CASE NO. 08-5167

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
MELVIN BAILEY, JR.,	)
	)
Defendant-Appellant	)

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Judge James H. Payne
D.C. No. 4:08-CR-00026-JHP-1

APPELLANT'S OPENING BRIEF

Respectfully submitted,

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Oral Argument is requested.
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED WITH DIGITAL SUBMISSION SENT VIA EMAIL

April 20, 2009

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STATEMENT OF PRIOR RELATED APPEALS

There are no prior or related appeals.

The undersigned counsel, on behalf of Melvin Bailey, Jr., defendant-appellant, for his opening brief states:

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Oklahoma had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. Mr. Bailey was convicted of possession of cocaine base with intent to distribute, possession of cocaine with intent to distribute and maintaining a drug involved premises. After sentencing, the judgment and commitment order was entered on October 29, 2008. (*Attachment 5*). The notice of appeal was timely filed in accordance with Rule 4(b)(1), F.R.A.P., on November 3, 2008. (doc. 75). This Court's jurisdiction derives from 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

THE DISTRICT COURT IMPROPERLY ADMITTED EVIDENCE AT TRIAL THAT WAS SEIZED FROM 2304 NORTH BOSTON PLACE, IN TULSA, OKLAHOMA, THROUGH THE USE OF AN INVALID SEARCH WARRANT.

THE DISTRICT COURT IMPROPERLY ADMITTED VOICE IDENTIFICATION TESTIMONY BY OFFICER JEFF HENDERSON.

THE GOVERNMENT ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT BY THREATENING TO PROSECUTE WITNESS FREDRICK CHAPELLE IF HE TESTIFIED THAT THE NARCOTICS SEIZED FROM 2304 NORTH BOSTON PLACE, IN TULSA, OKLAHOMA, BELONGED TO HIM.

STATEMENT OF THE CASE

The government obtained a sealed indictment against Mr. Bailey, charging him with possession of cocaine base with intent to distribute (Count I) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii); possession of cocaine with intent to distribute (Count II) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); and maintaining a drug involved premises (Count III), in violation of 21 U.S.C. § 856. (doc. 2).

Prior to trial, Mr. Bailey filed a motion to suppress evidence seized pursuant to a search warrant, arguing the evidence was seized in violation of Mr. Bailey's constitutional and statutory rights. (doc. 15). A hearing was held on the matter, (*Hearing*, docs. 91 and 92), and Magistrate Judge Paul Cleary filed a Report and Recommendation denying the motion to suppress with regard to the search warrant, but finding evidence unlawfully seized by an affiant officer on a previous encounter with Mr. Bailey should not be used to support an alleged "corroboration" of an informant's information. (*Attachment 2*). Magistrate Cleary noted the recklessness of various acts by the police officers involved. (*Attachment 2*). Judge James Payne, in his Order and Opinion, adopted Magistrate Cleary's recommendations, except as to the prior "corroborating" encounter, permitting some, but not all of the evidence obtained in that prior encounter to be utilized at trial. (*Attachment 3*).

Mr. Bailey also filed a motion in limine requesting exclusion of evidence of a prior telephone call allegedly made by Officer Jeff Henderson to Mr. Bailey with the assistance of an informant. (doc. 57). Judge Payne permitted the testimony, and at trial, Officer Henderson was permitted to testify that he recognized Mr. Bailey's voice over the speakerphone of a cellular telephone, even though he had not personally spoken with Mr. Bailey in at least 8 years. (*Transcript*, doc. 85 at 278-305).

The government presented its case largely through the testimony of Tulsa Police Department Officers who were involved in obtaining and/or carrying out the search warrant in question. The jury ultimately found Mr. Bailey guilty of all three counts against him. (*Transcript*, doc. 88 at 473-474). The Court imposed a term of 360 months imprisonment. (*Transcript*, doc. 87 at 11-15).

STATEMENT OF THE FACTS

This case began with a violation of Defendant Melvin Bailey, Jr.'s constitutional rights. As a reformed former gang member, Mr. Bailey actively worked in his community to steer children away from the dangers of gang violence. He sought to change his once troubled life. Although Mr. Bailey had not been involved in gang activity for many years, however, the Tulsa Police Department would not allow him to escape his troubled past. The search conducted at 2304 North Boston Place, in Tulsa, Oklahoma, during which Mr.

Bailey's Fourth Amendment rights were violated, is simply the latest example of his inability to escape his past in the eyes of Tulsa law enforcement.

The Story of Melvin Bailey, Jr.

In his youth, Melvin Bailey, Jr., did not lead an upstanding life. He was involved in a gang, and he has prior criminal convictions as a result of his involvement in that gang. (*Attachment 4*, *Presentence Investigation Report* (sealed)). Upon leaving prison in 2001, however, Mr. Bailey vowed to clean up his life. He obtained his GED while in prison (*Attachment 4*), and he was dedicated to making a positive difference in his community. He attempted to steer youth in his community away from the gang lifestyle which he had survived. (*Transcript*, doc. 85 at 240-241). As testified by Officer Sean Hickey, who is with the organized gang unit of the special investigations division of the Tulsa police department, Mr. Bailey had not even identified himself with a gang since 1992 - approximately 16 years prior to this trial. (*Transcript*, doc. 85 at 240).

Mr. Bailey relinquished his gang activity, but the police would not disassociate him from his past. Officer Hickey pointed to no evidence that Mr. Bailey was involved in a gang during the three years preceding his trial. (*Transcript*, doc. 85 at 244-245). Under the guidelines utilized by the Tulsa Police Department for maintaining a master "list" of gang members, if a person fails to meet the criteria for gang involvement for 12 months, his name is placed in an

inactive file, and if he fails to meet the criteria for 24 months, his name is completely purged from the "list". (*Transcript*, doc. 85 at 242). Under these guidelines, Mr. Bailey's name should have been removed from the "list" - but it was not.

Since his release from prison in 2001, Mr. Bailey actually *assisted* the police in steering the city's youth away from gangs, (*Transcript*, doc. 85 at 223-224; 240-241), yet this was not enough to convince law enforcement he had changed. This mindset is evident by the testimony of Officer Hickey, who examined a Tulsa World newspaper article depicting Mr. Bailey's efforts in the community, but chose only to see his orange shoelaces in the photograph as a "gang symbol." (*Transcript*, doc. 85 at 223-224).

Mr. Bailey also cleaned up his personal life, starting his own construction business - Bailey Construction (*Hearing*, doc. 92 at 14-25) - and he working at Club Fahrenheit. (*Hearing*, doc. 91 at 112-113). He had a girlfriend - Tiara Crawford - for a period of two years, and he stayed with her most nights. (*Hearing*, doc. 91 at 118-119; *Transcript*, doc. 86 at 398-400). In all, Mr. Bailey's life was heading in the right direction.

Perhaps it was because his name was never purged from the "list" of gang members, or perhaps it was because they could not forget Mr. Bailey's prior acts, but the police simply would not allow Mr. Bailey to continue on a positive road.

They were determined that he did not deserve a second chance to do positive things. This was evident in the attitude of Prosecutor Litchfield, who made the off-handed comment at Mr. Bailey's trial, "Not a real good citizen then, is he?" (*Transcript*, doc. 85 at 249).

The Story of this Investigation

Mr. Bailey's past provides the backdrop for an investigation filled with reckless statements and omissions. In a prior, unrelated encounter, the police, with conflicting stories, claim Mr. Bailey corroborated the testimony of an otherwise unreliable informant. The informant eventually testified that she never spoke with police. (*Hearing*, doc. 92 at 29-36). The search warrant was also flawed. (*Attachment 1*). Additionally, at trial, when exculpatory testimony was available, it was not properly investigated to determine whether someone else actually committed the crimes for which Mr. Bailey is currently imprisoned.

A Prior Encounter

Depending upon whose story we believe, either "a couple of months," or "a few weeks" prior to the execution of the search warrant on 2304 North Boston Place,[1] Mr. Bailey was with his friend, Tommy Mahan, near 205 Mohawk Blvd., in Tulsa, Oklahoma, taking measurements of a house. Mr. Mahan was doing some

[1] Officer Jason Muse testified the events occurred a "couple of months" prior to the execution of the warrant, (*Hearing*, doc. 91 at 56-57) while Officer Matt Snow testified they occurred a "few weeks" prior to the execution of the warrant. (*Hearing*, doc. 91 at 135).

work on the house, and he wished to subcontract work to Mr. Bailey's construction business. (*Attachment 2*; *Hearing*, doc. 91 at 14-28). Also present nearby was either a "large group" of individuals, or four to five people[2] - again, depending upon which police testimony we believe. Some of these people were assisting Mr. Mahan and Mr. Bailey, and others were just milling around the convenience store located next door. (*Hearing*, doc. 91 at 14-28).

Police approached, either with lights on or off,[3] and requested everyone, including Mr. Bailey, to sit on a nearby retaining wall and remove their shoes and socks. (*Attachment 2*; *Hearing*, doc. 91 at 14-28, 76-85, 91-100, 135-142). Mr. Bailey spoke with Officer Jason Muse. (*Hearing*, doc. 91 at 14-28, 76-85, 91-100, 135-142). Officer Muse asked if Mr. Bailey had weapons, and conducted a pat-down search, restraining his hands above his head. (*Attachment 2*; *Hearing*, doc. 91 at 76-85, 91-100, 135-142). Pursuant to Officer Muse's assertion that Mr. Bailey had consented, Officer Matt Snow conducted a search of Mr. Bailey's vehicle.[4] (*Attachment 2*; *Hearing*, doc. 91 at 76-85, 91-100, 135-142).

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[2] Officer Muse testified there was a "large group" of people present, (*Hearing*, doc. 91 at 57), while Officer Snow testified there were 4 to 5 people. (*Hearing*, doc. 91 at 136).

[3] Officer Matt Snow testified the police officers approached with their lights on, (*Hearing*, doc. 91 at 137), while Officer Jason Muse testified he and three other officers in police vehicles approached with their lights off. (*Hearing*, doc. 91 at 77).

[4] Officer Snow himself never actually obtained consent himself or heard Officer Muse obtain consent.

During this prior encounter, Officer Muse allegedly discovered money in Mr. Bailey's wallet during a pat-down. (*Attachment 2*; *Hearing*, doc. 91 at 76-85, 91-100). Officer Snow allegedly discovered a diagram depicting a "secret compartment." (*Attachment 2*; *Hearing*, doc. 91 at 76-85, 91-100, 135-142). Officer Muse claims Mr. Bailey told him that he lived at 2304 North Boston Place, and that he, "lived there alone." (*Attachment 2*; *Hearing*, doc. 91 at 76-85, 91-100). Mr. Bailey was not arrested as a result of this encounter, and nothing was seized. (*Attachment 2*; *Attachment 3* at 76-85, 91-100, 135-142).

Mr. Bailey sought to exclude evidence of this prior encounter. (doc. 15). After a hearing on the matter, (*Hearing*, docs. 91, 92), Magistrate Cleary found that, "…a reasonable person would not believe that he was free to leave and that the encounter was an investigative detention and not a consensual encounter." (*Attachment 2*). He further found that Officer Muse, "…exceeded the scope of his pat-down search of Bailey." (*Attachment 2* at 15). He thus excluded the money found on Mr. Bailey's person during the pat-down, and further excluded the diagram allegedly found within Mr. Bailey's vehicle because there was, "…no lapse between the illegal detention and Bailey's alleged consent to search his vehicle and no intervening circumstances." (*Attachment 2* at 17-18).

In adopting the Magistrate's Report, however, Judge Payne independently found that Mr. Bailey's encounter with police was consensual, even though he still

found that Officer Muse, "exceeded the scope of consent when - after verifying the wallet was indeed a wallet - he opened the wallet to examine its contents." (*Attachment 3* at 10). Judge Payne excluded the money allegedly found on Mr. Bailey, but admitted the diagram allegedly found in his car, because it was not, "causally connected to, or in any way an exploitation of, the prior illegal search of Bailey's wallet." (*Attachment 3* at 12).

Magistrate Cleary purged any reference to 205 Mohawk Blvd. from the search warrant affidavit, (*Attachment 2*), but it is unclear whether Judge Payne considered the alleged statement that Mr. Bailey resided at 2304 North Boston Place "alone." This is a critical corroborating fact, due to the informant's lack of reliability in this case.

The Informant

Either on November 24th or 25th 2007, depending upon which story we believe,[5] Officers Muse and Snow allegedly encountered Felicia Witherspoon[6] - a known drug offender with a substance abuse problem - standing on the corner of Virgin and Cincinnati, in Tulsa Oklahoma. (*Attachment 1*; *Hearing*, doc. 91 at 25-34, 44-50, 133-135, 143-155). Neither Officer Muse nor Officer Snow articulated

[5] The affidavit for search warrant recounts a conversation wherein Ms. Witherspoon stated she purchased drugs from Mr. Bailey at 6 p.m. on November 24th, but Officer Muse initially testified that he actually encountered Ms. Witherspoon on November 24th. (*Attachment 1*; *Hearing*, doc. 91 at 30-31)

[6] It is unclear whether Officers Muse and Snow were riding in the same patrol car when this encounter occurred. The officers' testimony conflicted again on this subject.

any reason for Ms. Witherspoon's stop other than "a pedestrian violation." (*Hearing*, doc. 91 at 25-34, 44-50, 133-135, 143-155). Both officers testified that Ms. Witherspoon was carrying a crack pipe, and had a misdemeanor warrant for her arrest, but neither of these facts became apparent until *after* the initial stop. (*Hearing*, doc. 91 at 25-34, 44-50, 133-135, 143-155). The officers did not collect the crack pipe she was allegedly carrying or the small baggie allegedly containing drug residue. In fact, Ms. Witherspoon was not even arrested on her outstanding warrant.[7] (*Hearing*, doc. 91 at 25-34, 44-50, 133-135, 143-155).

Officer Muse declared in his affidavit, that Ms. Witherspoon told him of a drug purchase at 2304 Boston Place, in which Mr. Bailey sold the drugs. (*Attachment 1*; *Hearing*, doc. 91 at 25-34, 44-50, 133-135, 143-155). Ms. Witherspoon herself testified, however, that she never even encountered the police officers, and that she certainly did not direct them to a house where drugs were purchased. (*Hearing*, doc. 92 at 29-52).

The Warrant

The search warrant in this case was obtained with an affidavit which: (1) improperly described the premises to be searched,[8] (2) relied on information

[7] It was later learned that Ms. Witherspoon's outstanding warrant was for a felony - not a misdemeanor as the police testified. (*Hearing*, doc. 92 at 33-34).

[8] The affidavit describes a brick house which was painted tan and a brown composition shingle roof, with a glass storm door. (*Attachment 1*). In fact, as testified by the owner of

provided by an informant with 11 prior drug arrests, who was likely high on drugs at the time, and denies ever speaking with police officers or directing them to the premises,[9] (3) provided an incorrect physical description of Mr. Bailey,[10] (4) utilized information from a prior encounter at 205 Mohawk Blvd. which should have been purged,[11] (5) described surveillance activity which could not possibly have occurred given the time constraints of the investigation and the conflicting testimony of the officers involved,[12] (6) described an act of watching Mr. Bailey open the door to let in pedestrians when in fact the affiant never physically saw Mr. Bailey,[13] (7) contained the incorrect year on its face,[14] and (8) was largely

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the house - Genevieve Bailey - the house is stucco with a light-colored roof, and there are bars on the storm door. (*Hearing*, doc. 91 at 20-21).

[9] The affidavit describes Ms. Witherspoon "driving" the officers to the house. (*Attachment 1*). Ms. Witherspoon herself testified that she never encountered the police officers during the time frame involved. (*Hearing*, doc. 92 at 29-52). Also of importance is that Officer Muse claims to have drafted the affidavit with the help of Officer Snow, but Officer Snow denies this. (*Hearing*, doc. 91 at 31, 154).

[10] The affidavit describes Mr. Bailey as around 160 to 180 pounds. (*Attachment 1*). In fact, Mr. Bailey's presentence investigation report indicates that he weighs approximately 220 pounds. (*Attachment 4*).

[11] The affidavit contains information regarding the money discovered on Mr. Bailey at 205 Mohawk Blvd. (*Attachment 1*). Judge Payne subsequently ruled that such evidence should not be taken into consideration. (*Attachment 3*).

