedly discussed an AK-47, Nixon's firsthand observations only went so far as to confirm that Turner had a photograph of an AK-47 on his phone. Turner could have been showing Nixon a photo that he himself had taken in order to settle a score or otherwise foist blame onto Mr. Bell. *Cf. United States v. Bell*, 585 F.3d 1045, 1050 (7th Cir. 2009) ("For all we know, Hale could have been a rival drug dealer, an angry customer, or had some other beef with Bell, which is certainly a factor to consider when assessing the reliability of his statements."). Nixon could have independently corroborated Turner's claims, either by checking cell phone records or by confirming that the photo he saw on Turner's phone arrived by text. Nixon did not do so, and the three "corroborating" facts on which the government relies do little to help.

Importantly, Nixon did not produce Turner to appear before the judges so that they may have assessed his credibility for themselves. *United States v.*

Musgraves, 831 F.3d 454, 460 (7th Cir. 2016) (noting that an informant appearing in person before the issuing judge is a significant factor in establishing that informant's credibility) (citation omitted); *United States v. Peck*, 317 F.3d 754, 757 (7th Cir. 2003) (noting that even when an informant appears before a judge but did not testify, that appearance is not enough to establish credibility). Although a history of providing reliable information to law enforcement can enhance an informant's credibility, Turner had no such history. *See, e.g.*, *United States v. Searcy*, 664 F.3d 1119, 1123 (7th Cir. 2011) (Such "history is important in determining whether, or the extent to which, an informant's information is colored by a bias against a defendant.").

Finally, by not providing this information, Nixon hindered the judges' roles as neutral arbiters. *Glover*, 755 F.3d at 818. Here, as in *Glover*, the issuing judge should not have had to rely on other factors because the agents omitted vital credibility information from the affidavit. Turner's character was unknown, his information was not credible, and it was not meaningfully corroborated. Thus, Turner's information cannot provide the basis for a finding of probable cause.

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.

Respectfully submitted,

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,202 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 type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for Defendant-Appellant Demontae Bell, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on February 20, 2019, which will send notice of the filing to counsel of record in the case.

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