

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Case No. 22-CR-00115
v.)	
)	Honorable John Robert Blakey
MICHAEL J. MADIGAN and)	
MICHAEL F. McCLAIN,)	Magistrate Judge Jeffrey Cole
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF
MICHAEL J. MADIGAN'S MOTION TO SUPPRESS**

TABLE OF CONTENTS

	Page
Introduction.....	1
Factual Background.....	5
A. The September 26, 2014 Title III Application	5
B. The June 3, 2016 Debrief of Alderman A.....	13
C. The June 7, 2016 Title III Application	14
D. The April 3, 2018 and April 4, 2018 Debrief of Alderman A	15
E. The April 6, 2018 Title III Application	17
Legal Standard for Title III Suppression	18
Argument.....	20
I. The September 26, 2014 Affidavit Lacked Probable Cause.....	21
II. The Government Deliberately or Recklessly Made False Statements and Omitted Material Facts.	24
III. The Court Should Conduct a <i>Franks</i> Hearing.....	27
Conclusion	28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978).....	18
<i>Gelbard v. United States</i> , 408 U.S. 41 (1972).....	17
<i>Silverhouse Lumber Company v. United States</i> , 251 U.S. 385 (1920).....	23
<i>United States v. Calandra</i> , 414 U.S. 338 (1974).....	17
<i>United States v. Giles</i> , 246 F.3d 966 (7th Cir. 2001)	21
<i>United States v. Giordano</i> , 416 U.S. 505 (1974).....	18
<i>United States v. Glover</i> , 755 F.3d 811 (2014)	26
<i>United States v. Gonzalez</i> , 412 F. 3d 1102 (9th Cir. 2005)	23
<i>United States v. Harris</i> , 464 F.3d 733 (7th Cir. 2006)	19
<i>United States v. Johnson</i> , 26 F. 3d 669 (7th Cir. 1994)	20
<i>United States v. Kimberlin</i> , 805 F.2d 210 (7th Cir. 1986)	26
<i>United States v. Mares-Martinez</i> , 240 F. Supp. 2d 803 (N.D. Ill. 2002).....	18, 19, 26
<i>United States v. McMurtrey</i> , 704 F.3d 502 (7th Cir. 2013)	18, 19, 23
<i>United States v. Rice</i> , 478 F. 3d 704 (6th Cir. 2007)	23

United States v. Roberts,
477 F. 2d 57 (7th Cir. 1973)23

United States v. Robinson,
724 F.3d 878 (7th Cir. 2013) 18, 19

United States v. Tate,
524 F.3d 449 (4th Cir. 2008) 19

United States v. Whitley,
249 F.3d 614 (7th Cir. 2001) 18

United States v. Williams,
718 F.3d 644 (7th Cir. 2013) 19

Wong Sun v. United States,
317 U.S. 471 (1963).....23

Statutes

18 U.S.C. § 19511, 5, 20, 21

18 U.S.C. § 2510(11)..... 18

18 U.S.C. § 2510-2522 17

18 U.S.C. § 2515 22, 23

18 U.S.C. § 2518 17

18 U.S.C. § 2518(3)..... 18

18 U.S.C. § 2518(10)(a).....23

18 U.S.C. § 2518(10)(a)(i) 18, 22

Other Authorities

U.S. Const. Amendment IV23

Introduction

On August 18, 2014, the government directed the target of an unrelated fraud investigation (CS) to record a meeting at which the lawyers at Michael J. Madigan's private law firm introduced themselves to the CS and a prospective developer client and explained the tax services they could provide. This was the one and only time that Madigan ever met the CS or this developer. Alderman A, who was not yet cooperating with the government, arranged for and was present for this meeting. The CS purported to act as the representative of and interpreter for the Chinese hotel developer. The Madigan firm was not retained and never performed any work for this developer or CS.

A little more than one month later, the government submitted an application to the Chief Judge and put forth its conclusion that, as a result of this meeting, Madigan and Alderman A had conspired to commit extortion, in violation of 18 U.S.C. § 1951. (Exhibit A, 9/26/14 Application and Affidavit, ¶8(a)) This was the first time that the government sought authority to intercept Madigan's communications. (*Id.*, Affidavit, ¶96) The affidavit in support of the application presented no facts regarding any actions or statements by Madigan that would support the government's conclusion. Madigan sat for one 32-minute, introductory meeting, discussing the tax services that his firm provides. Instead, the affidavit relied upon falsehoods and an incredible amount of speculation and unsupported assumptions put forth as inferences. The government theorized that Madigan conspired with Alderman A to threaten to withhold Alderman A's approval of a zoning request unless the developer hired Madigan's law firm. A full and fair review of the audio and video recording of the meeting, as well as analysis of the surrounding circumstances, demonstrates that the government's inferences were not objectively reasonable. In fact, they were purposefully false.

The falsity of the government's inferences and ultimate conclusion cannot be in dispute. The government confronted Alderman A almost two years later, on June 1, 2016. He decided to cooperate with the government, and on June 3, 2016, the government debriefed him about the August 18, 2014 meeting. (Exhibit B, 6/3/16 Interview, at 3-4) Alderman A explained that the government's theories were erroneous. Alderman A told the government that he asked the developer and CS to meet with Madigan and did so because he felt bad about an unrelated situation and "wanted [CS] to be successful in the attempt to get the hotel built," knowing that the developer had been unsuccessful on two prior occasions. (*Id.*) Alderman A informed agents that a "side meeting" with Madigan that day (which was not captured by the CS's recording device) did not include any discussion about a zoning change or frankly anything that would support the government's extortion theory. Further, Alderman A made clear that Madigan had never offered Alderman A anything for introducing him to developers. (*Id.* at 4) In short, various inferences advanced in the September 26, 2014 affidavit were flat wrong.

Four days later, on June 7, 2016, the government nonetheless submitted a Title III application directed at Madigan, mentioning *nothing* about the critical, exculpatory information that Alderman A provided on June 3, 2016. (Exhibit C, 6/7/16 Application and Affidavit) The government's own cooperator (Alderman A) essentially explained that their theory about what happened in August 2014 was factually wrong, and the government failed to disclose that to the Chief Judge. The information from Alderman A did not just undercut any conspiracy to commit extortion theory against Madigan but demonstrated that the inferences presented in the original Title III application were objectively unreasonable.