[12] The affidavit describes surveillance activity over a period of 72 hours prior to affidavit preparation. (*Attachment 1*). The testimony of Officers Muse and Snow conflicts regarding how much surveillance took place, (*Hearing*, doc. 91 at 37-42,108-109, 151-155), and given the time constraints between meeting Ms. Witherspoon sometime after November 24th at 6:00 p.m. and preparing the affidavit on November 26, 2007, at 3:05 p.m., 72 hours of specific surveillance is implausible.

[13] The affidavit describes pedestrians approaching the premises and, "being let inside by Melvin Bailey Junior." (*Attachment 1*). Under oath, Officer Muse testified he never actually saw Mr. Bailey letting people into the house. (*Hearing*, doc. 91 at 42-44).

[14] The affidavit is dated 2006, when in fact the year was 2007. (*Attachment 1*).

based on Mr. Bailey's past - namely information provided by Officer Henderson - who had dealings with the Mr. Bailey before he changed his ways.[15] These elements combined lead to the inevitable conclusion that the search warrant was invalid.

Exculpatory Testimony Swept Under the Rug

Tulsa Police were consumed with "catching" Mr. Bailey doing something wrong, but the government had no problem turning a blind eye to a man who wanted to do the right thing by telling the truth. Mr. Bailey had a girlfriend - Tiara Crawford - and he stayed with her most nights during the timeframe involved. (*Hearing*, doc. 91 at 118-119; *Transcript*, doc. 86 at 398-400). Because Mr. Bailey no longer stayed at 2304 North Boston Place, he permitted Fred Chapelle - a neighbor who he had known for 20 years, who was enduring a messy divorce - to stay at his place. (*Transcript*, doc. 86 at 420-425).

At trial, despite no requirement to do so, counsel for Mr. Bailey announced to the Court that he would be introducing the testimony of Fred Chapelle, who would testify that he resided at the house, and that he owned the drugs seized. (*Transcript*, doc. 86 at 382-387). The government immediately threatened to prosecute Mr. Chapelle (*Transcript*, doc. 86 at 385), and the Court appointed a

[15] Officer Muse spoke with Officer Henderson, who had no specific knowledge regarding these actual events, and obtained information regarding Mr. Bailey's past dealings, when he was involved in gang activity. (*Hearing*, doc. 91 at 34-37). Officer Muse then included information provided by Officer Henderson in the affidavit. (*Attachment 1*).

public defender.[16] (*Transcript*, doc. 86 at 386-394). Even after speaking with the public defender, Mr. Chapelle was undecided about whether or not he wished to come forward. (*Transcript*, doc. 86 at 389). Fed. R. Crim. Pro. 2 admonishes that the rules are, "to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." By the Court's failure to hear exculpatory testimony, Mr. Bailey was denied such justice.

SUMMARY OF THE ARGUMENTS

Evidence seized in this case should have been excluded as the product of an unconstitutional search, voice identification testimony of Officer Henderson should have been excluded as unreliable and prejudicial, and threats to prosecute witness Frederick Chapelle constituted prosecutorial misconduct.

STATEMENT OF STANDARD OF REVIEW

On appeal from the denial of a motion to suppress, the 10th circuit reviews the factual findings of the district court for clear error, reviewing *de novo* the ultimate determination of reasonableness under the Fourth Amendment. United States v. Villegas, 554 F.3d 894, 898 (10th Cir. 2009). Whether prosecutorial misconduct occurred is a mixed question of law and fact, which the appellate court reviews *de novo*. United States v. Gabaldon, 91 F.3d 91, 94 (10th Cir. 1996).

[16] Counsel for Mr. Bailey advised Mr. Chapelle to consult an attorney, but he refused.

THE DISTRICT COURT IMPROPERLY ADMITTED EVIDENCE AT TRIAL THAT WAS SEIZED FROM 2304 NORTH BOSTON PLACE, IN TULSA, OKLAHOMA, THROUGH THE USE OF AN INVALID SEARCH WARRANT

Several problems existed with the affidavit and search warrant in this case. The Fourth Amendment provides for the right of people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures. The law provides for the suppression of evidence secured as a result of a Fourth Amendment violation. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914).

> The tendency of those executing Federal criminal laws to obtain conviction by means of unlawful seizures and enforced confessions in violation of Federal rights is not to be sanctioned by the courts, which are charged with the support of constitutional rights.

Id. at 390.

Evidence should have been suppressed in this case because it was seized in violation of Mr. Bailey's Fourth Amendment rights. The search warrant failed to specify with sufficient particularity the property to be searched, the evidence unlawfully seized by the affiant officer on a previous encounter also should not have been used to corroborate an otherwise unreliable informant, and the affiant who obtained the search warrant for the premises either falsified information provided to him by a named informant, or acted with reckless disregard for the truth under the standard outlined in Franks v. Delaware, 438 U.S. 154 (1978). *See*

U.S. v. Cortina, 630 F.2d 1207 (7th Cir. 1980); U.S. v. Davis, 714 F.2d 896 (9th Cir. 1983); U.S. v. Leon, 468 U.S. 897 (1984).

The Warrant Failed to Specify with Particularity the Property to be Searched

Both the affidavit and the search warrant in this case failed to state with particularity the place to be searched. (*See Attachment 1*) The house located at 2304 North Boston Place is constructed of brown stucco - not tan painted brick. The roof on the house is light-colored - not brown. The search warrant describes a glass storm door, when in fact, the door has heavy bars, and there is no mention of security cameras on the house, when they are clearly visible from the street. If the affiant had conducted surveillance on the property, as he stated in his affidavit and testified at the suppression hearing, he would have clearly noticed these differences. (*Attachment 1*; doc. 15).

The sufficiency of description is determined by asking whether executing officers would be able to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that other premises might be mistakenly searched. U.S. v. Lora-Solano, 330 F.3d 1288 (10th Cir. 2003); Steele v. U.S., 267 U.S. 498 (1925); Anderson v. Maryland, 427 U.S. 463 (1976). When the description in the warrant is so ambiguous that it allows officers to speculate about whether they are reasonably certain that the place is correctly described, a violation of the Fourth Amendment may arise.

> …depending on the circumstances of the particular case, a warrant may be so facially deficient - *i.e.*, in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid.

United States v. Leon, 468 U.S. 897, 899 (1984).

In Groh v. Ramirez, 540 U.S. 551 (2004), a case in which the warrant described the dwelling to be searched as simply a "single dwelling residence ... blue in color," and failed to specify the items to be seized, the Supreme Court held that the particularity requirement had not been met. The Sixth Circuit also stated, in United States v. Lemmens, 527 F.2d 662, 666 (6th Cir. 1976), that, "…the Fourth Amendment 'safeguard is designed to require a description which particularly points to a definitely ascertainable place so as to exclude all others.'(Citation omitted)."

The Court herein erroneously decided that descriptive differences were insignificant. Considering that no numbers were on the house itself (*Response in Opposition to Motion to Suppress*, doc. 18 (attachment B)), the Court's conclusion that a correct address with physically absent markers (i.e., no display of numbers) and *partially* correct descriptors cured deficiencies in particularity was improper.

Evidence from a Previous Encounter with the Defendant Should be Excluded

Evidence unlawfully seized by the affiant officer on a previous encounter with Mr. Bailey was improperly used to corroborate the otherwise unreliable information provided by an informant. Statements acquired through the prior

encounter between Officer Muse and Mr. Bailey were used to bolster the strength of the affidavit itself, since Officer Muse admitted at the suppression hearing that he did not actually see Mr. Bailey open the door of 2304 North Boston Place so that pedestrian traffic could enter and allegedly purchase drugs. (*Hearing*, doc. 91 at 42-44). Without the implausible statement given during the prior encounter that Mr. Bailey "lived at 2304 North Boston Place," and that he "lived alone," there would be no basis for the warrant or the charges against Mr. Bailey.

Magistrate Cleary and Judge Payne differed in their opinions regarding what transpired during the prior encounter, and as a result, what evidence should be admitted or purged from the Affidavit for Search Warrant.[17] Through the examination of Magistrate Cleary's Report and Judge Payne's Opinion, however, it appears that any statement made by Mr. Bailey that he "lived alone" at 2304 North Boston Place was suppressed by the Court's ruling. Magistrate Cleary purged any reference to, or evidence obtained from the encounter at 205 Mohawk Blvd., and declined to consider it in making a probable cause determination. (*Attachment 2* at 6-19). Judge Payne determined that evidence of money contained within Mr. Bailey's wallet should be suppressed, but a diagram allegedly found in Mr. Bailey's car was admissible. (*Attachment 3* at 7-12). Judge Payne's Order mentioned nothing about the statement by Mr. Bailey that he "lived alone," however, and

[17] These facts are more fully outlined in the Statement of Facts section, above.

otherwise adopted the Report of Magistrate Cleary. (*Attachment 3* at 13). Judge Payne noted that he also declined to consider the 205 Mohawk encounter or Officer Muse's statement that he witnessed Mr. Bailey opening the door to 2304 North Boston Place in making his probable cause determination.

Consideration of this encounter for affiant reliance is discussed in further detail below. *Any* reference to the 205 Mohawk Blvd., however, should have been purged from consideration at trial. Admission of such testimony was clearly erroneous and prejudicial to Mr. Bailey. Under the principles of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the reasonableness of a search or seizure depends on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 20. *See* United States v. Holt, 264 F.3d 1215, 1220 (10th Cir. 2001).

The conflicting testimony of two officers who were present during the prior encounter demonstrates the lack of reasonable relation in scope to the circumstances.[18] Mr. Bailey was not even arrested as a result of this remote encounter. As such, even reference to the diagram should have been excluded, and

[18] As outlined in the Statement of Facts, above, the officers' testimony conflicted in every area - from how many people were present, to whether their lights were turned on, to even when the actual encounter occurred.

inclusion of any reference to the 205 Mohawk encounter at Mr. Bailey's trial constituted prejudicial error.

The Search of 2304 North Boston Place was Improper under the Franks Standard

Under the standard articulated in Franks v. Delaware, 438 U.S. 154 (1978), affiant Officer Muse either falsified information provided to him by a named informant, or acted with reckless disregard for the truth. The affidavit is fraught with inconsistencies, inaccurate information and omissions such that it cannot reasonably be relied upon under the totality of the circumstances.

Pursuant to Franks, where a defendant makes a substantial preliminary showing that a false statement "knowingly and intentionally," or "with reckless disregard for the truth," was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. Franks at 155-156. If, at that hearing, the allegation of false statements or reckless disregard "is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Franks at 156.

Mr. Bailey was not afforded the proper protection under Franks. At the suppression hearing, it was clearly established that information obtained from the prior encounter that Mr. Bailey "lived alone" at 2304 North Boston Place, and a statement in the affidavit by Officer Muse that he physically saw Mr. Bailey open the door to 2304 North Boston Place while conducting surveillance were either false or made with a reckless disregard for the truth. Magistrate Cleary and Judge Payne both declined to consider these items. The remaining affidavit, after purging these items, is woefully inadequate, however, and the District Court erred in determining that it was sufficient to establish probable cause.

After removing the statement obtained from the prior encounter, and the affidavit statement by Officer Muse that he physically saw Mr. Bailey open the door to 2304 North Boston Place, the remaining affidavit stands upon a telephone conversation between Officer Muse and Officer Jeff Henderson regarding things Mr. Bailey had done in the remote past, officers viewing out-of-state license plates at a residence over the Thanksgiving weekend,[19] and the uncorroborated testimony of an informant with a substance abuse problem and eleven prior convictions.

Omissions by Officer Muse with Regard to Informant

Officers Muse and Snow allegedly encountered Felicia Witherspoon on November 24th or 25th, 2007, as more fully discussed in the Statement of Facts,

[19] It should be noted that these plates were never traced. (*Hearing*, doc. 91 at 39-40).

above. They eventually determined she had an outstanding warrant against her, and was carrying a crack pipe and a baggie containing drug residue. Officers Muse and Snow both assert that the outstanding warrant against Ms. Witherspoon was for a misdemeanor, but it was later learned that it was an outstanding felony warrant.

In Oklahoma, pursuant to 22 Okl.St.Ann. § 172, "…a warrant of arrest is an order in writing, in the name of the state, signed by a magistrate, ***commanding the arrest*** of the defendant." (*emphasis added*). Warrants must contain the following language:

> …you are therefore ***commanded*** forthwith to arrest the above named C. D. and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

(*emphasis added*).

When encountering Ms. Witherspoon, especially since she faced a felony warrant, Officers Muse and Snow had no discretion in whether to arrest her. They were *commanded* to do so. After discovering the warrant, and further discovering drug paraphernalia on Ms. Witherspoon, however, they chose not to make an arrest. After being forced to sit in a police vehicle for a period of 15-20 minutes, the officers allege that Ms. Witherspoon provided them with information about Mr. Bailey. Even if this were true, Officer Muse conveniently failed to mention the "deal" he had struck with Ms. Witherspoon in his affidavit.

Officer Muse's failure to mention that he offered Ms. Witherspoon a "deal" in exchange for information regarding Mr. Bailey is an "omission." The omission of facts material to a magistrate's determination of probable cause constitutes a misrepresentation or a misstatement because it interferes with the ability of the magistrate to consider the "totality of circumstances," as required by Illinois v. Gates, 462 U.S. 213 (1983). The 10th Circuit described this concept in the case of Stewart v. Donges 915 F.2d 572, 582 -583 (10th Cir. 1990), as follows:

> Prior to the time of plaintiff's arrest in this case, the Tenth Circuit had not addressed whether the standards of *Franks* governed omissions as well as affirmative misstatements. However, several of the other circuits had indicated that the "deliberate falsehood" and "reckless disregard" standards of *Franks* applied to material omissions, as well as affirmative falsehoods… (citations omitted). Therefore, we hold that at the time defendant submitted his affidavit and arrested plaintiff, it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause.

Federal courts have held that facts undermining an informant's credibility should be related to the magistrate issuing the warrant so he might adequately assess credibility under Franks. *See, e.g.*, United States v. Rule, 594 F.Supp. 1223 (D. Ma. 1984); United States v. Reivich, 610 F.Supp. 538 (W.D. Mo. 1985) [officer's omission from affidavit of the "deal" offered to his informants constituted "reckless disregard" for truthfulness]; State v. Van Pieterson, 550 So.2d 1162 (Fla.

App. 1989) [failure to advise issuing magistrate of "deal" with CI, or inconsistency of his stories implicating the accused].

Under Franks, when a statement is held to be made with reckless disregard for the truth, the affidavit's false material is set to one side, and the remaining content is tested for probable cause. Id. at 156. This procedure is unworkable for an omission, however, so instead of setting the material to the side, the omitted truths are inserted, and probable cause is then tested. Stewart v. Donges, 915 F.2d 572, 583 (10th Cir. 1990).

After removing (1) the information gleaned from 205 Mohawk Blvd. that Mr. Bailey "lived alone" at 2304 North Boston Place, and (2) the affidavit testimony of Officer Muse that he witnessed Mr. Bailey opening the door of 2304 North Boston Place, and inserting (3) a statement that Officer Muse obtained information from Ms. Witherspoon by offering her a "deal" to avoid arrest, it is clear that the affidavit was inadequate. The Magistrate, therefore, was not given the opportunity to assess probable cause under the "totality of the circumstances."

Other Evidence of Reckless Disregard

Even without the inclusion of information regarding the "deal" struck between Officer Muse and Ms. Witherspoon, so many other false statements, or statements made with reckless disregard for the truth, are present in the affidavit that probable cause for a search could not possibly have existed.Not only did the

alleged informant testify at the suppression hearing that she never encountered the police at all, but there is an absolute lack of documentation by the police that any surveillance was conducted in order to corroborate the veracity of Ms. Witherspoon's alleged tip to the police. In fact, the testimony of Officer Muse and Officer Snow directly conflicts in this regard, with Muse testifying that he, "…made every effort possible when he wasn't doing something else to watch the house," (*Hearing*, doc. 91 at 109, lines 4-6), and Officer Snow testifying that he did not specifically remember doing surveillance on the property, and that he did not see Mr. Bailey inside the house. (*Hearing*, doc. 91 at 155, lines 9-17).

When judging information provided by an informant as the foundation supporting probable cause for a search warrant, the District Court considers an informant's veracity, reliability, and basis of knowledge as relevant factors in assessing whether, "given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Mathis, 357 F.3d 1200, 1205 (10th Cir. 2004) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). When there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant, United States v. Danhauer, 229 F.3d 1002, 1006 (10th Cir. 2000), but that is not the case here, where the police - if they

conducted surveillance at all - only did so for an extremely brief period of time, and did not actually view Mr. Bailey at the premises.

In the recent 6th Circuit case of United States. v. Higgins, 557 F.3d 381 (6th Cir. 2009), the Court, in a somewhat similar factual scenario, examined the veracity of an informant who gave statements to police after they discovered drugs in his car. After noting that this gave the informant an incentive to cooperate with the police to help himself, the Court held that the police did not sufficiently corroborate the statements of the informant, under the totality of the circumstances test, holding, "…the district court erred in its conclusion that this warrant was supported by probable cause." Id at 390.

In the case of United States v. Danhauer, 229 F.3d 1002 (10th Cir. 2000), the Court held that, where, "…the only police corroboration of the informant's information was the affiant's verification of the… residence's physical description, a records check to confirm that the [accused] resided at the premises in question, an observation of [the accused] coming and going from the house to the garage, and a search of the [accuseds'] criminal histories…," the affiant, "…neither established the veracity of the informant, nor obtained sufficient independent corroboration of the informant's information." Id. at 1006.

Not only is the credibility of the informant in serious doubt in this case, but the police in no way conducted sufficient surveillance or independent investigation

to corroborate her alleged statements. The face of the affidavit itself demonstrates this reckless disregard.

The affidavit begins with statements regarding informant Felicia Witherspoon. It states how the officers came into contact with her, her dealings with a man named only as "Pooh," and discusses an alleged buy "Pooh" made at 2304 North Boston Place on November 24, 2007. The informant allegedly describes "Ojo" Bailey as around 5 feet 10 inches tall, with light skin and braided hair, weighing around 160-180 pounds. The affidavit further states that Ms. Witherspoon drove the officers to the residence and pointed to a tan brick house with a brown shingle roof. (*Attachment 1*).

Each and every one of these statements is either false or made with reckless disregard for the truth. To begin with, Ms. Witherspoon herself has testified that she never came into contact with *any* Tulsa police officers during Thanksgiving weekend of 2007. (*Hearing*, doc. 92 at 29-52). She is certain of this, because she had a felony warrant outstanding, and any police officer would have arrested her. She testified to this at the suppression hearing, and Larry Edwards, the attorney who represented Mr. Bailey on state court charges, also corroborated her testimony. (*Hearing*, doc. 91 at 61-75). Even the two officers who allegedly encountered Ms. Witherspoon gave conflicting stories under oath, with Officer

Muse stating that she was stopped for a "pedestrian check" and Officer Snow stating that she must have had some sort of pedestrian violation.[20]

Furthermore, the timeline during which Officer Muse conceivably could have encountered Ms. Witherspoon while conducting the surveillance he claims to have conducted over the previous 72 hours is impossible. Officer Muse claims that Ms. Witherspoon told him she witnessed the alleged buy on November 24, 2007, at 6:00 p.m. He also testified that he encountered Ms. Witherspoon on his shift, which began at 4:00 p.m., on either November 24 or 25, 2007. He further testified, and swore under oath in his affidavit, that he observed the house located at 2304 North Boston Place for 72 hours. Given that the affidavit was executed on November 26, 2007, at 3:05 p.m., (*Attachment 1*) all of these activities could not possibly have occurred during a 72 hour period.

Also, the person identified as "Pooh" in this affidavit has never been identified by a proper name or charged, and has never been called to testify in conjunction with this case. Also, while Ms. Witherspoon admittedly knows Mr. Bailey as "Ojo" because he previously worked at a convenience store she frequented, (*Hearing*, doc. 92 at 29-52), she clearly never identified him on this night, because the description allegedly taken by Officer Muse is wrong. Officer

[20] Both officers point to an outstanding warrant and drug paraphernalia on Ms. Witherspoon's person, however neither of these pieces of information would have been known at the time the initial stop was made, since the officers did not know her name yet, and the crack pipe she was allegedly carrying was concealed.

Muse's notes from that night contain a reference only to someone name "Old Joe," who is "40-50 years old" and weighs only 160 to 180 pounds. Mr. Bailey was in his early thirties at this time, and weighed 220 pounds. (*Attachment 4*).

Reports are also clearly lacking with regard to Ms. Witherspoon. There are no police reports, other than Officer Muse's little spiral notebook, from conversations with her. A TRACIS report was run by Officer Muse at 5:02 p.m on November 25, 2007, (*Hearing*, doc. 91 at 64-66). This means however, that if she witnessed a drug sale at 6:00 p.m, it would have occurred on November 24, 2007. If the officers did not encounter Ms. Witherspoon, then, until November 25, 2007, there was no way for them to conduct corroborating surveillance for 72 hours, as Officer Muse asserts in the affidavit.

Additionally, Ms. Witherspoon lacks reliability. The government wishes to rely upon her as an informant, when she was abusing drugs and would say anything to avoid arrest, yet when she came to court, from a drug rehabilitation program, (*Hearing*, doc. 92 at 29-53), sober, to testify that she never witnessed a drug purchase involving Mr. Bailey, they assert her testimony is unbelievable. It cannot cut both ways.

At the time Officer Muse alleges to have encountered Ms. Witherspoon, she had a felony warrant outstanding against her. *If* the officers encountered her on the street, they were *commanded*, without discretion, to arrest her. And what

happened with the crack pipe Ms. Witherspoon was allegedly carrying, or the baggie which appeared to contain drug residue? It was never collected by the officers, and it was never turned into the evidence room. (*Hearing*, doc. 91 at 103).

Officer Muse goes on to state in his affidavit that Ms. Witherspoon directed the officers to a house located at 2304 North Boston Place. Officers Muse and Snow have conflicting stories regarding how this occurred, however. Officer Muse claims to have attempted to intentionally mislead Ms. Witherspoon while she was allegedly directing the officers to the house. (*Hearing*, doc. 91 at 44-46). Officer Snow, on the other hand, testified that Ms. Witherspoon directed the officers to the house, "the best she could." (*Hearing*, doc. 91 at 152).

Officer Muse's affidavit continues by describing a records check on 2304 North Boston Place which revealed that Mr. Bailey listed it as his address with the Tulsa Police Department. The affidavit lists a TRACIS description of Mr. Bailey and his alias - "Ojo", then describes the 205 Mohawk Blvd. encounter. (*Attachment 1*). These statements are also false, made with reckless disregard for the truth, or purged from the affidavit. While a records check would likely have revealed 2304 North Boston Place as a residence for Mr. Bailey, the physical description, as mentioned above, no longer matches him. In addition, this

statement relies heavily on the aforementioned 205 Mohawk Blvd. encounter, which *both* Magistrate Cleary and Judge Payne excluded from consideration.

The affidavit goes on to describe a utilities check, which allegedly returned Genevieve Bailey - Mr. Bailey's mother - as the person responsible for the bills at the residence. Again making reference to 205 Mohawk Blvd., Officer Muse relays that Mr. Bailey told him that he is the "sole occupant" of the house. (*Attachment 1*). With regard to this so-called "consensual encounter," which is excluded anyway, it is more than unlikely that a person would ever tell the police, "I am the sole occupant of 2304 North Boston Place," especially since it has already been established that Fred Chapelle was residing at 2304 North Boston Place at the time.

The affidavit continues by describing the aforementioned surveillance allegedly conducted on the premises during the previous 72 hours. The affidavit then describes a telephone conversation between Officer Muse and Officer Jeff Henderson during which Officer Henderson told him that he had conducted various narcotics investigations on Mr. Bailey. (*Attachment 1*). As with the informant, there are also no police reports from the surveillance allegedly conducted. This was Thanksgiving weekend 2007, and Mr. Bailey resided, at one time, with his family in Texas. (*Attachment 4*). It is not unexpected, therefore, that there would be Texas license plates on cars in the driveway on this particular weekend. And ultimately, we return to where this brief began - a statement of Officer Jeff

Henderson, who never wanted to allow Mr. Bailey to escape his past in the first place. He had no personal knowledge whatsoever regarding the facts surrounding this particular case, yet put his two cents into the affidavit to bolster an otherwise weak showing of probable cause.

The fact that Ms. Witherspoon allegedly provided information in exchange for freedom is a critical omission which should be inserted into the affidavit. Even without it, however, the affidavit is critically lacking. The affidavit pursuant to which the search occurred contains so many false statements and/or statements made with reckless disregard for the truth that no warrant upon probable cause should ever have been issued.

THE DISTRICT COURT IMPROPERLY ADMITTED THE VOICE IDENTIFICATION TESTIMONY OF OFFICER JEFF HENDERSON

At trial, Officer Jeff Henderson was permitted to testify that he had an encounter with an informant, who was under arrest at the time, during which the informant allegedly called Mr. Bailey to arrange a "drug buy." (*Transcript*, doc. 85 at 304-306). Officer Henderson testified that he recognized Mr. Bailey's voice on the other end of the telephone line, even though the phone call was heard over the speaker of a cellular telephone, and Officer Henderson had not spoken with Mr. Bailey in at least eight years. (*Transcript*, doc. 85 at 304). This telephone call was never recorded. (*Transcript*, doc. 85 at 302). Furthermore, Officer Henderson is not a voice recognition specialist, (*Transcript*, doc. 85 at 305), and it is utterly

implausible that a person could specifically recognize a voice that he had not heard in at least eight years. While Officer Henderson relied on the informant's assertion to him that he was indeed placing a call to Mr. Bailey, the number was never cross-referenced and no attempt was made to confirm that Mr. Bailey's telephone number was indeed the one called. (*Transcript*, doc. 85 at 303-304). While a lay witness need only be minimally familiar with a defendant's voice before offering an identification, U.S. v. Parker, 551 F.3d 1167 (10th Cir. 2008), Officer Henderson's last encounter with Mr. Bailey was so remote in time in comparison with the instant action that his familiarity with Mr. Bailey's voice could not even be described as minimal. This case is particularly problematic because the investigation admittedly never culminated in an arrest. (*Transcript*, doc. 85 at 303). Mr. Bailey was also not afforded the opportunity to confront the informant who allegedly placed the call.

Pursuant to Fed. Rules of Evid. § 404(b), evidence must be related to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This phone call does not reliably fall within any of these criteria, and therefore it was erroneously admitted at trial. Even if relevant, it is too remote in time, and therefore more prejudicial than probative under the Fed. Rules of Evid. § 403 balancing test.

THE GOVERNMENT ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT BY THREATENING TO PROSECUTE FREDRICK CHAPELLE IF HE TESTIFIED THAT THE NARCOTICS SEIZED FROM 2304 NORTH BOSTON PLACE, IN TULSA, OKLAHOMA, BELONGED TO HIM

As outlined in the Statement of Facts, above, the person who actually resided at 2304 North Boston Place when the search warrant in this case was executed - Fredrick Chapelle - was prepared to testify at trial that the drugs seized at the residence actually belonged to him. In an overabundance of caution, trial defense counsel made a point to notify the Court and U.S. Attorney Litchfield about the content of Mr. Chapelle's testimony prior to his taking the stand. In response, Judge Payne insured that a public defender was appointed to Mr. Chapelle, and U.S. Attorney Litchfield immediately threatened to prosecute him:

> MR. LITCHFIELD: …But I can tell you, judge, that if Mr. Chapelle, you know, takes responsibility for the dope in Mr. Bailey's house, he'll get probably charged up with that. So I don't want there to be any confusion about that.

(*Transcript*, doc. 86 at 385, lines 10-14). Mr. Chapelle became afraid, and after consultation with a public defender, he decided to invoke his Fifth Amendment rights if questioned regarding ownership of the drugs (*Transcript*, doc. 86 at 382-394).

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S.Ct. 940, 947 (U.S.N.Y.,1982). In a

prosecutorial misconduct case, "the relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (U.S.Fla. 1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

There is no doubt that the threats of Attorney Litchfield toward Mr. Chapelle completely changed the direction and outcome of this case. Had Mr. Chapelle testified that the drugs found where *he was living* were indeed his own, Mr. Bailey would not be where he is today. As such, the actions of the prosecutor involved herein led to an unfair trial, and a denial of due process to Mr. Bailey.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the complex issues presented by this case, counsel believes the Court's decisional process will be aided by oral argument.

CONCLUSION

Mr. Bailey is a reformed man, who was attempting to do good things in his life. He no longer even resided at 2304 North Boston Place on a permanent basis, instead spending the nights with his girlfriend, Tiara Crawford. Because he did not stay there often, he was neighborly, and allowed a friend who was going through a bad divorce to live there. His neighbor, Mr. Chapelle, was prepared to testify at trial that the drugs that were seized from 2304 North Boston Place were his, not

Mr. Bailey's, but thanks to the announcement by Mr. Bailey's counsel that he would be introducing this evidence, the government threatened Mr. Chapelle, and his public defender eventually dissuaded him.

Setting aside any reference to Mr. Chapelle, the affidavit upon which the search warrant in this case was issued failed to meet the Franks standard. It was fraught with false statements, statements made with reckless disregard for the truth, and obvious omissions. Under the totality of the circumstances test, therefore, the affidavit and resulting search warrant fail.

Finally, the reemergence of Officer Henderson as a "player" in this case is regretful. He had no specific involvement in this investigation, yet he was permitted to inform upon the affidavit upon which the warrant was issued. He was also permitted to insert his "two cents" with regard to the telephone call discussed above. Officer Henderson's testimony should clearly have been excluded.

After making the adjustments to the affidavit which are required by law, as discussed herein, and excluding Officer Henderson's irrelevant and prejudicial testimony, it is clear that the residence located at 2304 North Boston Place was searched without probable cause, and Mr. Bailey has been wrongfully convicted.

Mr. Bailey's sentence should be reversed, and his case remanded to the district court for proceedings consistent with the exclusion of previously admitted evidence.

Respectfully submitted,

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By: _____
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(Digital)

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I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee VirusScan, version 8.1, updated 12/15/08, and, according to the program, is free from viruses.

By: _____
Dorie Christian
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF** was furnished by U.S. Mail to the following on this the 20th day of April, 2009:

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Additionally, on the same date, a copy of the digital submission in electronic form was emailed to Assistant United States Attorney Leena Alam at: leena.alam@usdoj.gov.

By: _____
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(Digital)

AFFIDAVIT FOR SEARCH WARRANT - Uniform Controlled Dangerous Substance Act ORIGINAL

STATE OF OKLAHOMA, } ss. IN THE DISTRICT COURT
COUNTY OF TULSA, }

THE STATE OF OKLAHOMA, Plaintiff, SW-2007-491

VS. No.

MELVIN LOUIS BAILEY JUNIOR B/M

Defendant,

District Court
FILED
DEC 06 2007
SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

AFFIDAVIT FOR SEARCH WARRANT

The undersigned affiant, being duly sworn, upon oath says: that in Tulsa County, Oklahoma, at and upon or within a certain vehicle, house, building, or premises, the curtilage thereof and the appurtenance thereto belonging, described as follows:

THE STRUCTURE TO BE SEARCHED IS A SINGLE STORY RESIDENCE LOCATED ONE-HOUSE NORTH OF EAST XYLER STREET NORTH, ON THE WEST SIDE OF NORTH BOSTON PLACE. THE RESIDENCE TO BE SEARCHED HAS A SLOPED BROWN COMPOSITION SHINGLE ROOF. THE RESIDENCE IS CONSTRUCTED OF BRICK PAINTED TAN. THE RESIDNECE TO BE SEARCHED HAD NO VISABLE HOUSE NUMBERS ON THE EAST SIDE OF THE RESIDENCE. THE FRONT DOOR IS ON THE EAST SIDE OF THE HOUSE AND FACES EAST. A GLASS STORM DOOR SHROUDS THE FRONT DOOR. THIS ADDRESS IS MORE COMMONLY KNOWN AS 2304 NORTH BOSTON PLACE, CITY AND COUNTY OF TULSA, STATE OF OKLAHOMA.

The named defendant, or other persons in whose possession he has placed the following described property for concealment, does now unlawfully, illegally, knowingly and willfully keep, and does unlawfully have in his possession and under his control certain dangerous substances, to wit:

Cocaine and cocaine base, fruits and instrumentalities utilized in the use, sale and distribution of cocaine and cocaine base, monies derived from the sale of cocaine and cocaine base, records indicating sales of illegal drugs, surveillance equipment, weapons used for protecting the illegal enterprise, unexplained wealth, drug proceeds and proof of residency.