Not until 674 days later, on April 6, 2018, after submitting numerous other Title III applications¹ did the government finally tell the Acting Chief Judge about at least some of the exculpatory information offered by Alderman A. In doing so, the government buried its admission in the middle of a footnote and offered its spin that even though the government's interpretation of what happened in August 2014 was factually wrong, it was still somehow permissible for the government to rely upon the August 2014 incident because the now-cooperating Alderman A "acknowledged" how "an independent observer" could have misinterpreted the events.² (Exhibit D, 4/6/18 Affidavit, at 20, n. 7)

The inclusion of the footnote and the so-called acknowledgment by Alderman A followed a remarkable two days of pressing Alderman A about the August 2014 meeting. More specifically, on April 3, 2018, the government met with Alderman A, who, according to the report, told the government at the start of the interview:

[Alderman A] stated that [the developer] was in the process of building a hotel in the 25th Ward of Chicago that would be a "big deal" for the ward. [Alderman A] stated [the developer] would have received any zoning changes [the developer] required to get the hotel built, regardless of [the developer's] decision to enter into an agreement with Madigan's law firm.

(Exhibit E, 4/3/18 Interview, at 2) Other questions followed, but Alderman A did not change his perspective and mustered the comment, "I see [your] point." (*Id.*) Even though the 32-minute meeting on August 18, 2014 was the one and only topic on the agenda for the April 3, 2018 session with Alderman A, the government's questioning of Alderman A about that meeting continued into

¹ See Applications submitted on 6/7/16, 7/6/16, 8/4/16, 9/1/16, 10/28/16, 11/23/16, 12/22/16, 1/20/17, 2/17/17, 3/17/17, 4/14/17, 5/12/17, 6/8/17, 7/7/17, 8/3/17, 9/1/17, 9/29/17, 10/27/17, 11/22/17, 12/21/17, 1/16/18, 2/15/18, 3/16/18. This was in addition to nine applications submitted prior to confronting Alderman A: 10/27/14, 12/1/2014, 2/9/2015, 3/12/15, 4/10/15, 5/11/15, 6/11/15, 7/23/15, 8/21/15.

² The government provided no additional detail in the nine additional applications submitted on 5/8/18, 6/8/18, 7/10/18, 8/9/18, 10/18/18, 11/14/18, 1/7/19, 2/1/19, 3/1/19.

a second day, when a smaller government team again pressed Alderman A on his answers about the August 2014 meeting. After numerous questions about certain words and phrases in the recording, Alderman A expressed his hope that “others will see the entire recording of the meeting.” (Exhibit F, 4/4/18 Interview, at 2) Alderman A explained that he would have made the exact same comments even if the meeting had not been with Madigan, but some different private lawyer—completely undermining the government’s claim that Alderman A and Madigan had conspired to extort the developer. (*Id.*) Alderman A refuted the government’s theory as well as specific facts relied upon to draw the objectively unreasonable inferences in the original September 26, 2014 Affidavit. In short, after two days of being pressed and despite desperately seeking cooperation credit, Alderman A told the government that its view of what took place in that August 18, 2014 meeting was factually wrong.

Needless to say, the August 2014 event involving CS was not charged in the original or superseding indictment in this case for one simple reason – Madigan had committed no crime. The government’s theory that Madigan conspired to commit extortion, put forth in the September 26, 2014 Affidavit as well as numerous other subsequent affidavits to support its Title III surveillance, was purposefully false.

The Court should suppress the contents of the communications intercepted as a result of the September 26, 2014 Title III application, and any evidence derived therefrom,³ for at least two reasons, each of which standing alone supports suppression. First, a viewing of the audio/video

³ Each and every application for authority under Title III submitted from September 26, 2014 through April 2019 incorporated the information from the original September 26, 2014 wire application and thus all content intercepted was derived from that first illegal September 26, 2014 wiretap. See Applications submitted on 10/27/14, 12/1/2014, 2/9/2015, 3/12/15, 4/10/15, 5/11/15, 6/11/15, 7/23/15, 8/21/15, 6/7/16, 7/6/16, 8/4/16, 9/1/16, 10/28/16, 11/23/16, 12/22/16, 1/20/17, 2/17/17, 3/17/17, 4/14/17, 5/12/17, 6/8/17, 7/7/17, 8/3/17, 9/1/17, 9/29/17, 10/27/17, 11/22/17, 12/21/17, 1/16/18, 2/15/18, 3/16/18, 4/6/18, 4/13/18, 5/8/18, 5/11/18, 6/8/18, 7/6/18, 7/10/18, 8/3/18, 8/9/18, 8/31/18, 9/28/18, 10/18/18, 10/26/18, 11/14/18, 11/20/18, 12/19/18, 1/7/19, 1/9/19, 1/14/19, 1/18/19, 2/1/19, 2/14/19, 3/1/19, 3/15/19, 4/17/19.

recorded meeting, analysis of the surrounding facts, and any *reasonable* inferences drawn therefrom did not support a finding of probable cause to believe that either Madigan or Alderman A attempted or conspired to commit extortion in or around August 2014. Second, the information submitted to support the September 26, 2014 Title III application was purposefully false. This was true at the time of the original application, and this was true each and every time the government submitted another Title III application after receiving information from Alderman A (June 3, 2016, April 3, 2018, and April 4, 2018), each of which was derived from the original September 26, 2014 Title III application.

Factual Background

Based on the discovery tendered to date, the government's investigation of Madigan appears to have started when Alderman A asked Madigan, in his capacity as a private lawyer, to meet with an individual (CS), who unbeknownst to Alderman A and Madigan had engaged in a million dollar fraud scheme (having nothing to do with Madigan) and, when caught, sought to earn cooperation credit and reduce his jail sentence by surreptitiously recording public officials with scripted directions from the government. After Madigan had one and only one meeting in August 2014 with this CS, Madigan chose not to work with him. His law firm was never engaged by CS. Nonetheless, the government targeted Madigan with a wiretap by misleading the Chief Judge in order to get it.