Listed in the schedules of the Uniform Controlled Dangerous Substance Act of the State of Oklahoma, with the unlawful intent to possess, use and distribute said substances in violation of the laws of the State of Oklahoma

Affiant further states that said dangerous substances by reason of their physical structure are easily destroyed, and that there is likelihood that the person in possession of the same will attempt to destroy them, and that there is further likelihood that the aforesaid controlled dangerous substance, equipment, and paraphernalia will be moved unless a search warrant may be executed during **daytime, 6:00A.M. – 10:00P.M.**

YOUR AFFIANT FURTHER STATES:

THAT HE IS A TULSA POLICE OFFICER FOR THE CITY OF TULSA POLICE DEPARTMENT AND HAS BEEN SO EMPLOYED FOR THREE YEARS. YOUR AFFIANT FURTHER STATES THAT IN DECEMBER 2002 HE GRADUATED FROM SOUTHERN NAZARENE UNIVERSITY WITH A BACHELORS OF SCIENCE DEGREE IN PSYCHOLOGY. YOUR AFFIANT IS PRESENTLY ASSIGNED TO UNIFORM DIVISION NORTH. YOUR AFFIANT FURTHER STATES THAT HE HAS BEEN TRAINED IN THE RECOGNITION OF CONTROLLED DANGEROUS SUBSTANCES BY THE TULSA POLICE ACADEMY AND THE COUNCIL ON LAW ENFORCEMENT EDUCATION AND TRAINING. YOUR AFFIANT FURTHER STATES THAT HE HAS RECEIVED ADDITIONAL TRAINING WHILE WORKING WITH MORE EXPERIENCED NARCOTIC INVESTIGATORS, AND THAT HE HAS PARTICIPATED IN OVER 200 ARRESTS INVOLVING CONTROLLED DANGEROUS SUBSTANCES

YOUR AFFIANT FURTHER STATES THAT OFFICERS WITH THE TULSA POLICE DEPARTMENT CAME INTO CONTACT WITH FELICIA WITHERSPOON. WITHERSPOON HAS ELEVEN PREVIOUS DRUG ARREST IN THE CITY OF TULSA. WITHERSPOON TOLD ME THAT SHE WAS AT 2304 NORTH BOSTON PLACE WITHIN THE LAST 72 HOURS, AND WATCHED A LIGHT SKINNED BLACK MALE SHE KNOWS AS "OJO" SELL WHAT SHE TOLD ME WAS A QUARTER OF AN OUNCE OF CRACK COCAINE TO A MAN SHE KNEW AS "POOH". SHE TOLD ME THAT SHE KNOWS THAT A QUARTER OUNCE WEIGHS APPROXIMATELY 7 GRAMS. SHE SAID "POOH" THEN SOLD HER A "ROCK" OF CRACK COCAINE FROM THE SACK SHE SAW HIM BUY FROM "OJO", AND SHE SMOKED IT WITH "POOH". WITHERSPOON HAD KNOWLEDGE ON THE SALE AND DISTRIBUTION OF CRACK COCAINE, AND THOROUGHLY CONVINCED YOUR AFFIANT ON HER KNOWLEDGE OF IT, ITS PACKAGING, ITS WEIGHING, ITS DISTRIBUTION, AND ITS USE. WITHERSPOON THEN RELAYED THE FOLLOWING:

- THAT SHE HAS BEEN GOING TO 2304 NORTH BOSTON PLACE WITH "POOH" FOR SEVERAL MONTHS FOR THE PURCHASE OF CRACK COCAINE.
- THAT SHE SAW "POOH" PURCHASE THE CRACK COCAINE FROM A LIGHT SKINNED BLACK MALE SHE KNEW AS "OJO".
- THAT "OJO" IS AROUND 5 FEET 10 INCHES TALL, LIGHT SKINNED, AND WEIGHED AROUND 160-180 POUNDS WITH LONG BLACK BRAIDED HAIR.
- THAT "OJO" LIVES AT THIS RESIDENCE WHERE HE DISTRIBUTES CRACK COCAINE.
- THAT THIS RESIDENCE IS CONSTRUCTED OF BRICK, WITH A WOODEN FENCE AROUND THE SOUTH AND BACKSIDE OF THE RESIDENCE
- THAT SHE HAS BEEN TO THIS RESIDENCE SEVERAL TIMES IN THE PAST MONTH WITH "POOH", AND WATCHED HIM PURCHASE CRACK COCAINE.
- THAT SHE BUYS A SMALL PORTION OF THE CRACK COCAINE FROM "POOH" AFTER EACH VISIT.
- THAT "POOH" CUTS THE LARGER ROCKS INTO SMALLER ROCKS, AND THEN SELLS THEM INDIVIDUALLY ON THE EAST SIDE OF TULSA IN AN APARTMENT COMPLEX IN THE AREA OF 10800 EAST 31ST STREET
- THAT SHE PERSONALLY WATCHES "OJO" SELL CRACK COCAINE TO "POOH" EACH TIME THEY VISIT.
- THAT "OJO" SELLS "POOH" AROUND A QUARTER OUNCE OF CRACK COCAINE ON EACH VISIT.
- THAT ON 112407 AT 1800 HOURS SHE RODE WITH "POOH" TO THE RESIDENCE, AND WATCHED HIM BUY APPROXIMATELY A QUARTER OUNCE OF CRACK COCAINE
- WITHERSPOON TOLD ME THAT EVERYTIME SHE HAS STOPPED AT THE HOUSE WITH "POOH", "OJO" ALWAYS HAS CRACK COCAINE. THIS INCLUDES WHEN THEY SHOWED UP UNANNOUNCED.

WITHERSPOON THEN DROVE OFFICERS TO 2304 NORTH BOSTON PLACE, AND POINTED TO A HOUSE WITH TAN BRICK AND A BROWN SHINGLE ROOF.

YOUR AFFIANT CONDUCTED A RECORDS CHECK ON THE RESIDENCE, AND IT REVEALED THAT A BLACK MALE BY THE NAME OF MELVIN LOUIS BAILEY JUNIOR LISTED HIS ADDRESS AS 2304 NORTH BOSTON PLACE WITH THE TULSA POLICE DEPARTMENT. IN TRACIS MELVIN BAILEY JUNIOR IS DESCRIBED AS BEING 34 YEARS OLD, 5 FEET 9 INCHES TALL, AND 167 POUNDS. MELVIN BAILEY JUNIOR LISTED AN ALIAS OF "OJO" WITH THE TULSA POLICE DEPARTMENT. YOUR AFFIANT STOPPED MELVIN BAILEY JUNIOR AT 205 MOHAWK BLVD PREVIOUSLY, AND THAT HE HAD APPROXIMATELY 4500 DOLLARS IN CASH ON HIM, AND A DIAGRAM OF HOW TO MAKE A HIDDEN COMPARTMENT INSIDE THE BED OF A PICKUP TRUCK INSIDE HIS BLACK LEXUS. MELVIN BAILEY JUNIOR TOLD YOUR AFFIANT DURING THIS ENCOUNTER THAT HE WAS SELF-EMPLOYED MELVIN BAILEY JUNIOR HAS BEEN SEEN IN SEVERAL

YOUR AFFIANT STATES THAT A UTILITIES CHECK OF 2304 NORTH BOSTON PLACE SHOWED GENEVIEVE BAILEY IS LISTED AS THE PERSON RESPONSIBLE FOR THE BILLS. THAT A CHECK THROUGH RECORDS SHOWED THAT MELVIN LOUIS BAILEY JUNIOR, AKA "OJO", LISTED HIS ADDRESS AS 2304 NORTH BOSTON PLACE WITH THE TULSA POLICE DEPARTMENT. YOUR AFFIANT WAS TOLD DURING A CONSENTUAL ENCOUNTER WITH MELVIN BAILEY JUNIOR THAT HE IS THE SOLE OCCUPANT AT 2304 NORTH BOSTON PLACE.

YOUR AFFIANT FURTHER STATES THAT WITHIN THE PAST 72 HOURS HE AND OTHER OFFICERS CONDUCTED SURVEILLANCE ON 2304 NORTH BOSTON PLACE IT REVEALED FREQUENT OUT OF STATE (TEXAS) VEHICULAR TRAFFIC ARRIVE, APPROACH THE RESIDENCE AFTER BEING LET INSIDE BY MELVIN BAILEY JUNIOR, AND THEN LEAVE A FEW MINUTES LATER. BEING TOLD BY OFFICER JEFF HENDERSON THAT HE HAS CONDUCTED NUMEROUS NARCOTICS INVESTIGATIONS ON MELVIN BAILEY JUNIOR, AND THAT THESE INVESTIGATIONS REVEALED THAT A BLACK MALE IS BRINGING A LARGE QUANTITY OF NARCOTICS FROM TEXAS TO THIS HOUSE. YOUR AFFIANT STATES THAT THESE MEETINGS ARE INDICATIVE OF DRUG TRANSACTION.

YOUR AFFIANT BELIEVES ALL OF THIS INFORMATION CORROBORATES THE STATEMENTS OF WITHERSPOON.

YOUR AFFIANT FURTHER STAES THAT INDIVIDUALS WHO COMMONLY USE AND OR SELL QUANTITIES OF CONTROLLED DANGEROUS SUBSATNCES HAVE VISITORS, FRIENDS AND CUSTOMERS WHO VISIT THEIR RESIDENCE. YOUR AFFIANT STATES THAT THESE TYPES OF INDIVIDUALS COMMONLY PLACE QUANTITIES OF CURRENCY WITH WHICH TO PURCHASE THE CONTROLLED DANGEROUS SUBSTANCE ON THEIR PERSON. YOUR AFFIANT STATES THAT THESE TYPES OF INDIVIDUALS ALSO COMMONLY PURCHASE QUANTITIES OF CONTROLLED DANGEROUS SUBSTANCES AND SECRET THE PURCHASED QUANTITIES AND ASSOCIATED DRUG PARAPHERNALIA ON THEIR PERSON, IN THEIR CLOTHING AND PERSONAL EFFECTS AS WELL AS THEIR VEHICLES.

YOUR AFFIANT FURTHER STATES THAT BASED ON HIS PRIOR EXPERIENCE ON NARCOTIC INVESTIGATIONS, PEOPLE WHO USE AND SELL CONTROLLED DANGEROUS DRUGS ROUTINELY KEEP CONTROLLED DANGEROUS SUBSTANCES, DRUG PARAPHERNALIA, MONIES, WEAPONS, AND RECORDS RELATING TO THEIR DRUG TRANSACTIONS. YOUR AFFIANT FURTHER STATES THAT IT IS HIS TRAINING AND EXPERIENCE THAT DRUG DEALERS OFTEN USE SURVEILLANCE CAMERAS TO

WARN THEM OF EITHER THE ARRIVAL OF POLICE OR RIVAL DRUG DEALERS COMING TO ROB THEM.

SW-2007-491

YOUR AFFIANT FURTHER STATES THAT BASED ON HIS PRIOR EXPERIENCE ON NARCOTIC INVESTIGATIONS, PEOPLE WHO USE AND SELL CONTROLLED DANGEROUS DRUGS KEEP PARAPHERNALIA, MONIES AND RECORDS OF THEIR TRANSACTIONS YOUR AFFIANT REQUESTS THE ISSUANCE OF A SEARCH WARRANT FOR 2304 NORTH BOSTON PLACE, TULSA, TULSA COUNTY, OKLAHOMA.

FURTHER YOUR AFFIANT SAYETH NOT.

WHEREFORE, Affiant asks that a search warrant issue according to law, directed to any sheriff, policeman or law enforcement officer in Tulsa County, Oklahoma, commanding that he search said persons, premises and/or vehicle, and take possession of all the controlled dangerous substances, equipment and paraphernalia hereinbefore described, and vehicle in which said dangerous substance is unlawfully kept, deposited or concealed.

Affiant J. B.

Subscribed and sworn to before me this 26 day of Nov, 2006. Time: 3:05 pm

Judge of the District Court

Attachment 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 08-CR-26-JHP**
	)	
MELVIN LOUIS BAILEY, JR., a/k/a "Ojo,"	)	
	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Before the Court for report and recommendation is the Motion to Suppress Evidence filed by Defendant Melvin Louis Bailey, Jr. ("Bailey"). (Dkt. #15). The motion came on for hearing on March 25, 2008 and continued on April 17, 2008. The parties filed supplements to their briefs on April 24, 2008. The matter is now at issue.

The parties presented the testimony of eleven witnesses: Officer Jason Muse ("Muse"), the affiant of the search warrant affidavit at issue; Officer Matt Snow ("Snow"), Muse's partner, Felicia Witherspoon ("Witherspoon"), the informant upon whose information the search warrant was based; Genevieve Bailey, Bailey's mother; Elgin Scott, Bailey's co-manager of Club Fahrenheit; Tiara Crawford, Bailey's girlfriend; Larry Edwards, Bailey's attorney in the state court proceedings; Brian Breman, an employee of Parkhills Liquors and Wines; Thomas Mahan ("Mahan"), a house construction and remodeling contractor with whom Bailey worked as a subcontractor; and Officers Ronny Leatherman and Dale Francetic, the officers who executed the subject search warrant. Admitted exhibits included the search warrant affidavit (Def. Ex. 2), photographs of the house at 2304 N. Boston Pl. that was searched (Def. Ex. 1 and Govt. Exs. 1-2), photographs of the house and truck at 205 Mohawk Blvd. (Def. Exs. 6-8), invoices for

Bailey's construction jobs (Def. Exs. 9-10), invoice of liquor purchase from Parkhills Liquors and Wines, dated 11/24/08 at 18:04 (Def. Ex. 5), Muse's notes of his encounter with Witherspoon (Def. Ex. 4), and a record of TRACIS inquiries on Witherspoon (Govt. Ex. 3).

On February 6, 2008, Bailey was indicted for possession of cocaine and cocaine base with intent to distribute and maintaining a drug-involved premises as a result of the search of his unoccupied residence at 2304 North Boston Place on December 4, 2007 ("the search"). The search yielded 317 grams of cocaine base and 390 grams of cocaine. Bailey contends that the evidence seized as a result of the execution of the search warrant issued on November 26, 2007 ("the search warrant") should be suppressed on the following grounds: (1) the search warrant is facially defective, (2) it fails to establish probable cause for the search because the search warrant relies on the illegal seizure of $4500 in cash and the diagram of a hidden compartment by police in a prior encounter with Bailey and information that is false or given in reckless disregard for the truth, and (3) it is stale.

I. Description of the place to be searched.

Bailey contends that the search warrant is insufficient because the description of the house to be searched is incorrect. The warrant describes the place to be searched as follows:

> THE STRUCTURE TO BE SEARCHED IS A SINGLE STORY RESIDENCE LOCATED ONE-HOUSE NORTH OF EAST XYLER STREET NORTH, ON THE WEST SIDE OF NORTH BOSTON PLACE. THE RESIDENCE TO BE SEARCHED HAS A SLOPED BROWN COMPOSITION SHINGLE ROOF. THE RESIDENCE IS CONSTRUCTED OF BRICK PAINTED TAN. THE RESIDENCE TO BE SEARCHED HAD NO VISABLE [SIC] HOUSE NUMBERS ON THE EAST SIDE OF THE RESIDENCE. THE FRONT DOOR IS ON THE EAST SIDE OF THE HOUSE AND FACES EAST. A GLASS STORM DOOR SHROUDS THE FRONT DOOR. THIS ADDRESS IS MORE COMMONLY KNOWN AS 2304 NORTH BOSTON PLACE, CITY AND COUNTY OF TULSA, STATE OF OKLAHOMA.

Exhibit to Defendant's Motion to Suppress Evidence. Bailey notes, and the photographs confirm, that the house at 2304 N. Boston Place is constructed of tan stucco, not tan painted brick, and the roof is light-colored, rather than brown. Bailey also points out that the warrant describes a glass storm door rather than a door with heavy bars and fails to mention the surveillance cameras which are visible from the street. Given these discrepancies and because Muse, the affiant, did not accompany the executing officers, Bailey argues there is a question of whether the executing officers reasonably may have searched the wrong property.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched* and the persons or things to be seized." U.S.CONST. amend. IV (emphasis added). "'The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.' " *United States v. Lora-Solano,* 330 F.3d 1288, 1293 (10th Cir.2003) (quoting *United States v. Pervaz*, 118 F.3d 1, 9 (1st Cir.1997)).

The Court concludes that the description of the location to be searched is sufficient. The search warrant and affidavit accurately describe the location and street address of the house, the direction it faces and the color. There is an outside front door with bars and a frame of glass or plastic that could be described as a storm door. And although the roof is light-colored and appears gray, it is accurately described as a sloped composition shingle roof. "Practical accuracy rather than technical precision controls the determination of whether a search warrant adequately describes the premises to be searched." *United States v. Dorrough*, 927 F.2d 498, 500 (10th Cir.

1991); *Harmon v. Pollock*, 446 F.3d 1069 (10th Cir. 2006) ("We have upheld warrants like the one at issue where one part of the description is inaccurate, but the description has other accurate information to identify the place to be searched with particularity."); *Lora-Solano*, 330 F.3d at 1294 ("A technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched."). In addition, Muse testified that he had surveilled the residence within 72 hours of seeking the search warrant and verified from police records that Bailey resided at that address. Further, the executing officer, Officer Ronny Leatherman, testified that he had no problem locating the house from the description and the address and that Muse had also instructed him as to its location the previous week. Finally, there is no evidence establishing a reasonable probability that another premise might be mistakenly searched.

II. Probable Cause for the Search Warrant

The search warrant was issued by Judge Cliff Smith in the District Court for Tulsa County, State of Oklahoma on November 26, 2008 at 3:03 PM.[1] based on the information set forth in Muse's affidavit. Bailey argues that the evidence secured from the execution of that search warrant must be suppressed because the affidavit fails to establish probable cause to search Bailey's residence.

As noted above, the Fourth Amendment requires "probable cause" before a search warrant may be issued. To determine whether probable cause exists to support a search warrant, a magistrate judge must simply "make a practical, common-sense decision whether, given all the

[1] The actual date on the search warrant and affidavit is November 26, 2006. Muse explained that the 2006 year was mistakenly carried over from a previous form.

circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The magistrate judge's decision to issue a warrant is entitled to "great deference." *Id*. at 236. Thus, the Court "need only ask whether, under the totality of the circumstances presented in the affidavit, the magistrate judge had a 'substantial basis' for determining that probable cause existed." *United States v. Artez*, 389 F.3d 1106, 1111 (10th Cir. 2004); *Gates*, 462 U.S. at 238-39.

A. Burden of proof

The burden of proof in a suppression motion is a preponderance of the evidence standard. *Lego v. Twomey*, 404 U.S. 477, 488-89 (1974); *United States v. Matlock*, 415 U.S. 164, 178 n. 14 (1974) ("[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence."). It is well established that the burdens of production and persuasion generally rest upon the movant in a suppression hearing if the search or seizure was carried out pursuant to a warrant. *United States v. Esser*, 451 F.3d 1109, 1112 (10th Cir. 2006). Thus, it is Bailey's burden to prove that there is no probable cause for the issuance of the search warrant. However, if "the police acted without a warrant, the burden of proof is on the prosecution." *Id*. One such situation is here where the defendant alleges that he did not consent to the warrantless search of his person or car when Muse, Snow and other officers stopped him at 205 Mohawk and thus, the "fruits" of that illegal search, $4500 and a diagram of how to make a hidden compartment in the bed of a pickup truck, cannot be used as supporting evidence to secure the search warrant. *United States v. Ringold*, 335 F.3d 1168, 1171

(10th Cir. 2003) ("[W]henever the government relies on a defendant's consent to validate a search it bears the burden of proving the consent valid."); *United States v. McRae*, 81 F.3d 1528, 1536-37 (10th Cir. 1996) ("If the government seeks to validate a search based on consent, the government bears the burden of proving that the consent was freely and voluntarily given.").

B. Prior encounter

In his affidavit in support of the search warrant, Muse attested to the following regarding a prior encounter with Bailey at 205 Mohawk Blvd ("205 Mohawk"):

> YOUR AFFIANT STOPPED MELVIN BAILEY JUNIOR AT 205 MOHAWK BLVD PREVIOUSLY, AND THAT HE HAD APPROXIMATELY 4500 DOLLARS IN CASH ON HIM, AND A DIAGRAM OF HOW TO MAKE A HIDDEN COMPARTMENT INSIDE THE BED OF A PICKUP TRUCK INSIDE HIS BLACK LEXUS. MELVIN BAILEY JUNIOR TOLD YOUR AFFIANT DURING THIS ENCOUNTER THAT HE WAS SELF-EMPLOYED. . . . YOUR AFFIANT WAS TOLD DURING A CONSENTUAL [SIC] ENCOUNTER WITH MELVIN BAILEY JUNIOR THAT HE IS THE SOLE OCCUPANT AT 2304 NORTH BOSTON PLACE.

Defendant's Ex. 2. Bailey asserts that the evidence from this illegal search cannot be considered in determining whether the affidavit established probable cause for the search of his residence. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("Any evidence obtained as a result of an illegal search and seizure is subject to the exclusionary rule - i.e., the evidence cannot be used in a criminal proceeding against the victim of the illegal search and seizure."); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) ("[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . .is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."). The government responds that the search was not illegal as it was the result of a consensual encounter between Muse and Bailey.

The Tenth Circuit has identified three kinds of police-citizen encounters:

> (1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause.

United States v. Torres-Guevara, 147 F.3d 1261, 1264 (10th Cir. 1998) (internal quotation marks and brackets omitted). It is undisputed that this encounter did not result in arrest or recovery of the currency or diagram. Bailey, however, contends the encounter was an investigative detention entitling him to Fourth Amendment protection, while the government claims that the encounter was consensual and thus not a seizure under the Fourth Amendment. As noted above, it is the government's burden to prove the consensual nature of the encounter.

To determine whether the encounter is a seizure entitled to Fourth Amendment protection,

> a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.

Florida v. Bostick, 501 U.S. 429, 439 (1991). The inquiry is an objective one. *Ringold*, 335 F.3d at 1172. "As long as a reasonable innocent person, as opposed to a person knowingly carrying contraband, would feel free to leave, such encounters are consensual and need not be supported by reasonable suspicion of criminal activity." [2] *United States v. Laboy*, 979 F.2d 795, 798 (10th

[2] The Supreme Court adopted the "reasonable person" test, which presupposes an *innocent* person, to ensure "that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). Some commentators have criticized the "reasonable person" concept applied to search and seizure as fictional, with no basis in reality. *See, e.g.*, Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 39 San Diego L. Rev. 507 (Spring 2001). Steinbock observes that this "reasonable person" standard is "simply out of touch with societal reality. Briefly put, most people have neither the knowledge nor the fortitude to terminate unwanted interactions with the police." *Id*. at 522. He notes that if this "reasonable

Cir. 1992) (citing *Bostick*, 501 U.S. at 434). The Tenth Circuit has identified a nonexhaustive list of factors to consider under this "reasonable person-totality of the circumstances" test:

> 1) the threatening presence of several officers; 2) the brandishing of a weapon by an officer; 3) some physical touching by an officer; 4) use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; 5) prolonged retention of a person's personal effects such as identification and plane or bus tickets; 6) a request to accompany the officer to the station; 7) interaction in a nonpublic place or a small, enclosed place; and 8) absence of other members of the public.

Ringold, 335 F.3d at 1171 (numbers added); *United States v. Hill*, 199 F.3d 1143, 1147-48 (10th Cir. 1999). Additional factors include whether the officer advised the defendant that he need not cooperate and was free to leave. *Torres-Guevara*, 147 F.3d at 1264-65. None of these factors is dispositive, "nor should they be treated as exclusive, and it may be that the strong presence of two or three factors demonstrates that a reasonable person would have believed that he was not

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person resembles any real human being, it is a white, middle-class, educated professional - just like most members of the [Supreme] Court itself." *Id*. at 526.

This same criticism was lodged by Judge McKay in *United States v. Williams*, 356 F.3d 1268 (10th Cir. 2004) (McKay J., dissenting) where he recognized that the judge's subjective interpretation of this "objective" standard results in "differing judgments about the response of the judicially defined 'innocent' person." *Id*. at 1276 ("The reasonable person of our case law has historically come from the minds and experience of judges, not from the record."). In *Williams*, Judge McKay disagreed with the majority's holding that there was no seizure of the defendant although a drug-detection dog "placed her nose in the immediate vicinity of [the defendant's] waist and groin area." *Id*. at 1276.

> When, as in this case, a drug dog shoves its nose in a person's groin, and the person is told that the dog is searching for drugs, the notion that an innocent person would not feel constrained-but free to leave unmolested-strains my credulity. . . .
> At the very least, before we declare such encounters "reasonable," or free from seizure implications, we ought to be informed of how widespread the fear of dogs, far short of cynophobia, is among reasonable and innocent persons. While the "reasonable person" and the "innocent person" are legal fictions created by the courts, before we settle the matter, we ought at least to examine what can be known of common human behavior before we ratify police dog handler behavior which on its face seems repugnant.

Id; *see also United States v. Little*, 18 F.3d 1499, 1508 (10th Cir. 1994) (Logan J., with whom Seymour J. and McKay J. join, dissenting) ("There apparently are no empirical studies of how a reasonable person, a reasonable innocent person, would react in similar circumstances. The 'reasonable person' exists only in the minds of the judges who adjudicate these matters.").

free to terminate an encounter with government officials." *Fuerschbach v. Southwest Airlines Co.*, 439 F.3d 1197, 1203 (10th Cir. 2006) (internal quotation marks omitted). The "reasonable person-totality of the circumstances" test is necessarily imprecise, but the focus is on "the coercive effect of police conduct taken as a whole" on a reasonable person. *Michigan v. Chesternut*, 486 U.S. 567, 573-74 (1988).

The evidence regarding this encounter consisted of the testimony of Muse, Snow and Mahan. Muse testified that approximately two months before the search warrant was issued, he and three other officers in four police vehicles without their lights and sirens on pulled up to where a group of 10-15 black males were standing on the east side of the parking lot of a convenience store at 205 Mohawk. Muse said that they approached the men because 205 Mohawk was known for narcotics sales and he had stopped two people conducting a hand-to-hand narcotics transaction in that same time period. The officers approached the group without their guns drawn. Bailey walked up to Muse and asked why they were bothering these people. Muse decided to pat Bailey down immediately because Bailey approached him and the first thing he does in a high crime area is check for weapons. Muse asked Bailey if he had any weapons on him; Bailey said no. Muse then told him to turn around so he could check him for weapons. While he was restraining both of Bailey's hands, Muse patted Bailey down and felt a bulge in his back pocket and asked him what it was. Bailey responded that it was his wallet. Muse testified that it seemed too big for a wallet and pulled the wallet out and went through it; he found $4500 in cash in the wallet. Muse told Bailey that he shouldn't be carrying that much cash in this area and Bailey responded that people knew him there and no one would mess with him. Muse asked for his name and Bailey told him his name and address and that he lived alone; Muse

remembered Bailey's address because he had heard from several people there was drug trafficking there. Bailey told Muse that he was doing construction on the house next to the parking lot (and from this, Muse assumed that Bailey owned trucks). Muse asked if the black Lexus belonged to him and if there were any weapons or explosives in the car. Bailey said no and Muse asked if they could search the car. Bailey consented and Muse told Snow to look in the vehicle. Muse later found out that Snow had found a diagram of a hidden compartment to be placed in the bed of pickup trucks. The encounter lasted approximately 15-20 minutes. Muse characterized the encounter as consensual as he did not cuff Bailey and the encounter took place in a public area. He stated that he did not tell anyone to sit on the retaining wall between the house and the parking lot, though they did.

Snow testified that the encounter at 205 Mohawk occurred a couple of weeks before their contact with Witherspoon and he was with Muse at the time. Snow said that four officers approached in their vehicles, with police lights flashing and sirens on, 4-5 men who were mulling around in the parking lot near the retaining wall. He testified that Muse, and not he, talked to Bailey and he could not hear their conversation and did not hear Bailey give his address to Muse. Muse told Snow that Bailey had given consent to search the black Lexus and Snow found the diagram of the hidden compartment on the floorboard of the car. Defense counsel asked "Besides Bailey, where were these other citizens?" Snow responded that they were seated on the retaining wall and instructed to remain there until they were allowed to leave by the officers. The encounter lasted 10-20 minutes.

Mahan testified that he had asked Bailey to meet him that day at 205 Mohawk to give him a bid on a roof for the house because Bailey had subcontracted for roofing for Mahan for the

last three years. Mahan said he, Bailey and another guy named Sam who worked with Bailey were taking measurements around the house when four or five cop cars pulled up and approached Bailey and Sam and 5-6 other guys who were hanging out near the retaining wall. The officers told Bailey, Sam and the other men to sit on the retaining wall and remove their shoes and socks, which they did. Except for this, Mahan said he did not hear any of the conversation between the officers and the men. The officers searched everyone. Mahan said he did not see the search of Bailey or his car as the officers did not call him over and so he continued to take measurements of the house, but when he came back around the house he saw that the police had Bailey's money. He did not see the officer give the money back. The encounter lasted 30-35 minutes. Having weighed the evidence and the credibility of the witnesses, the Court makes the following findings. Four uniformed officers in separate cars with their lights and sirens on approached 4-6 men who were congregated around the retaining wall between the house that Bailey was measuring for a new roof and the parking lot. The officers told the men to sit on the retaining wall, to remove their shoes and socks, and to remain there until they were allowed to leave by the officers. When Muse asked Bailey if he had any weapons on him; Bailey said no. Muse then told him to turn around so he could check him for weapons. Muse restrained both of Bailey's hands, while he patted Bailey down. Muse felt a bulge in Bailey's back pocket and asked him what it was. Bailey responded that it was his wallet. Muse testified that it seemed too big for a wallet and so he pulled out the wallet and went through it; he found $4500 in cash in the wallet. Muse then asked if the black Lexus belonged to Bailey and if there were any weapons or explosives in the car. Bailey said no and Muse asked if they could search the car. Bailey said yes and Muse told Snow to look in the vehicle. Snow

found a diagram of a hidden compartment to be placed in the bed of a pickup truck on the floorboard of the car. Neither the diagram nor the $4500 in currency was confiscated. The encounter lasted approximately 15-20 minutes. Considering all the circumstances surrounding the encounter, the Court concludes that a reasonable person would not believe that he was free to leave and that the encounter was an investigative detention and not a consensual encounter. Although the encounter occurred in an open, public space and the officers did not brandish their weapons, they exhibited a clear "show of authority" when, uniformed and armed, they descended upon Bailey and the other men in four patrol cars with sirens on and lights flashing. *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991). In a further show of authority the officers instructed Bailey and the other men to sit on the retaining wall and remove their shoes and socks. A reasonable person would not feel free to walk away under these conditions, particularly barefoot. Further, there is no testimony that Muse or any of the other officers informed Bailey that he did not need to cooperate and was free to leave. And when Bailey answered that he did not have a weapon, Muse physically restrained Bailey's hands, while he patted Bailey down and removed his wallet. It is not surprising then that Bailey acquiesced in Muse's request to search his car for explosives and weapons. Contrary to the government's argument, this is not a case in which the officers "merely approaching an individual on the street or in another public place, . . . ask[] him if he is willing to answer some questions, [or] . . . put[] questions to him if the person is willing to listen." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Although no single factor is dispositive, the totality of the circumstances convinces the Court that the police conduct here "'would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" *Gallegos v.*

City of Colorado Springs, 114 F.3d 1024, 1028 (10th Cir. 1997) (quoting *Bostick*, 501 U.S. at 439). The encounter was a seizure and thus Bailey was entitled to the protections of the Fourth Amendment.

As there has been a seizure, the Fourth Amendment requires that the seizure be reasonable. *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (Fourth Amendment prohibits unreasonable seizures). The existence of probable cause is required for formal arrests or seizures that resemble formal arrests to be reasonable. *Gallegos*, 114 F.3d at 1028. However, "[r]ecognizing that police officers must often act before probable cause can be determined, . . . the Supreme Court adopted an intermediate approach in *Terry* [*v. Ohio*, 392 U.S. 1 (1968)]," for an investigative detention or "*Terry* stop," which requires less than probable cause. *United States v. Perdue*, 8 F.3d 1455, 1461 (10th Cir. 1993). Under such circumstances, a two-prong test is applied to determine the reasonableness of investigatory detentions.

First, the Court must decide if the detention was "justified at its inception." *United States v. Johnson*, 364 F.3d 1185, 1189 (10th Cir. 2004) (quoting *Terry*, 392 U.S. at 20). The government "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id*. (quoting *Terry*, 392 U.S. at 21). "Those facts must tend to show that the detainee had committed or is about to commit a crime." *Id*. "Neither 'inarticulate hunches' nor 'unparticularized suspicion' will suffice to justify an investigatory detention. *Gallegos*, 114 F.3d at 1028 (quoting *Terry*, 392 U.S. at 27).