A. The September 26, 2014 Title III Application

On September 26, 2014, the government submitted an application for an order authorizing the interception of communications over a phone subscribed to by Alderman A. (Exhibit A, 9/26/14 Affidavit, ¶3) The application named Alderman A and Madigan as the sole "Interceptees" and "Violators," stating that there was probable cause to believe that Alderman A and Madigan conspired to commit extortion in violation of 18 U.S.C. § 1951. (*Id.* ¶¶ 3, 8) Section 1951 was the

only Subject Offense identified. (*Id.*) In the affidavit submitted to support this application, the government revealed that it received information from CS, who acted as the representative of a Chinese developer (*Id.* ¶10). The affidavit disclosed that the CS would be charged for his participation in a fraud scheme that included false representations to a financial institution and purchasers of real estate, as well as the misappropriation of funds from these purchasers. (*Id.* ¶14, n. 1)

According to the affidavit, the CS reported that he had several meetings with Alderman A in early 2014 to attempt to obtain Alderman A's support for a zoning change viewed as necessary to develop a parcel on South Archer Avenue into a hotel. (*Id.* ¶ 22) According to CS, Alderman A indicated that he would support the zoning change if two conditions were met: (1) the parcel of land adjacent to the Archer Property was not used to build another hotel, and (2) the developer provided letters of support from the community supporting the proposed rezoning. (*Id.*) Although unstated in the affidavit, Alderman A said nothing about the developer meeting with the Madigan firm, let alone any suggestion that retaining the Madigan firm was necessary to secure his approval.

According to the CS, Alderman A met with the CS again on July 21, 2014. At this meeting, Alderman A told the CS that he wanted to see two more letters of support from identified neighborhood organizations. (*Id.* ¶¶ 24, 25) Once again, not stated in the affidavit was the fact that Alderman A said nothing about meeting with the Madigan firm, let alone any suggestion that retaining the firm was necessary to secure his approval.

According to the CS, Alderman A told him in an unrecorded call on August 5, 2014, that "he (Alderman A) wanted to arrange a meeting with MADIGAN, [CS], [the developer], and himself." (*Id.* ¶ 26) The CS then received an email from a staffer for Alderman A to schedule the meeting. (*Id.*) The meeting took place on August 18, 2014, at the offices of Madigan's law firm.

The CS recorded the audio and video of this attorney-client meeting. The full recording of this meeting is submitted as Exhibit G.⁴

The affidavit describes the introductory small talk at the August 18, 2014 meeting and interestingly quotes nearly every word. When the affidavit turns to the bulk of the discussion at the meeting—namely, Madigan’s and his law partner’s description of their services, the other hotel clients that the firm represents, and the typical terms of any engagement—the affidavit becomes far less detailed. (Exhibit A, 9/26/14 Affidavit, ¶37) The affidavit includes Madigan’s statement that the Madigan firm has “a little different approach to representation on hotels than the other law firms,” but then purposefully omits the end of Madigan’s sentence, which explains what he means: “it does make a difference in terms of the results you get from the assessor or from the board of review.” (*Compare* Exhibit A, ¶37 with Exhibit G, 8/18/14 Recording, Part 5, 7:05) The affidavit also omits Madigan’s law partner’s detailed explanation of the approach, which centered on how to convince the assessor to assign a value based on rental revenue instead of the property’s purchase price or construction cost. (Exhibit G)

Madigan’s partner noted that there is a difference between the “going concern value you buy and sell hotels for and what they should be valued for real estate tax purposes.” (*Id.* at Part 5, 7:30.) The law partner explained that his approach was to convince the tax authorities to exclude “a certain percentage of the income that relates to the personalty whether it’s tangible, intangible, goodwill, assembled workforce, food and beverage,” among other components. (*Id.* at Part 5, 7:42) The partner stated that “you want to make sure you are only being taxed on the income that falls directly from the rental rooms.” (*Id.* at Part 5, 8:04) The law partner again emphasized, “it’s not

⁴ The video was provided by the government in eight parts. The citations throughout this Motion refer to the relevant part and approximate time stamp within that part.

what you buy and sell it for or what you build it for.” (*Id.* at Part 5, 8:00) All of this discussion was omitted from the affidavit.

Also omitted from the affidavit is the CS’s response, which stated “how it work, the tax, because [the developer] *got another tax consultant working with him* but I don’t know, like, but also *he bought a lot of commercial properties this trip* so like how you charge, by hour.” (*Id.* at Part 5, 10:10 (emphasis supplied)) In response, Madigan’s law partner explains that a fee would be calculated as an annual fee or as a percentage of the tax savings earned, “whichever the client is most comfortable with.” (*Id.* at Part 5, 11:10)

The CS stated, “for instance, the hotel that he is proposing in Chinatown is about \$6 million dollars, hopefully we get support from Alderman to get the zoning change, but for instance this hotel project how much tax, that like, is normal, that like the tax that the state and city will charge him and then like how much he can save from hiring a good law firm.” (*Id.* at Part 6, 0:36) The affidavit ends this quote at the word “change.” (Exhibit A, Affidavit, ¶ 38) In immediate response to the CS’s question, Madigan’s law partner asked how many rooms will be rented, what the room rate would be, what the occupancy rate would be, and then initially tries to do the math in his head before leaving the room to grab a calculator and other materials to perform the calculations. (*Id.* at Part 6, 0:50) The conversation is entirely consistent with the earlier-expressed statements (purposefully omitted from the affidavit) that the firm’s approach is to advocate for a tax assessment based on the rental income from the rooms, not the \$6 million construction cost. No one responded to the CS’s aside about the zoning change. Contrary to statements in the affidavit and when viewed in the context of the complete conversation, it was a stray comment at best, totally irrelevant to the back-and-forth that was taking place.

When Madigan's law partner left the room, the CS then took out a map and, as directed by law enforcement, stated that he and the developer wanted to talk about a separate parcel in Chinatown. (*Id.* at Part 6, 3:30) After questions about the map and the meeting participants' understanding of who owns what, Alderman A stated that "it's still early stages. I mean if he has a proposal, bring it up but it wouldn't be an official," (*Id.* at Part 6, 7:40) at which point the CS says "ok, it's too early, ok, yeah." (*Id.* at Part 6, 7:48) The affidavit then states that "Madigan added: 'Okay,'" as part of the discussion on this topic. (Exhibit A, ¶41) This is inaccurate – Madigan made no statement that could be construed as a willingness to consider the project. If there is an "okay" stated, it was stated by another participant. (*Id.* at Part 6, 7:48) But even if Madigan had uttered "ok," no basis exists to assert that Madigan was willing to consider the project.