Second, the officers' actions must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20; *Gallegos*, 114 F.3d at

1028; *Johnson*, 364 F.3d at 1189.

> *Terry* stops must be limited in scope to the justification for the stop. Officers may ask the detained individual questions during the *Terry* stop in order to dispel or confirm their suspicions, "[b]ut the detainee is not obliged to respond." Since police officers should not be required to take unnecessary risks in performing their duties, they are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a *Terry*] stop." An encounter between police and an individual which goes beyond the limits of a *Terry* stop, however, may be constitutionally justified only by probable cause or consent.

Perdue, 8 F.3d at 1462 (citations omitted).

"To determin[e] whether an investigatory stop is supported by reasonable suspicion, courts must 'look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.' " *United States v. Portillo-Portillo*, 2008 WL 538487 at * 4 (10th Cir.) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotations omitted). Considering the totality of the circumstances, the Court finds that the investigative detention of Bailey was not "justified at its inception." The only evidence regarding the reason for the encounter at 205 Mohawk was Muse's testimony. Muse testified that he had surveilled 205 Mohawk because it was known for its narcotic sales and he had stopped two people conducting a hand-to-hand narcotics transaction sometime in that time period. While witnessing a hand-to-hand narcotics transaction in an area known for narcotics sales would certainly justify stopping those two people, the only tie to Bailey is that he was in the same general area measuring the roof of a house when the four patrol cars pulled up with their sirens and lights on. "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Nor

does including Muse's testimony that there was a group of 10-15 males in the parking lot adjoining the house create "reasonable suspicion" that Bailey "had committed or is about to commit a crime." *Terry*, 392 U.S. at 21. Based on the testimony of Muse, Snow and Mahan, the Court found that Muse must have mistaken the number of males in the parking lot as Snow testified there were 4-5 males and Mahan testified there were 5-6 males. And, in any case, the number of men congregating in the parking lot certainly does not create "reasonable suspicion" that Bailey, who is separated from them by the retaining wall and is working next door at the house, is involved in anything they may be doing. Given these facts, it is not surprising that the government has not argued there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] the intrusion." *Terry*, 392 U.S. at 21.

In addition, Muse exceeded the scope of his pat-down search of Bailey. The law permits officers to do a pat-down search during a *Terry* stop if they reasonably believe that a detainee may be armed and could gain immediate control of a weapon; in other words, "armed and dangerous." *Terry*, 392 U.S. at 30. Muse testified that he patted down Bailey because the first thing he does in a high crime area is check for weapons. However, the "'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion *directed at the person to be frisked*, even though that person happens to be on premises where an authorized narcotics search is taking place." *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (emphasis added); *United States v. Santillanes*, 848 F.2d 1103, 1108 (10th Cir. 1988). Muse offered no basis to support a reasonable belief that Bailey specifically was armed. Further, "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or, indeed any

search whatever for anything but weapons." *Ybarra*, 444 U.S. at 93-94; *Santillanes*, 848 F.2d at 1108. And even if Muse had a reasonable belief that Bailey was armed, a bulging wallet cannot reasonably be mistaken for a weapon or provide any legal basis for Muse to put his hand in Bailey's pocket. *Sibron v. New York*, 392 U.S. 40, 65 (1968) ("The search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the men he searched.").

The government, nonetheless, argues that even if the detention of Bailey were illegal, Bailey consented to the pat down and the search of his car. "The voluntariness of consent to search must be determined from the totality of the circumstances, and the government bears the burden of proof, without any presumption." *United States v. Nicholson*, 983 F.2d 983, 988 (10th Cir. 1993). The government must show that there was no duress or coercion, express or implied, that the consent was unequivocal and specific, and that it was freely and intelligently given." *Id*. Thus, the two-step test to determine the voluntariness of the consent is:

> First, the government must proffer "clear and positive testimony that consent was unequivocal and specific and freely and intelligently given." Furthermore, the government must prove that this consent was given without implied or express duress or coercion.

United States v. Angulo-Fernandez, 53 F.3d 1177, 1180 (10th Cir.1995) (citations omitted).

There is no credible basis for the government's argument that Bailey consented to the pat down. First, Muse did not testify that Bailey agreed to the pat down or to Muse removing his wallet from his pocket. And, in any case, Muse's testimony actually belies any consent to the pat down as Muse restrained Bailey's hands during the pat down and pulled the wallet from Bailey's pocket. Thus, the $4500 in currency was illegally obtained and is subject to the

exclusionary rule.

Although the only testimony pertaining to Bailey's consent is Muse's undisputed testimony that Bailey voluntarily consented to the search of his black Lexus, the diagram found therein must, nonetheless, also be excluded.[3] When there has been a Fourth Amendment violation, "the government bears the heavy burden of showing that the primary taint of that violation was purged." *United States v. Caro*, 248 F.3d 1240, 1247 (10th Cir. 2001); *United States v. Reeves*, _ F.3d _, 2008 WL 1961246, *5 (10th Cir.) ("When a consensual search is preceded by an unlawful [detention], the government must prove the consent was given voluntarily. It must also 'establish a break in the causal connection between the illegality and the evidence thereby obtained.'"). To satisfy this burden, "the government must prove, from the totality of the circumstances, a sufficient attenuation or 'break in the causal connection between the illegal detention and the consent.' " *United States v. Gregory*, 79 F.3d 973, 979 (10th Cir.1996) (quoting *United States v. McSwain*, 29 F.3d 558, 562 n. 2 (10th Cir. 1994). The factors to consider under the totality of the circumstances test are: "(1) the temporal proximity of the illegal detention and consent, (2) any intervening circumstances, and (3) the purpose and flagrancy of any official misconduct." *Caro*, 248 F.3d at 1247 (quoting *Gregory*, 79 F.3d at 979); *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

Although the government has argued that Bailey's consent to search the car was voluntary, it made no attempt to meet its burden to prove that the search was not an "exploitation" of the prior illegal detention. *United States v. Melendez-Garcia*, 28 F.3d 1046,

[3] Both Snow and Mahan testified that they did not hear Muse's and Bailey's conversation. And Bailey did not take the stand.

1054-55 (10th Cir. 1994).[4] There was no lapse between the illegal detention and Bailey's alleged consent to search his vehicle and no intervening circumstances. Both of these factors support a finding that there was no "break in the causal connection between the illegality and the evidence thereby obtained." *United States v. Fernandez*, 18 F.3d 874, 883 (10th Cir. 1994) (quoting *United States v. Recalde*, 761 F.2d 1448, 1458 (10th Cir. 1985)). Further, the purpose and flagrancy of Muse's conduct also weighs against a finding of voluntary consent. Muse offered no reason for the detention of Bailey other than Bailey approached him and engaged him in conversation, telling him that he was doing construction work on the house. The only reason Muse gave for patting Bailey down for weapons was that it is the first thing he does in high crime areas, a reason clearly lacking the requisite reasonable suspicion that Bailey was "armed and dangerous." And finally, even though there is no evidence that Muse thought Bailey's bulging wallet was a weapon, Muse nonetheless removed the wallet from Bailey's pocket. For these reasons, the Court also finds that Muse's conduct was "sufficiently egregious" that it tainted any consent that Bailey may have given for the pat down or the search of his vehicle.

Because the Court finds that Bailey's Fourth Amendment rights were violated during Muse's prior encounter with Bailey at 205 Mohawk, the Court sets aside and does not consider the references to that encounter in determining whether Muse's affidavit establishes probable

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[4] The Tenth Circuit in *Melendez-Garcia* explains the difference between the "voluntariness and fruits tests":

> While there is a sufficient overlap of the voluntariness and fruits tests that often a proper result may be reached by using either one independently, it is extremely important to understand that (I) the two tests are not identical, and (ii) consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality.

Melendez-Garcia 28 F.3d at 1054 -1055 (quoting LaFave, 3 Search and Seizure § 8.2(d) at 190).

cause for the search of Bailey's residence.

C. The veracity of the search warrant affidavit

Bailey alleges in essence that Muse, in his affidavit in support of the search warrant, made up the story about the informant, Witherspoon. Accordingly, he requested an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978).

As noted above, the Fourth Amendment Warrant Clause provides that "no warrants shall issue but upon probable cause, *support by Oath or affirmation*." U.S. amend. IV (emphasis added). Implicit in this is that the statements in the affidavit are true. Therefore, it is a violation of the Fourth Amendment to "knowingly and intentionally, or with reckless disregard for the truth," include false statements in a search warrant affidavit. *Franks*, 438 U.S. at 155.

Under *Franks*, a defendant may request an evidentiary hearing regarding the veracity of a search warrant affidavit. *Id*. at 171-72. To be entitled to a *Franks* hearing, the defendant must allege that the search warrant affidavit contains deliberate falsehood or reckless disregard for the truth, and the allegations must be accompanied by an offer of proof - "[a]ffidavits or sworn or otherwise reliable statements of witnesses" - or their absence explained. *Id*. at 171. The government objects that Bailey failed to meet the pre-hearing requirement of an affidavit supporting his allegation of falsehoods. Bailey contends that he established a preliminary showing as required under *Franks* of either false statements within the affidavit or statements made in reckless disregard of the truth based on the following:

> (1) There is no statement as to the reliability or credibility of Witherspoon who has had eleven previous drug-related arrests; (2) Bailey will put on evidence that Witherspoon has stated on several occasions subsequent to the search that she had no contact with officers as it related to Bailey, was not questioned about him by officers, and does not know Bailey and has never been inside

> his house;
> (3) Although the affidavit states that Witherspoon witnessed "Pooh" purchase a quarter ounce of crack cocaine from "Ojo" on November 24, 2007 at 6:00 PM, Bailey will prove that he was at Club Fahrenheit, opening it for manager Elgin Scott who was out of town for the Thanksgiving holiday.

None of these vitiates the requirement of an affidavit in support of a motion for a *Franks* hearing. First, the search warrant affidavit need not discuss the reliability of an informant when the information is corroborated by other independent information. *United States v. Avery*, 295 F.3d 1158, 1167 (10th Cir. 2002). And statements about what the defendant *will* prove is no substitute for an affidavit of a witness who attests to the actual falsehoods. However, as the defendant's counsel had difficulty obtaining a sworn statement from Witherspoon because she was residing in a court-ordered half-way house and there were other issues to consider at the hearing, the Court agreed to hear evidence on the *Franks* challenge as well.

To establish a *Franks* violation, the defendant must establish by a preponderance of the evidence that the search warrant affidavit contains intentional or reckless false statement(s) and that the affidavit, purged of its falsities, would not be sufficient to establish probable cause for the search. *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997); *Avery*, 293 F.3d at 1166-67.

Muse's search warrant affidavit states the following regarding Witherspoon:

> YOUR AFFIANT FURTHER STATES THAT OFFICERS WITH THE TULSA POLICE DEPARTMENT CAME INTO CONTACT WITH FELICIA WITHERSPOON. WITHERSPOON HAS ELEVEN PREVIOUS DRUG ARREST [SIC] IN THE CITY OF TULSA. WITHERSPOON TOLD ME THAT SHE WAS AT 2304 NORTH BOSTON PLACE WITHIN THE LAST 72 HOURS, AND WATCHED A LIGHT SKINNED BLACK MALE SHE KNOWS AS "OJO" SELL WHAT SHE TOLD ME WAS A QUARTER OF AN OUNCE OF CRACK COCAINE TO A MAN SHE KNEW AS "POOH". SHE TOLD ME THAT SHE KNOW THAT A QUARTER OUNCE WEIGHS

APPROXIMATELY 7 GRAMS. SHE SAID "POOH" THEN SOLD HER A "ROCK" OF CRACK COCAINE FROM THE SACK SHE SAW HIM BUY FROM "OJO", AND SHE SMOKED IT WITH "POOH". WITHERSPOON HAD KNOWLEDGE ON THE SALE AND DISTRIBUTION OF CRACK COCAINE, AND THOROUGHLY CONVINCED YOUR AFFIANT ON HER KNOWLEDGE OF IT, ITS PACKAGING, ITS WEIGHING, ITS DISTRIBUTION, AND ITS USE. WITHERSPOON THEN RELAYED THE FOLLOWING:

- THAT SHE HAS BEEN GOING TO 2304 NORTH BOSTON PLACE WITH "POOH" FOR SEVERAL MONTHS FOR THE PURCHASE OF CRACK COCAINE.
- THAT SHE SAW "POOH" PURCHASE THE CRACK COCAINE FROM A LIGHT SKINNED BLACK MALE SHE KNEW AS "OJO".
- THAT "OJO" IS AROUND 5 FEET 10 INCHES TALL, LIGHT SKINNED, AND WEIGHED AROUND 160-180 POUNDS WITH LONG BLACK BRAIDED HAIR.
- THAT "OJO" LIVES AT THIS RESIDENCE WHERE HE DISTRIBUTES CRACK COCAINE.
- THAT THIS RESIDENCE IS CONSTRUCTED OF BRICK, WITH A WOODEN FENCE AROUND THE SOUTH AND BACKSIDE OF THE RESIDENCE.
- THAT SHE HAS BEEN TO THIS RESIDENCE SEVERAL TIMES IN THE PAST MONTH WITH "POOH", AND WATCHED HIM PURCHASE CRACK COCAINE.
- THAT SHE BUYS A SMALL PORTION OF THE CRACK COCAINE FROM "POOH" AFTER EACH VISIT.
- THAT "POOH" CUTS THE LARGER ROCKS INTO SMALLER ROCKS, AND THEN SELLS THEM INDIVIDUALLY ON THE EAST SIDE OF TULSA IN AN APARTMENT COMPLEX IN THE AREA OF 10800 EAST 31st STREET.
- THAT SHE PERSONALLY WATCHES "OJO" SELL CRACK COCAINE TO "POOH" EACH TIME THEY VISIT.
- THAT "OJO" SELLS "POOH" AROUND A QUARTER OUNCE OF CRACK COCAINE ON EACH VISIT.
- THAT ON 112407 AT 1800 HOURS SHE RODE WITH "POOH" TO THE RESIDENCE, AND WATCHED HIM BUY APPROXIMATELY A QUARTER OUNCE OF CRACK COCAINE.
- WITHERSPOON TOLD ME THAT EVERYTIME SHE HAS STOPPED AT THE HOUSE WITH "POOH", "OJO" ALWAYS HAS CRACK COCAINE. THIS INCLUDES WHEN THEY SHOWED UP UNANNOUNCED.

WITHERSPOON THEN DROVE OFFICERS TO 2304 NORTH BOSTON PLACE, AND POINTED TO A HOUSE WITH TAN BRICK AND A BROWN SHINGLE ROOF.

Def. Ex. 2.

At the hearing, Witherspoon testified that the above was "a lie." She testified that although she knew of Ojo because he used to work at a convenience store she frequented, she had never been to his house, never been to 2304 N. Boston Pl., and never saw him sell crack cocaine. Witherspoon testified that she met Pooh around five years ago but had not been in a car with him in five years and was not with him on November 24, 2007 and did not recall being with him any time over that Thanksgiving weekend; she was not with Pooh when he allegedly purchased drugs from someone at 2304 N. Boston Pl.; she only bought marijuana from Pooh; and never saw Pooh purchase drugs from Bailey. Witherspoon denied that she was picked up or had any contact with police around November 24 or 25, 2007, that she said any of the above to police, that she knew or talked to Muse or Snow, and that she rode with them and directed them to and pointed out Ojo's house. Witherspoon admitted that she had been arrested eleven times for possession of drugs, had a crack pipe and purchased crack cocaine "off the street," paying $20 a rock. She testified that she was probably somewhere smoking crack on November 24, 2007 at 6:00 PM because she was using a lot that day, but even if she were high she would know if she had an encounter with the police as she had an outstanding warrant for her arrest. Finally, Witherspoon testified that Bailey's state court attorney, Larry Edwards, met with her when she was in jail and later she met with Bailey's current attorney, Stan Monroe, and when they each showed her Muse's affidavit she told each of them it was a lie.

Larry Edwards confirmed that he visited Witherspoon while she was in custody for charges brought against her in Tulsa County drug court and she told him that she never acted as an informant for law enforcement, had never been to Melvin "Ojo" Louis Bailey, Jr.'s house, had

never witnessed drug sales and/or distribution at 2304 N. Boston Pl., and the alleged statements by her to an officer as stated in the affidavit for search warrant are wholly not true and she never made such statements to anyone, including law enforcement.

Muse testified that his affidavit accurately reflected what Witherspoon told him when he and Snow picked up Witherspoon on November 24, 2007 at 6:00 PM. He added that they picked Witherspoon up while she walking at Virgin and Cincinnati; she appeared nervous as she had a crack pipe and baggie with powder residue; Muse did not field test the baggie, but used the baggie to bluff Witherspoon so that she would give them information; Muse verified that she had an outstanding misdemeanor warrant, did not make any promises to her, knew she had a life-long problem with drugs, asked where she purchased her last rock, tried to get information about Pooh, and told her he would name her as an informant on the search warrant. Muse also testified the following about his notes from this encounter with Witherspoon: Witherspoon described Ojo as in his mid-late 30s, light-skinned with braided long hair and his house as located around Cincinnati and Young, red brick with a wood fence and a bunch of cars. Muse acknowledged that Muse's house was located at the intersection of Boston Place and Xyler, and the house was not red brick but tan stucco. Muse also took the following notes about Pooh: he was a black male, 27-30 years old, drove a blue Buick Century and sold narcotics around 31st & Mingo. Muse also testified that Witherspoon directed them to Bailey's residence at 2304 N. Boston Pl., although Muse attempted to go in the wrong direction several times, and pointed out Bailey's house.

Snow confirmed that he was present with Muse when Witherspoon was interrogated, that Witherspoon described the person who was the source of Pooh's crack cocaine purchase (and

Snow suspected that Bailey was the person she described), and that Witherspoon gave directions to Ojo's house and pointed out the house at 2304 N. Boston Pl.

The following, however, are inconsistencies between Muse's affidavit and the evidence at the hearing. (1) Muse testified that he and Snow picked up Witherspoon on November 24, 2007 at 6:00 PM; yet the affidavit states that Witherspoon was with Pooh at that time watching him buy crack cocaine from Bailey at his house. Indeed, it seems that Bailey was omnipresent the evening of November 24, 2007. Elgin Scott testified that he saw Bailey at Club Fahrenheit around 7:00 PM on November 24, 2007; Tiara Crawford testified that November 24th was her birthday and Bailey spent most of the day and evening with her and took her to dinner at the Cheesecake Factory around 7:00 in the evening; and Brian Breman, a very credible witness, testified that Bailey was purchasing liquor for Club Fahrenheit around 6:00 PM on November 24, 2007 and identified a Parkhill Liquors and Wines invoice dated 11/24/07 at 18:04 as reflecting Bailey's purchase. (2) Muse stated in his affidavit that "A UTILITIES CHECK OF 2304 NORTH BOSTON PLACE SHOWED GENEVIEVE BAILEY IS LISTED AS THE PERSON RESPONSIBLE FOR THE BILLS," yet Genevieve Bailey testified that only the water bill and land telephone line are in her name; Bailey's name is on the gas and electric. (3) Muse attested in his affidavit that "WITHIN THE PAST 72 HOURS [MUSE] AND OTHER OFFICERS CONDUCTED SURVEILLANCE ON 2305 NORTH BOSTON PLACE. IT REVEALED FREQUENT OUT OF STATE (TEXAS) VEHICULAR TRAFFIC ARRIVE, APPROACH THE RESIDENCE AFTER BEING LET INSIDE BY MELVIN BAILEY JUNIOR, AND THEN LEAVE A FEW MINUTES LATER," yet Muse admitted that he surveilled the house from a distance and could not see faces. Therefore, he did not see, but

merely assumed that it was Bailey letting people inside.

Having considered the evidence and testimony presented at the hearing and judged the credibility of the witnesses, the Court finds Witherspoon's testimony at the hearing implausible. At best, she may have been so high from smoking crack cocaine when she was picked up by Muse and Snow that she was unaware of or forgot what transpired. But, as Larry Edwards characterized his impression of her denial that she was an informant, she had "reasons to tell the truth and reasons to lie." As for the above inconsistences between Muse's testimony and his affidavit, clearly there is a problem with November 24, 2007 being the date Witherspoon allegedly witnessed Pooh purchase crack cocaine from Bailey at his residence, but Bailey has failed to show by a preponderance of the evidence that the error is intentionally and recklessly false.[5] Although the statement regarding Genevieve Bailey paying the bills for the utilities at Bailey's house is too broad, it also does not rise to the level of an intentional or reckless false statement. The statement that Muse observed people "APPROACH THE RESIDENCE AFTER BEING LET INSIDE BY MELVIN BAILEY JUNIOR," however, is a reckless false statement. Yet, the Court finds that the statement, if purged, would not undermine Judge Smith's probable cause determination such that it could no longer be said to have a substantial basis.

In sum, without consideration of the prior encounter at 205 Mohawk or the statement identifying Bailey as the person who allowed suspected drug dealers inside his house, the Court finds, under the totality of the circumstances presented in Muse's affidavit, that Judge Smith had a "substantial basis" for determining that there was probable cause to search 2304 N. Boston

[5] The log of TRACIS inquiries on Witherspoon reveals that an inquiry was run on November 25, 2007 at 5:02 PM from Muse's laptop.

Place.

III. Staleness

Bailey contends that even if the affidavit contains probable cause for the search of his residence, the information in the affidavit is stale as the search warrant was not executed until eight days after it was issued.

"Probable cause to search cannot be based on stale information that no longer suggests that the items sought will be found in the place to be searched." *United States v. Snow*, 919 F.2d 1458, 1459 (10th Cir.1990). "However, the determination of whether information is stale depends on the nature of the crime and the length of criminal activity, not simply the number of days that have elapsed between the facts relied upon and the issuance of the warrant." *United States v. Myers,* 106 F.3d 936, 939 (10th Cir.1997) (concluding gap of five months between tip and search warrant did not render information stale when drug activities were demonstrated to be continuous and ongoing). "[T]he passage of time becomes less significant when the criminal offense is continuous." *United States v. Miles*, 772 F.2d 613, 616 (10th Cir.1985).

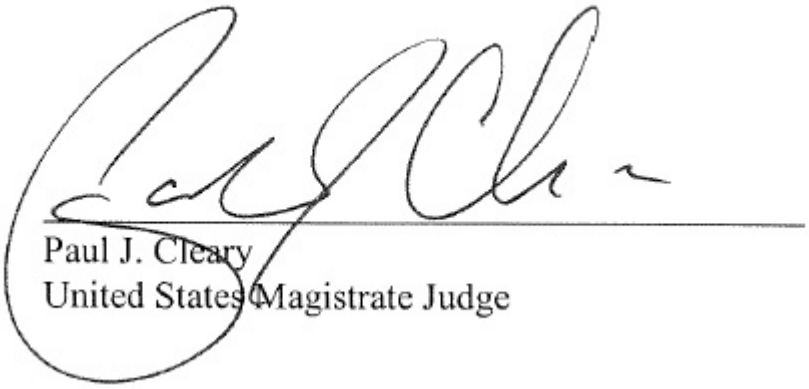
The facts alleged in the affidavit state that Bailey was selling crack cocaine from his house on an ongoing basis for at least "several months" preceding November 24, 2007, and that every time Witherspoon stopped by Bailey's house with Pooh, even when unannounced, Bailey "always" had crack cocaine. As the affidavit contains facts demonstrating that Bailey's alleged drug trafficking was continuous and ongoing for over several months, the Court finds that the passage of time from November 24, 2007 to the execution of the search warrant on December 4, 2007 did not render the information stale.

IV. Recommendation and Objections

For the reasons stated above, the Court recommends that Bailey's Motion to Suppress Evidence (Dkt. #15) be **DENIED**.

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so on or before **May 27, 2008.** See 28 U.S.C. § 636(b)(1) and Fed.R.Crim.P. 59(b). The failure to file written objections to this Report and Recommendation "waives a party's right to review." Fed.R.Crim.P. 59(b).

Dated this 16th day of May, 2008.



Paul J. Cleary
United States Magistrate Judge

Attachment 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATE OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 08-CR-026-JHP
	)	
MELVIN LOUIS BAILEY, JR., a/k/a "Ojo,"	)	
	)	
	)	
Defendant.	)	

ORDER AND OPINION

Before the Court are both the Government and Defendant Melvin Louis Bailey Jr.'s Objections (Docket Nos. 35, 37) to the Report and Recommendation (Docket No. 33) of United States Magistrate Judge Paul J. Cleary regarding Defendant Melvin Louis Bailey Jr.'s Motion to Suppress (Docket No. 15).

BACKGROUND

This matter was initially referred to the Magistrate Judge on March 17, 2008, pursuant to Fed. R. Crim. P. 59(b)(1) and 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge conducted a hearing on March 25, 2008, and April 17, 2008. On May 16, 2008, the Magistrate Judge issued his Report and Recommendation, recommending that Bailey's Motion to Suppress be denied.

On May 23, 2008, Bailey filed objections to the Magistrate Judge's Report and Recommendation. Bailey makes five specific objections: (1) he objects to the Magistrate's finding that "the description of the location to be searched is sufficient"; (2) he objects to the "manner that the Magistrate addressed the issue of the wrong date appearing on the Warrant"; (3) he objects to

the finding that the testimony of the named informant, Felicia Witherspoon, was "implausible"; (4) he objects to the Magistrate's ultimate finding that the search warrant was valid; and (5) he complains about the Magistrate's failure to address the Tulsa Police Department's alleged failure to comply with a *supboena duces tecum* for certain records that Defendant argues would have "shed some light on the lingering issues which were raised during the hearing."

On May 27, 2008, the Government filed a single objection to the Magistrate Judge's Report and Recommendation. The Government objects to the Magistrate's determination that an encounter between Tulsa Police Department officers and Bailey in the parking lot of a convenience store at 205 Mohawk Boulevard was an unjustified, non-consensual encounter. Based on that determination, the Magistrate struck any reference to that encounter from the affidavit supporting the search warrant for Bailey's house, and did not consider those references in making his probable cause determination. The Government argues that the evidence from the suppression hearing establishes that the encounter was consensual and that the evidence from the encounter should therefore be considered for purposes of the probable cause determination.

DISCUSSION

A. The Description of the House

Bailey argues that the search warrant authorizing the search of his house is deficient because the description of his house is partially inaccurate:

> THE STRUCTURE TO BE SEARCHED IS A SINGLE STORY RESIDENCE LOCATED ONE-HOUSE NORTH OF EAST XYLER STREET NORTH, ON THE WEST SIDE OF NORTH BOSTON PLACE. THE RESIDNECE [SIC] TO BE SEARCHED HAS A SLOPED BROWN COMPOSITION SHINGLE ROOF. THE RESIDENCE IS CONSTRUCTED OF BRICK PAINTED TAN. THE RESIDENCE TO BE SEARCHED HAD NO VISABLE [SIC] HOUSE NUMBERS ON THE EAST SIDE OF THE RESIDENCE. THE FRONT DOOR IS ON THE EAST SIDE OF THE HOUSE AND FACES EAST. A GLASS STORM DOOR SHROUDS THE

> FRONT DOOR. THIS ADDRESS IS MORE COMMONLY KNOWN AS 2304 NORTH BOSTON PLACE, CITY AND COUNTY OF TULSA, STATE OF OKLAHOMA.

(Docket No. 15-2 at 1). Evidence at the suppression hearing established that the house is not tan painted brick, but rather tan stucco. Evidence at the hearing also established that instead of a "sloped brown composition shingle roof," the house actually has a sloped grey/tan composition roof that is edged with brown trim. Additionally, the door shrouding the front door is not a simple "glass storm door," it instead is a "security" door with either plexiglass or glass intersected by metal bars.

Having examined the Magistrate's findings and conclusions, the Court is satisfied that the Magistrate applied the correct legal standard to the facts, and the Court agrees with the Magistrate's conclusion that there was not a reasonable probability that another house might be searched. The search warrant described the proper street address for the house, accurately described the house's location in relation to cross streets and other houses, accurately described the direction the house faced, and accurately noted the lack of visible street numbers on the front of the house. Even the portions of the description that Bailey complains are deficient are partially accurate.

Therefore, on these facts, the Court agrees with the Magistrate's findings and conclusion and overrules Bailey's objection to this portion of the Report and Recommendation.

B. The Incorrect Date on the Warrant

The search warrant in this case was issued on November 26, 2008, however, the warrant is actually dated November 26, 2006. In his Report and Recommendation, the Magistrate noted in a footnote that the officer who prepared the affidavit and warrant testified that the typed "2006" on the form was accidentally carried over from a previous form.

Bailey argues that the Magistrate's treatment of this issue in a footnote is inadequate, as it

fails to make a finding that the warrant was facially valid or invalid as a result of the typographical error.

To the extent that the Magistrate failed to make a finding on this issue, the Court finds that the officer's testimony regarding this typographical error was credible, and further finds that the officers executing the warrant relied on the incorrectly dated warrant in good-faith. The Court further finds that this error does not render the warrant invalid. *See United States v. White*, 356 F.3d 865, 869 (8th Cir. 2004)(holding that so long as executing officers relied on mis-dated warrant in good-faith, they should not be punished for the an oversight made by the authorizing judge, who bears the ultimate responsibility for ensuring the accuracy of the warrant).

C. The Credibility of Felicia Witherspoon's Testimony

Bailey objects to the Magistrate's finding that Felicia Witherspoon, the informant named in the affidavit supporting the search warrant, gave "implausible" testimony at the suppression hearing when she testified that she had never spoken to the Tulsa Police Department officer who named her as an informant in the affidavit in support of the search warrant for Bailey's house. Bailey only objects to this credibility determination made by the Magistrate, instead urging the Court to find her testimony at the hearing credible.

The Court has reviewed Witherspoon's testimony and agrees with the Magistrate that Witherspoon's testimony at the hearing lacked credibility. The Court therefore finds that Witherspoon did in fact speak to Officers Muse and Snow as described in the affidavit, and finds that her subsequent denial of that conversation is implausible. While certain inconsistencies between the information in the affidavit accompanying the search warrant and the testimony heard at the suppression hearing do exist, Witherspoon—who will likely be labeled a "snitch" on the street for

cooperating with police—plainly has a motive for denying her cooperation with police. Additionally, to believe Witherspoon's testimony that she never spoke to the Tulsa police officers who named her in the affidavit is to believe that those officers completely fabricated their encounter with Witherspoon, something that is implausible given the fact that much of the information contained in the affidavit, and which the Tulsa police officers claim they gleaned from the encounter with Witherspoon, has proven to be accurate.

Therefore, the Court thus finds no reason to disagree with the Magistrate Judge's conclusion that Witherspoon's testimony at the suppression hearing lacked credibility.

D. The Magistrate's Failure to Address the Tulsa Police Department's Failure to Comply with a *Subpoena Duces Tecum*

As part of his previous objection, Bailey complains that the "Tulsa Police Department utterly disregarded [a] *subpoena duces tecum* — served 7 days before the hearing resumed — without any explanation whatsoever. The issue was not addressed in the R & R, but should have been[.]"

A review of the audio from the suppression hearing shows that Bailey's attorney raised this issue near the conclusion of the hearing on April 17, 2008, and informed the Court that he needed to contact the Tulsa Police Department to inquire as to why the records he was seeking had not been produced. After a discussion in which the Magistrate expressed his frustration over the fact this issue had not been resolved *prior* to the hearing — particularly considering the fact the hearing had already been continued from March 25th to April 17th so that a necessary witness could testify, the Magistrate informed the parties that he was closing the evidentiary record. The Magistrate informed Bailey's attorney that should he acquire the records in question and find them to be relevant, Bailey should brings those records to the district court's attention so that the district court could consider those records in its review of the Magistrate's Report and Recommendation.

Bailey now simply continues to argue that the records have not been produced. Bailey does not indicate that after the conclusion of the suppression hearing he did in fact contact the Tulsa Police Department to check on the status of the subpoena. And a review of the docket reflects that no motion to compel compliance with the subpoena was ever filed by Bailey. It appears as though Bailey complains of a discovery abuse, but Bailey has apparently made no effort to utilize the discovery tools made available to him by Rule 16 of the Federal Rules of Criminal Procedure in order to resolve this issue. This Court can therefore find no error in the Magistrate's decision to close the evidentiary record at the conclusion of the suppression hearing. Indeed, Bailey had from April 17th to May 23rd—the date Bailey filed his objections to the Report and Recommendation—to seek production of those records so that they could be provided to this Court, but Bailey has seemingly failed to do so.