Following a clear pause in the conversation, someone prompted Madigan's law partner, who had re-entered the room at this point, to resume his discussions about calculating the expected tax based on room usage. (*Id.* at Part 6, 7:54) Again, purposefully omitted from the affidavit is the law partner's detailed explanation, including that "while you're building it, you're only taxed on the land value. Until you're at stabilized vacancy, they give you partial assessments but once you hit market occupancy, say 70%, then yeah you'll get a full assessment." (*Id.* at Part 6, 8:50) The law partner then explained for the type of project contemplated, "there's probably not going to be a restaurant on the premises. There is not going to be meeting rooms. So the business value is less on a 60 room hotel/motel setting. Most of that income is dividend, comes from room rentals so that it's harder to say that there's a lot of business value there." (*Id.* at Part 6, 9:30) The law partner again explained that the costs of construction and what hotels buy and sell for is informational, but "the only way they can get uniformity among all these hotels is to look at what revenues they're

generating, what expenses and that way they kind of level the playing field so that you're treated competitively with like hotels." (*Id.* at Part 7, 0:06)

Also omitted from the affidavit was the CS's response, in which the CS again stated that the developer had consulted "another tax attorney" and posed more questions about the fees. (*Id.* at Part 7, 1:18) The CS stated that the developer "gets a lot of like people like referred him, a lot of other consultants" and wants to know if there are other opportunities in Chicago. (*Id.* at Part 7, 2:35) Alderman A responded that there was a lot of opportunities in Chinatown and "as Chairman of Zoning," he sees general growth across the city. (*Id.* at Part 7, 3:24)

Madigan said nothing in response to this remark, instead asking for clarification on whether the developer already was represented by counsel: "what's the status of the representation of this hotel we're talking about. You said he's been working with others, is he committed to other people?" (*Id.* at Part 7, 3:47) When the CS responded in the negative, Madigan added, "so he's considering – we're under consideration?" (*Id.* at Part 7, 3:58) When the CS responded saying yet again that there were a lot of people "proposing him for services," Madigan asked if they were lawyers or not. (*Id.* at Part 7, 4:09) The CS responded that they were lawyers and "take like percentage of the savings," adding "besides the hotel, he just bought almost 15 commercial space, retail space in the Chicago area." (*Id.* at Part 7, 4:40) The affidavit submitted to the Chief Judge omitted most of this conversation, including the discussion of the developer already "working with others" and the CS's mention of the 15 other purchased properties. Also omitted was Madigan's response, where he explained that "we would do a fee that would be agreeable to the client, alright," that if the client wants to do a contingency fee, the firm would recommend a cap because with "no cap on the fee, it's not good for the client." (*Id.* at Part 7, 4:58)

In short, the government purposefully omitted significant portions of the attorney-client discussion that provided important context and demonstrated that the government's inferences and ultimate conclusion were objectively unreasonable. For example, the government mocked the idea that this was a real pitch by an attorney to a potential client, noting that "Madigan sought to have his firm retained to reduce the taxes to be paid by a hotel which had not been constructed, had no income, and which had not been assessed any tax." (Exhibit A, 9/26/14 Affidavit, ¶ 62) The government attempted to land this point by omitting the following material facts from the recording: (1) there was extensive discussion about the fact that the hotel already was being taxed based on the land value, but that would change once a hotel was built and the developer needed an advocate to get the assessor to use the right approach – revenue based on room rentals, not the "\$6 million" cost of construction, (2) the developer already was talking with "another tax consultant," "another tax attorney," and "other consultants," thus stating that there was on-going competition between attorneys as to who would be retained, and (3) the developer had recently purchased other properties, as many as 15, for which he needed tax consulting. (Exhibit G, 8/18/14 Recording). These facts of course explain why an attorney would pitch a potential client at that particular time, yet all of these facts were omitted from the affidavit so that the government could suggest – falsely – that the meeting was not intended as a real client pitch but a ruse to commit extortion. A simple viewing of the full recording demonstrates otherwise.

As another example, the government alleged that Madigan's "demonstrated willingness" to consider "other public projects" gave "the impression that [Alderman A] and MADIGAN were willing to consider taking official action for the benefit of [the developer] at the same time they were soliciting a private benefit for MADIGAN." (Exhibit A, ¶ 62) This stunning sentence has no basis in fact. Madigan never made any statement that one could reasonably construe as a

willingness to take official action for the developer. While Madigan’s law partner stepped out to grab a calculator and do some math, the CS (at the direction of the government) pulled out a map, Madigan asked about what he was being shown, and then Alderman A cut off the discussion by saying it was too early to consider any proposal. The false allegation that Madigan said “okay” as part of this discussion, presumably the basis for the so-called “demonstrated willingness,” revealed the government’s desperation to attribute behavior and words to Madigan that a simple viewing of the full recording demonstrates to be objectively false.

Stretching to reframe what took place at this meeting was critical to the government’s conclusion because, after all, the August 18, 2014 recording was the only meeting Madigan attended with the CS and this developer. The affidavit includes a description of the CS’s separate conversation with Alderman A outside Madigan’s presence, where Alderman A stated “if he works with the Speaker, he will get anything he needs for that hotel.” (Exhibit A, ¶ 47), and attempts to tie that back to Madigan by pointing out that Alderman A asked to speak with Madigan for a “couple of minutes” before Alderman A left the office with the CS (Exhibit A, ¶¶ 46, 62). Attributing to Madigan any knowledge of or connection to these statements by Alderman A – made outside Madigan’s presence – was utter speculation. There simply was no evidence to suggest that Madigan conspired with Alderman A to commit extortion. Once again, a viewing of the recording demonstrates that the description of events in the affidavit was purposefully false. (Exhibit G)

Nor was there sufficient evidence to establish Alderman A attempted to commit extortion. Alderman A had met with the CS at least twice prior to the August 18, 2014 meeting to explain what the developer would need to do in order obtain his support for a zoning change and never mentioned the Madigan firm let alone suggested that the developer would need to retain the

Madigan law firm in order to get Alderman A's approval. Alderman A explained that he arranged for the introduction of CS and the developer to the Madigan law firm because he believed that the success of the potential hotel development was important to his ward and that the developer would "benefit" from the tax savings that the firm could provide. Alderman A stated that he planned to approve the zoning request because it was supported by the community and was good for his ward, not because of any statement by the CS that they would retain the firm. In fact, Alderman A in a letter and orally at a public hearing provided his support for the zoning change *before* any engagement of the Madigan law firm took place. The developer *never* engaged the Madigan law firm. The affidavit did not establish probable cause of any extortion.

In an attempt to bolster its application, the government included additional information about Alderman A from four years earlier. Specifically, according to the CS, he was told by a different Chinese developer that Alderman A had received cash bribes from this developer on a trip to China in 2010. According to the affidavit, the CS told Alderman A on September 12, 2014 that this other developer was still interested in proceeding with the 2010 project. Although the information clearly was stale, the government reported to the Chief Judge that it "plans to instruct" the CS to try and set up another meeting with the Madigan firm. (Exhibit, Affidavit, ¶ 67) Such a meeting never took place.

B. The June 3, 2016 Debrief of Alderman A

The falsity of the government's speculation about the August 18, 2014 meeting was confirmed after the government confronted Alderman A with evidence of his multiple crimes (none of which had anything to do with Madigan). A redacted report of this interview is attached hereto as Exhibit B. Among other topics, the government asked Alderman A about the August 18, 2014 meeting. According to the report, Alderman A explained that the CS had attempted to

develop a hotel in the same location in Chinatown on two prior occasions, but had been unsuccessful. (Exhibit B, at 4) Alderman A stated that he had instructed the CS to contact his scheduler and set up a meeting with Madigan and the developer because Alderman A felt bad about an unrelated situation and “also because” he wanted the CS and the developer to be successful in the attempt to get the hotel built. (*Id.*)

Alderman A addressed questions about the so-called “side meeting” and explained that its purpose was simply to inform Madigan who the CS and the developer were and what they were trying to do with the hotel development. (*Id.*) There was no discussion about any zoning change and, more importantly, no discussion whatsoever about any plan to withhold Alderman A’s approval unless and until the CS and the developer hired Madigan’s firm. Alderman A added that he had “never been offered anything” from Madigan in exchange for making referrals. (*Id.*) The information provided by Alderman A on June 3, 2016, made clear that the government’s theory about the August 18, 2014 meeting and its attempts to suggest that Alderman A and Madigan conspired to commit extortion were factually wrong.

C. The June 7, 2016 Title III Application

Just four days later, on June 7, 2016, the government submitted another Title III application on Alderman A’s phone seeking authority to continue to intercept Madigan. (Exhibit C, 6/7/14 Application, ¶¶ 3, 7). The application incorporated the allegations of the September 26, 2014 Title III application. (*Id.*, ¶5) In the June 7, 2016 application, the government disclosed that the government had confronted Alderman A, that he agreed to cooperate, and that he had been debriefed on June 3, 2016. (*Id.*, ¶¶ 3, 7) Stuningly, the application failed to disclose that its speculation about the “side meeting” and other material facts relating to the August 18, 2014 meeting was factually wrong.

D. The April 3, 2018 and April 4, 2018 Debrief of Alderman A

Alderman A met with the government on April 3, 2018. At this point, more than two years had passed since Alderman A began and continued to cooperate with the government's investigation. According to the report, the sole topic of the interview was the August 18, 2014 recorded meeting at Madigan's law office. (Exhibit E, 4/3/18 Interview) After portions of the audio/video recording were shown to Alderman A, he explained his "anything" comment:

[Alderman A] stated that [the developer] was in the process of building a hotel in the 25th Ward of Chicago that would be a "big deal" for the ward. [Alderman A] stated [the developer] would have received any zoning changes [the developer] required to get the hotel built, regardless of [the developer's] decision to enter into an agreement with Madigan's law firm.

(*Id.*, at 2 (emphasis supplied)) In response to this answer, the government pressed Alderman A about what he meant when he told the CS that he would "benefit" from hiring the Madigan firm. Alderman A explained that "[the developer] would be working with one of the best tax attorneys in the Chicago area." (*Id.*) Not satisfied with that answer, the government pressed yet further on other selective quotes from the meeting. But Alderman A repeated, "[the developer] would have received the zoning changes he was seeking regardless of whether or not he retained Madigan's law firm," and explained that he was not getting "anything from anybody" for introducing the developer to Madigan. (*Id.*) In other words, even after two years of desperately working to earn cooperation credit, Alderman A still told the government that it had it wrong.

At this point, a member of the seven-person government team explored whether Alderman A would agree that a "bystander" could have interpreted Alderman A's statements to CS (outside Madigan's presence) to mean that they should retain Madigan's firm to get Alderman A's approval of the zoning request, to which Alderman A said, among other words, "I can see the point." But, as noted in the report, Alderman A:

reiterated, 1) [the developer's] hotel was good for the ward, 2) [the developer] was going to get the zoning he needed for his hotel regardless of his decision to retain Madigan's law firm, and 3) [the developer] would 'benefit from working with the Speaker' because of Madigan's reputation for providing quality 'tax work.'

(*Id.* (emphasis supplied)) As a review of the full report reveals, the government team repeatedly pressed Alderman A on this, but there was no change in Alderman A's view. Among other statements, Alderman A insisted – once again – that he “fully intended to grant [the developer] the zoning changes he needed for his hotel regardless of [the developer's] decision to retain Madigan's law firm.” (*Id.*)

Clearly not satisfied with Alderman A's information, a much smaller government team met with Alderman A the following day, April 4, 2018, to once again discuss the recording made on August 18, 2014. During this second day, Alderman A “was asked why [Alderman A] had expressed concern with ensuring that others will see the entire recording of the meeting with [the developer] and Madigan.” (Exhibit F, 4/4/18 Report, at 2) Alderman A explained that he recalled Madigan's law partner explaining the percentage of savings that could be realized, “possibly 12%,” and after listening to this presentation, he was convinced such savings on taxes were the “benefit” to hiring Madigan's firm and that is why he said as much during the meeting. (*Id.*) (As noted above, it was this type of detail from the law partner's presentation that was intentionally omitted from the 9/26/14 affidavit.) Alderman A emphasized that “the point” was that he “would have said the same things even if [Alderman A] had been in the office of [a different lawyer not affiliated with Madigan's law firm] . . . but not in terms of a 'quid pro quo.’” (*Id.* (emphasis supplied)). Alderman A disputed the notion that his position as Chair of the Zoning Committee was of special importance, pointing out that any alderman is “going to have a lot of weight in terms of what they present for their ward in terms of a development.” (*Id.*)