Therefore, Bailey's claim that the Magistrate erred by failing to address the issue in his Report and Recommendation is simply without merit. The Magistrate addressed the issue at the suppression hearing; if, after the conclusion of the suppression hearing, Bailey had brought any matters to the Court's attention regarding this discovery dispute, those matters would have been addressed in an appropriate order. The Magistrate's Report and Recommendation ruling on the motion to suppress, however, was not the proper vehicle for adjudication of any issues surrounding this discovery dispute.

E. The Validity of the Search Warrant

Bailey's final objection is to the Magistrate's ultimate conclusion that the search warrant in this case was valid. In the Report and Recommendation, the Magistrate concluded that, even omitting from the affidavit accompanying the search warrant the references to Bailey's encounter

with the police at 205 Mohawk Boulevard, as well as Officer Muse's statement that he had observed Bailey letting people into his house through the front door, the search warrant was supported by probable cause.[1]

The Court agrees. The Magistrate applied the correct legal standards, and based on the Court's overruling of Bailey's other objections, the Court sees no reason to depart from the Magistrate's analysis. The evidence presented at the hearing indicates that the affidavit accompanying the search warrant contains ample corroborated evidence of drug trafficking by Bailey from his house.

Therefore, the Court agrees and adopts the Magistrate's conclusion that under the totality of the circumstances the issuing judge had a substantial basis for determining that probable cause existed.

F. The 205 Mohawk Boulevard Encounter

The Government objects to the Magistrate's finding that the encounter between Bailey and Tulsa Police Department officers which occurred in the parking lot of a convenience store at 205 Mohawk Boulevard was unjustified, and non-consensual. Based on that finding, the Magistrate purged any reference to, or evidence obtained from, that encounter from the affidavit accompanying the search warrant and made his probable cause determination based on that purged affidavit. The Government argues that the encounter was consensual, and therefore the evidence obtained from that encounter should not have been purged from the affidavit.

The Magistrate made the following factual findings with regard to this encounter:

[1]Although this Court ultimately disagrees with a portion of the Magistrate's Report and Recommendation regarding the encounter at 205 Mohawk Boulevard, the Court, like the Magistrate, does not consider that encounter in making this probable cause determination. If that encounter were considered, the probable cause determination would, of course, be even more in the Government's favor.

> Having weighed the evidence and the credibility of the witnesses, the Court makes the following findings. Four uniformed officers in separate cars with their lights and sirens on approached 4-6 men who were congregated around the retaining wall between the house that Bailey was measuring for a new roof and the parking lot. The officers told the men to sit on the retaining wall, to remove their shoes and socks, and to remain there until they were allowed to leave by the officers. When Muse asked Bailey if he had any weapons on him; Bailey said no. Muse then told him to turn around so he could check him for weapons. Muse restrained both of Bailey's hands, while he patted Bailey down. Muse felt a bulge in Bailey's back pocket and asked him what it was. Bailey responded that it was his wallet. Muse testified that it seemed too big for a wallet and so he pulled out the wallet and went through it; he found $4500 in cash in the wallet. Muse then asked if the black Lexus belonged to Bailey and if there were any weapons or explosives in the car. Bailey said no and Muse asked if they could search the car. Bailey said yes and Muse told Snow to look in the vehicle. Snow found a diagram of a hidden compartment to be placed in the bed of a pickup truck on the floorboard of the car. Neither the diagram nor the $4500 in currency was confiscated. The encounter lasted approximately 15-20 minutes.

(Docket No. 33, at 11-12).

Having reviewed the audio recordings of Officers Muse, Officer Snow, and Thomas Mahan's testimony at the suppression hearing, the Court makes the following factual findings, and vacates the Magistrate's factual findings to the extent they are inconsistent: Four uniformed officers in separate cars with their lights and sirens on approached 4-6 men who were congregated in the parking lot of a convenience store adjacent to a house that Bailey was measuring for a new roof. The officers told the men in the parking lot to sit on the retaining wall, to remove their shoes and socks, and to remain there until they were allowed to leave by the officers. Bailey — whom Officer Muse initially did not realize was present — approached Officer Muse and asked him why the officers were bothering the men in the parking lot. Officer Muse immediately asked Bailey if he had any weapons on him; Bailey said no, and told Officer Muse that he was free to check. Officer Muse had Bailey turn around and patted Bailey down. As was his custom, Officer Muse held onto Bailey's hands while conducting the patdown. While patting Bailey down, Officer Muse felt a bulge in

Bailey's back pocket and asked him what it was. Bailey responded that it was his wallet. Officer Muse remarked that it seemed too big to be a wallet. Officer Muse pulled out the object and discovered that it was indeed a wallet containing $4,500 in cash. Officer Muse then asked Bailey if a black Lexus parked nearby was his. When Bailey indicated it was his car, Officer Muse asked if there were any weapons or explosives in the car. Bailey said no and Officer Muse asked if they could search the car. Bailey said yes, and Officer Snow proceeded to search the car. In the floorboard of the car, Officer Snow found a diagram showing how to place a hidden compartment in the bed of a pickup truck. Neither the diagram nor the $4,500 in currency was confiscated, and Bailey went on his way. The encounter lasted approximately 15-20 minutes.

Based on these factual findings, the Court finds that Bailey's encounter with the police was consensual, and that Bailey was at no time seized by the police. Under the totality of the circumstances, nothing about the police officers' conduct in interacting with Bailey would have "communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). Indeed, Bailey's interaction with the police was initiated by Bailey himself. Having initiated the encounter, there is no reason to believe that Bailey did not feel free to terminate the encounter. *See id.* at 434 ("So long as a reasonable person would feel free to disregard the police and go about his business the encounter is consensual and no reasonable suspicion is required.")(internal quotation omitted). All the evidence presented tends to show that the encounter was generally friendly, and amounted to nothing more than Bailey asking Officer Muse questions, and Officer Muse asking Bailey questions. *See Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion) ("Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in

another public place, by asking him if he is willing to answer some questions, [and] by putting questions to him if the person is willing to listen").

The Court additionally finds that Bailey freely consented to Officer Muse's search of his person for weapons. The government has proffered "clear and positive testimony that consent was unequivocal and specific and freely and intelligently given." *United States v. Angulo-Fernandez*, 53 F.3d 1177, 1180 (10th Cir.1995) (citations omitted). Furthermore, considering the consensual nature of the encounter, the Government has proven that Bailey's consent was given without implied or express duress or coercion. *Id.* Officer Muse provided uncontested testimony at the suppression hearing that when Officer Muse asked Bailey if he had any weapons, Bailey said no, and told Officer Muse that he was free to check. It was only then that Officer Muse patted Bailey down and discovered the wallet. Therefore, the Court finds that Bailey unequivocally, specifically, freely, and intelligently consented to a search of his person for weapons.

Officer Muse did not exceed the scope of this consent when he removed Bailey's wallet to confirm it was not a weapon. Officer Muse testified that although Bailey told him the object in his pocket was a wallet, Officer Muse was not convinced because the object felt much too large to be a wallet. Officer Muse was therefore justified in removing the object to confirm that it was not a weapon — particularly in light of the fact Officer Muse felt Bailey was being untruthful when he said the object was a wallet.

Officer Muse, however, exceeded the scope of the consent when—after verifying the wallet was indeed a wallet—he opened the wallet to examine its contents. Once Officer Muse had confirmed that the wallet was not a weapon, he should have returned the wallet, as Bailey had only consented to a search of his person for weapons.

Therefore, the Court disagrees with a portion of the Magistrate Judge's factual findings, his conclusion that Bailey had been seized, and his conclusion that Bailey had not consented to a search of his person. However, because the Court finds that Officer Muse exceeded the scope of the consent that Bailey did give, the Court looks to whether reasonable suspicion of illegal activity existed which would justify Officer Muse's search of Bailey's wallet. Here, the Court finds no reason to depart from the Magistrate Judge's analysis and conclusion on this point.[2] The Court agrees and adopts the Magistrate Judge's conclusion that, absent consent, the search of Bailey's wallet was unjustified. Therefore, any evidence regarding the $4,500 must be suppressed.

The Court next turns to the search of Bailey's car. When a consensual search is preceded by a Fourth Amendment violation, as in this case, the government must prove not only the voluntariness of the consent to search, but also the existence of a break in the causal connection between the illegality and the evidence thereby obtained. *U.S. v. Melendez-Garcia*, 28 F.3d 1046, 1053 (10th Cir. 1994)(internal citations omitted)(quotations omitted). Here, Bailey plainly consented to a search of his car for weapons, and Officer Snow did not exceed the scope of this consent in discovering the diagram laying on the floorboard of the car. The only question, therefore, is whether the otherwise consensual search of the car was an "exploitation" of the prior illegal search of Bailey's wallet. *Id.* at 1054-1055 (quoting LaFave, 3 Search and Seizure § 8.2(d) at 190).

The Supreme Court has provided three factors that are especially relevant to determining whether a consent is tainted by a preceding illegal search or seizure: (1) the temporal proximity between the police illegality and the consent to search; (2) the presence of intervening

[2]The Court also notes that the search of the wallet may very well have to have been supported by probable cause. However, because the search was not supported by even reasonable suspicion, the Court does not reach that issue.

circumstances; and particularly (3) the purpose and flagrancy of the official misconduct. *Id.* at 1054 (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975); *United States v. Recalde*, 761 F.2d 1448, 1458 (10th Cir.1985). Here, the illegal search of the wallet and the subsequent consensual search of the car occurred very close in time and without intervening circumstances. The Court finds, however, that the purpose and flagrancy of the illegal search of Bailey's wallet does not rise to a level that would necessitate suppression of the evidence subsequently found in Bailey's car. As the Court has previously concluded, the illegal search was the search of Bailey's wallet. In light of the fact that Bailey consented to the search of his person, and the fact that Officer Muse was justified in removing Bailey's wallet to confirm it was not a weapon, the Court cannot conclude that Officer Muse's mere act of examining the contents of the wallet was so "egregious" as to taint the subsequent search of the car. Additionally, no suggestion has been made that Officer Muse requested consent to search Bailey's car for weapons or explosives because of the discovery of the $4,500 in Bailey's wallet. To the contrary, the record shows that Officer Muse, wanting to know if a Bailey had a weapom on his person, wanted to also find out if Bailey had a weapon in his nearby car. On this record, despite the temporal proximity and lack of intervening circumstances, the Court cannot conclude that the search of the car was either causally connected to, or in any way an exploitation of, the prior illegal search of Bailey's wallet.

Therefore, the Court finds that the evidence gleaned from the search of Bailey's car need not be suppressed, as nothing about this search violated the Fourth Amendment. As noted previously, however, the evidence obtained from the search of Bailey's wallet must be suppressed, as that search violated the Fourth Amendment.

CONCLUSION

Because Defendant's objections fail to raise any new issues of law or fact that alter the viability of the Magistrate Judge's Report and Recommendations, the Court finds Defendant's objections to be without merit. The Government's objection, however, correctly noted that the Magistrate's factual findings regarding the 205 Mohawk Boulevard encounter are not consistent with the record before the Court. Therefore, after carefully reviewing both the Report and Recommendation and the record in this case, and having listened to a recording of the hearing in this matter, the Court concludes that — other than certain portions dealing with the 205 Mohawk Boulevard encounter — the Magistrate Judge's factual findings are supported by the record, and his Report and Recommendation correctly applies applicable law to the facts of this case in a thorough and well reasoned manner. Accordingly, the Court makes its own factual findings and conclusions of law as to the 205 Mohawk Boulevard encounter — but otherwise adopts the Report and Recommendation as the findings and order of this Court.

For the reasons stated in the Report and Recommendation and set forth above, Defendant Melvin Louis Bailey Jr.'s Objections (Docket No. 35) to the Report and Recommendation are OVERRULED. The Government's Objection (Docket No. 37) to the Report and Recommendation is SUSTAINED in part, and OVERRULED in part. Defendant's Motion to Suppress (Docket No. 15) is therefore DENIED in part, and GRANTED in part.

IT IS SO ORDERED

James H. Payne
United States District Judge
Northern District of Oklahoma

\ ✎AO 245B (Rev. 06/05) Judgment in a Criminal Case Sheet 1

Attachment 5

UNITED STATES DISTRICT COURT

NORTHERN District of OKLAHOMA

UNITED STATES OF AMERICA
V.

MELVIN LOUIS BAILEY, JR.
a/k/a "Ojo"

JUDGMENT IN A CRIMINAL CASE

Case Number: 08-CR-026-001-JHP

USM Number: 06942-062

Stan D. Monroe
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 counts One, Two and Three of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii)	Possession of Cocaine Base with Intent to Distribute	12-4-07	1
21 §§ 841(a)(1) and 841(b)(1)(C)	Possession of Cocaine with Intent to Distribute	12-4-07	2
21 U.S.C. § 856	Maintaining Drug Involved Premises	12-4-07	3

The defendant is sentenced as provided in pages 2 through 6 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.

October 8, 2008
Date of Imposition of Judgment

James H. Payne
United States District Judge
Northern District of Oklahoma

October 29, 2008
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Melvin Louis Bailey, Jr.
CASE NUMBER: 08-CR-026-001-JHP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 360 months. Said term consists of 360 months as to Count One, 240 months as to Count Two, and 240 months as to Count Three. Said terms to run concurrently, each with the others.

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

The Court recommends the defendant be placed in a facility that will allow him the opportunity to participate in the Bureau of Prisons' Residential Drug Abuse Treatment Program. The Court further recommends the defendant be placed in a facility as close to Tulsa, Oklahoma, as possible.

☒ 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 12 noon 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

DEFENDANT: Melvin Louis Bailey, Jr.
CASE NUMBER: 08-CR-026-001-JHP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : Ten years. Said term consists of ten years as to Count One, three years as to Count Two and three years as to Count Three. The terms of supervised release shall run concurrently, each with the others.

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.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse, but authority to administer drug testing for cause is retained. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall 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 standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement (any objection to such notification shall be decided by the district court);
14. the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
15. the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

DEFENDANT: Melvin Louis Bailey, Jr.
CASE NUMBER: 08-CR-026-001-JHP

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in a program of testing and treatment, to include inpatient treatment, for drug and alcohol abuse, at a treatment facility and on a schedule determined by the probation officer. The defendant shall abide by the policies and procedures of the testing and treatment program to include directions that the defendant undergo urinalysis or other types of drug testing consisting of no more than eight tests per month if contemplated as part of the testing and treatment program. The defendant shall waive any right of confidentiality in any records for drug and alcohol treatment to allow the probation officer to review the course of testing and treatment and progress with the treatment provider.

2. The defendant shall abide by the "Special Financial Conditions" previously adopted by the Court, as follows:

    1. The defendant shall maintain a checking account in the defendant's name and deposit into this account all income, monetary gains or other pecuniary proceeds, and make use of this account for payment of all personal expenses. All other bank accounts must be disclosed to the probation officer.

    2. The defendant shall not make application for any loan or enter into any credit arrangement, without first consulting with the probation officer.

    3. The defendant shall disclose all assets and liabilities to the probation officer. The defendant shall not transfer, sell, give-away, or otherwise convey any asset, without first consulting with the probation officer.

    4. If the defendant owns or maintains interest in any profit or nonprofit entity, you shall, upon request, surrender and/or make available for review, any and all documents and records of said profit or nonprofit entity to the probation officer.

    5. The defendant shall, upon request of the probation officer, complete a personal financial affidavit and authorize release of any and all financial information, to include income and tax return records, by execution of a Release of Financial Information form, or by any other appropriate means.

3. The defendant shall submit his person, residence, office or vehicle to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Melvin Louis Bailey, Jr.
CASE NUMBER: 08-CR-026-001-JHP

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	**$** 300	**$** 3,000	**$** N/A

☐ 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	$ 0

☐ 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:

* 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.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Melvin Louis Bailey, Jr.
CASE NUMBER: 08-CR-026-001-JHP

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ 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:

Any criminal monetary penalty is due in full immediately, but payable on a schedule of the greater of $25 quarterly or 50% of income pursuant to the Federal Bureau of Prisons' Inmate Financial Responsibility Program while in prison. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of at least $50 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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) penalties, and (8) costs, including cost of prosecution and court costs.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The U.S. Probation Office is responsible for sending a copy of this page and the first page of the judgment to: U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531