E. The April 6, 2018 Title III Application

On April 6, 2018, the government submitted to the Acting Chief Judge an application to intercept communications on a phone subscribed to co-defendant McClain. The government identified Madigan and McClain, as well as others, as the Interceptees, and put forth its conclusion that there was probable cause to believe that McClain and Madigan had violated various provisions of federal law. (Exhibit D, 4/6/18 Application and Affidavit, ¶ 3) This was the government's first application on this phone. The affidavit submitted in support of the application incorporated the original 9/26/14 Affidavit, as well as the other Title III applications and affidavits that derived from that original application. (Exhibit D, Affidavit ¶ 10, n. 3)

The April 6, 2018 Affidavit included a description of the events of August 2014 over nine pages with seventeen paragraphs of information. The description specifically noted that the August 2014 "solicitation" was "set forth in detail in the 9/26/14 Affidavit." (*Id.* ¶ 22) The description essentially mirrored the description provided in the original 9/26/14 Affidavit, omitting the same important details about the August 18, 2014 meeting mentioned above and including the same false allegation that Madigan said "okay" to considering another proposal. Near the end of this description, the government added the following footnote in small font:

After he began cooperating, [Alderman A] was shown a recording of this exchange with [the CS] and then made a series of statements about the exchange. Initially, Solis said that this development project was a "big deal" for his ward, and his comment that [the developer] would "benefit from being with the Speaker" meant that [the developer] would be working with one of the best tax attorneys in the Chicago area. [Alderman A] also said that he was not getting anything from anybody by making this introduction, and that the developer would have received [Alderman A's] support for the zoning changes for the Archer property whether or not MADIGAN's law firm was retained. However, [Alderman A] acknowledged that, even though he intended to support the zoning request, an independent observer would interpret his comments to mean that MADIGAN's firm should be retained in order to receive the required zoning support from [Alderman A], and that [the developer] would

benefit with zoning support from [Alderman A] by hiring MADIGAN's private law firm. [Alderman A] was asked why he made these statements to [the CS] (which, according to [Alderman A], did not reflect his true intentions with respect to the Archer Property). [Alderman A] explained that MADIGAN was in a powerful position in Illinois, and viewed the matter from an "election" standpoint, and said that, "You don't want MADIGAN working against you." [Alderman A] stated that his comments to [the CS] were designed to benefit [Alderman A] politically with MADIGAN.

(Exhibit D, 4/6/18 Affidavit, ¶ 37, n. 7 (emphasis added)) In other words, the government buried into the middle of a footnote at the end of a nine-page description the results of two days of hammering Alderman A about the August 18, 2014 meeting, efforts that frankly were unsuccessful. Even in the perspective of its own cooperator – and a participant at the meeting in question who knew the facts not presented by the government to the Chief Judge – the government simply had it wrong. There was not sufficient evidence to support the allegation that Madigan conspired with Alderman A to commit extortion.

Legal Standard for Title III Suppression

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2522, established a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard v. United States*, 408 U.S. 41, 46 (1972), and codified "special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance." *United States v. Calandra*, 414 U.S. 338, 355 n. 11 (1974). Section 2518 provides the procedure to seek wiretap authority, including the requirements, among others, that the government demonstrate that "there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense," and that "there is probable cause for belief that particular communications concerning that offense will be obtained through such interception." 18 U.S.C. § 2518(3). The Supreme Court has noted that Title III surveillance should be "used with restraint

and only where the circumstances warrant the surreptitious interception of oral and wire communications.” *United States v. Giordano*, 416 U.S. 505, 515 (1974).

Any aggrieved person – “a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed” (18 U.S.C. § 2510(11)) – may move to suppress the contents of any wire or oral communication intercepted, or evidence derived therefrom on the grounds that “the communication was unlawfully intercepted.” 18 U.S.C. § 2518(10)(a)(i). A communication is “unlawfully intercepted” when the government’s application has not established that there is probable cause of the subject offense and that the intercept will collect evidence of that crime. *See* 18 U.S.C. § 2518(3)

A communication also is “unlawfully intercepted” under Title III when it fails to comply with the Fourth Amendment principles articulated in *Franks v. Delaware*, 438 U.S. 154 (1978). *United States v. Mares-Martinez*, 240 F. Supp. 2d 803, 817-19 (N.D. Ill. 2002). In *Franks*, the Supreme Court ruled that suppression is required when a defendant demonstrates that the affiant made false statements knowingly, intentionally, or with reckless disregard for the truth. *Franks*, 438 U.S. at 171. The Seventh Circuit has described the *Franks* test as a three part inquiry: (1) whether the challenged affidavit contains false information, (2) whether that information was included in the affidavit intentionally or with reckless disregard for the truth, and (3) whether that information was necessary to the finding of probable cause. *United States v. McMurtrey*, 704 F.3d 502, 511 (7th Cir. 2013); *see also United States v. Robinson*, 724 F.3d 878, 886 (7th Cir. 2013); *United States v. Whitley*, 249 F.3d 614, 620 (7th Cir. 2001).

In its analysis, the court may consider “deliberately or recklessly deceptive omissions.” *McMurtrey*, 704 F.3d at 508; *see also United States v. Williams*, 718 F.3d 644, 647-48 (7th Cir. 2013); *United States v. Harris*, 464 F.3d 733, 738 (7th Cir. 2006). To demonstrate a *Franks*

violation based on omissions, a defendant must show that the facts were intentionally or recklessly omitted, and that the affidavit – if supplemented with the omitted information – could not support a finding of probable cause. *United States v. Tate*, 524 F.3d 449, 455-56 (4th Cir. 2008). Because an affiant’s state of mind is at issue, it may be inferred from evidence of the circumstances under which misstatements or omissions are made. *See McMurtrey*, 704 F.3d at 512 (“Deliberate or reckless disregard for the truth, like other states of mind, must be shown by circumstantial evidence.”).

The defendant’s burden in seeking a *Franks* hearing is not as heavy as proving a violation itself. *Mares-Martinez*, 240 F. Supp. 3d at 821 (“[T]he preliminary showing needed to obtain a hearing need not satisfy the preponderance-of-the-evidence standard needed following a hearing to establish deliberate falsehood or reckless disregard.”). Rather, a defendant seeking a *Franks* hearing need only make a “substantial preliminary showing” as to each of the three factors. *See Robinson*, 724 F. 3d at 886; *McMurtrey*, 704 F.3d at 508; *Harris*, 464 F.3d at 739. The defendant “need not come forward with conclusive proof of deliberate or reckless falsity. Otherwise, there would be no need for a *Franks* hearing.” *McMurtrey*, 704 F.3d at 511.

Argument

The Title III surveillance directed at Madigan should be suppressed for at least two reasons. First, the September 26, 2014 Affidavit did not establish probable cause to support the government’s conclusion that Madigan conspired to commit extortion under color of official right or that either Madigan or Alderman A attempted to commit extortion. Second, the government included false information in the affidavit and omitted material facts that intentionally or at the very least recklessly misled the Chief Judge into finding that there was probable cause to believe that Madigan attempted or conspired to commit extortion under color of official right. At a minimum, Madigan is entitled to a *Franks* hearing.

I. The September 26, 2014 Affidavit Lacked Probable Cause

The government submitted its Title III application and affidavit asserting there was probable cause to believe that Madigan and Alderman A conspired to commit extortion in violation of 18 U.S.C. § 1951 (Exhibit A, ¶ 8(a)). The Hobbs Act makes it a crime to knowingly obtain, or attempt to obtain, money or property through extortion under color of official right. 18 U.S.C. § 1951. As noted in the Seventh Circuit Pattern Jury Instructions, the government must demonstrate that (1) the defendant knowingly obtained (or attempted to obtain) money or property, (2) the defendant did so by extortion under color of official right, (3) the defendant believed that the alleged victim parted (or would have parted) with the money or property because of the extortion, and (4) the conduct affected interstate commerce.⁵ Conspiracy of course requires the government to “demonstrate that 1) there was an agreement between two or more persons to commit an unlawful and, 2) that the defendant was a party to the agreement, and 3) that an overt act was committed in furtherance of the agreement.” *United States v. Johnson*, 26 F. 3d 669, 684 (7th Cir. 1994).

The affidavit did not present sufficient evidence to demonstrate even by a probable cause standard any knowing agreement by Madigan to commit extortion. There was no evidence of any communication between the CS and Madigan prior to the August 18, 2014 meeting. Further, there was no evidence of any agreement between Alderman A and Madigan prior to, during, or after the August 18, 2014 meeting to extort the CS or his developer client. The affidavit described two meetings in early 2014 between the CS and Alderman A where Alderman A explained what he would need before offering his approval of a zoning change. None of Alderman A’s requests

⁵ Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *The William J. Bauer Pattern Criminal Federal Jury Instructions, 18 U.S.C. § 1951 Attempted Extortion - Elements*, at 777 (2022 Ed.).

constituted extortion. Alderman A's requests, as reported by the CS, were not soliciting bribes, but were instead the types of requests that alderman routinely make regarding projects in their ward. Moreover, neither of those meetings even mentioned the Madigan law firm.

The one and only meeting where Madigan attended was on August 18, 2014, when he was one of seven participants in a meeting with the CS. As a full viewing of the recording of that meeting demonstrates, it was a normal discussion between a lawyer and a prospective client. Madigan, in his private capacity as a lawyer, and his law partner explained the type of services they provide, the approach they take to advocate for a fair tax assessment, and the possible fee arrangements. Neither Madigan nor his law partner engaged in any discussion about any zoning request or what Alderman A may or may not do. There was no discussion that suggested the CS or the developer needed to hire the firm in order to get Alderman A's support. There were no winks. There were no nods. To the contrary, the recording demonstrates two private lawyers who were doing their best to *earn* the opportunity to represent a potential client based on the quality of their work and experience and by offering a fee arrangement that would be competitive and in the client's best interest. Madigan even suggested putting a cap on the fee.

The affidavit relies upon events that took place outside of Madigan's presence and without his knowledge: Alderman A's conversation with the CS after they left the law office and Alderman A's subsequent support for the developer's zoning request. The affidavit offers no evidence that would suggest Madigan was even aware of either event, let alone that Madigan authorized, approved of, or condoned any conduct by Alderman A. There was no evidence of any intent by Madigan to enter into a *quid pro quo* agreement relating to his firm being retained (it was not) and Alderman A supporting a request relating to zoning, which is required to state a violation of 18 U.S.C. § 1951. *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001). A full and fair viewing

of the recording demonstrates a normal pitch by private lawyers who were trying to explain their experience, their methods, and the competitive nature of their fees. And, as Alderman A stated, there was no *quid pro quo* in relation to the CS or the developer. (Exhibit F, at 2). As importantly, the comments made by Alderman A during and after the meeting, when considered under the totality of the circumstances, were not sufficient to establish probable cause that he was attempting to commit extortion.

To attempt to remedy its lack of evidence, the government offered pure speculation under the guise of interpreting participants' statements and offering inferences. (Exhibit A, ¶ 62). For example, the affidavit describes how the CS pulled out a map and started talking about another potential project only to have the conversation shut down by Alderman A. The government then offered this thought: Madigan's "demonstrated willingness to mix the discussion of the retention of Madigan's firm for a non-existent hotel with a discussion of other public projects during their meeting with [the CS and developer], including an unrelated parking lot project development, thereby giving the impression that [Alderman A] and Madigan were willing to take official action for the benefit of [the developer] at the same time they were soliciting a private benefit for Madigan." (*Id.*) This "interpretation" of events is objectively unreasonable and, more importantly, false. The assertion that Madigan gave the "impression" of being willing to take official action is pure fiction, wholly unsupported based on a simple viewing of the recording.

A fair reading of the facts and any *reasonable* inferences in the Application and Affidavit makes clear that it did not establish probable cause to direct its wiretaps at Madigan. For this reason, the court should suppress all of the materials derived from the September 26, 2014 Title III application pursuant to the Fourth Amendment of the Constitution of the United States and 18 U.S.C. § 2515, 2518(10)(a)(i). The September 26, 2014 application was the first in this

investigation. Each and every application through and including 2019 incorporated the allegations of this first affidavit, and the materials collected thereafter were derived from this illegal wiretap. Title III provides that “[w]henver any wire or oral communication has been intercepted, no part of the contents of such communications and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury . . .” 18 U.S.C. § 2515 (emphasis supplied). The “evidence derived therefrom” provisions of the statute codify the “fruit of the poisonous tree” Fourth Amendment exclusion doctrine first articulated in *Silverhouse Lumber Company v. United States*, 251 U.S. 385 (1920), and developed further in *Wong Sun v. United States*, 317 U.S. 471 (1963) (excluding narcotics and oral statements of the defendant as fruits of an illegal search). See *United States v. Gonzalez*, 412 F. 3d 1102, 1115 (9th Cir. 2005). Under Title III, extensions or subsequent wiretaps that are the progeny the illegal wiretap must be suppressed pursuant to 18 U.S.C. § 2515 and § 2518(10(a)). *United States v. Roberts*, 477 F. 2d 57, 60-61 (7th Cir. 1973) (affirming suppression of wiretap extension since first wiretap was illegally obtained). The statutory remedy of suppression is not subject to any good faith exception. See, e.g., *United States v. Rice*, 478 F. 3d 704, 711-12 (6th Cir. 2007).

II. The Government Deliberately or Recklessly Made False Statements and Omitted Material Facts.

The Affidavit submitted in support of the September 26, 2014 Title III Application (1) contained false information and omitted material facts, (2) that information was either included or omitted intentionally or with reckless disregard for the truth, and (3) that information was material to the Chief Judge’s determination of probable cause. As such, the Court should suppress the communications derived from this illegal wiretap pursuant to the Fourth Amendment and the *Franks* doctrine. *McMurtrey*, 704 F.3d at 511.

The allegation that Madigan was knowingly involved in any extortion of the CS or the developer was false. The affidavit used numerous quotes from the recording to give the Chief Judge the false impression that it somehow was a full and complete description of what took place. Actually, the quotes were carefully selected or omitted to create a false narrative. The government wanted to advance its theory that the meeting was not truly necessary and simply a ruse to extort the CS and the developer using Alderman A's ability to approve a zoning change on one parcel. The government suggested that there should be suspicion as to why a meeting even occurred because the hotel "had not been constructed, had no income, and [] had not been assessed any tax." (Exhibit A, ¶ 62). The government believed this point was so material to the probable cause determination that it included it in the summary of the key facts supporting probable cause. (*Id.*)

But to make this point, the government needed to mischaracterize what took place by omitting the various details that contradicted its argument. As described extensively above, the government intentionally omitted significant parts of Madigan's and his law partner's description of the firm's "different approach" and the type of service it provides. The government omitted these details because they demonstrated what actually happened – a law firm met with a prospective client and pitched him based on their work and their experience. The meeting participants fully recognized the fact that the hotel was not built, but that was not the point. They were planning a development and had questions about the how the assessment and taxes would be determined (by the \$6 million cost of construction or by room rental revenue) and whether this law firm would be able to help the developer achieve tax savings. Even after Alderman A was cooperating with the government, he told them that it was these aspects of the presentation – i.e., the tax savings – to which he was referring when he told CS he would "benefit" from retaining the

Madigan firm (Exhibit F, 4/4/18 Interview, at 2). Including the word “benefit” in the affidavit, but removing the context to explain what was meant, was intentionally misleading.

Further, the government omitted a number of statements by the CS, again to support the false narrative that the meeting was not necessary and thus suspicious. The government omitted each and every time the CS mentioned that the developer already was talking with “another tax consultant,” “another tax attorney,” and other “consultants.” Those statements were purposefully omitted to mislead the Chief Judge about what happened at the meeting. The fact that there was already competition to be the developer’s tax attorney explains why the meeting took place in the first place. Suggesting to the Chief Judge that the developer had no need to meet with Madigan’s law firm and then omitting the fact the CS and developer were telling Madigan there already was competition to be his attorney was intentional or at the very least reckless. Also omitted were the CS’s multiple statements about the developer having purchased as many as 15 other commercial properties, yet another legitimate reason to explain why this meeting was occurring even though the hotel had not yet been built. Including these statements by the CS would have contradicted one of the central arguments that the government advanced to convince the Chief Judge.

Another material fact in the government’s list of key facts supporting probable cause (Exhibit A, ¶ 62) was the government’s “inference” that Madigan was willing to consider taking official action on a “public project” involving state land while pitching for legal work. As noted, a careful review of the recording quickly establishes the falsity of this statement. At the direction of the government, the CS pulled out a map and what followed was discussion about who owned what on the map. Madigan never said, or even intimated, that he would “consider” taking official action on a “public project.” To attempt to make this argument, the Affidavit includes the false assertion that Madigan said “Okay” in response to Alderman A’s statement that if the developer

had a proposal, he could bring it up later. (*Id.* ¶ 41). The CS certainly says the word, “okay,” but Madigan does not give any indication that he was willing to consider taking official action. And, what follows is a pause before someone says something intelligible to prompt Madigan’s law partner to continue his detailed description about how to calculate the tax. Falsely attributing to Madigan an expression of arguable agreement – “okay” – was intentionally misleading.

An accurate description of the recorded meeting on August 18, 2014 undoubtedly was material to the determination of whether or not there was probable cause. After all, it was the one and only meeting that Madigan ever had with the CS and the developer. What actually happened at that meeting was not of “minimal significance.” *United States v. Kimberlin*, 805 F.2d 210, 251 (7th Cir. 1986). The government spent six pages describing the meeting in its Affidavit, but through strategic inclusion and exclusion of key words and phrases, intentionally created a false and misleading description of what took place. Even Alderman A, who had been working at the government’s direction and trying to earn cooperation for more than two years, told them that they had it wrong and recognized the importance of context, expressing concern about others “see[ing] the entire recording of the meeting with [the developer] and Madigan. (4/4/18, Exhibit F, at 2).

III. The Court Should Conduct a *Franks* Hearing

Based on this filing and its exhibits, the court should grant Madigan’s request to conduct a *Franks* hearing. Madigan has made the required “substantial preliminary showing.” *See Mares-Martinez*, 240 F. Supp. 2d at 821 (“the preliminary showing needed to obtain a hearing need not satisfy the preponderance-of-the-evidence standard needed following a hearing to establish deliberate falsehood or reckless disregard.”). At this hearing, the parties may examine the government’s explanations for the manner in which the information was presented in the affidavit. *United States v. Glover*, 755 F. 3d at 811, 821 (7th Cir. 2014).

Conclusion

For all of the reasons set forth above, Madigan respectfully requests that this Court grant this Motion to Suppress.

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Respectfully submitted,

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