

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)
) CR No. 07-023-N-EJL
 Plaintiff,)
) ORDER
 vs.)
)
 JOSEPH EDWARD DUNCAN, III,)
)
 Defendant.)
)
 _____)

Pending before the Court in the above-entitled matter is Defendant's motion to suppress the evidence obtained from several search warrants issued in relation to this case:

- 1) **August 20, 2004** - Residence Search of 810 7th, St. Fargo, North Dakota (State Warrant).
- 2) **May 24, 2005** - Residence Search of 810 7th St., Fargo, North Dakota (State Warrant).
- 3) **July 2, 2005** - Vehicle Search of 2005 Red Jeep at 8:16 a.m. CDA, Idaho (State Warrant).
- 4) **July 2, 2005** - Vehicle Search of 2005 Red Jeep at 3:05 p.m. CDA, Idaho (State Warrant).
- 5) **August 1, 2005** - Search of Digital Evidence Seized during the August 2004 Residence Search in Fargo, North Dakota. (Federal Warrant).
- 6) **August 1, 2005** - Search of Digital Evidence Seized from Search of 2005 Red Jeep on the morning of July 2, 2005. (Federal Warrant).

The Government has determined it will not introduce any items seized during the August 2004 residence search in North Dakota (#1) or pursuant to the August 2005 Search Warrant of the Residence Search (#5). Thus, only those warrants numbered 2, 3, 4, and 6 above are

at issue.

Generally, the defense argues the search warrants 1) lacked probable cause, 2) lacked specificity/particularity, and 3) were over-board. The later warrants, the defense argues, were tainted by the violations of the previous warrants. In addition, the motion argues the officers searches exceeded the scope of the warrants.

The Government counters each of these arguments and, alternatively, argues that the good faith exception and/or the exigent circumstances exception validates the searches. The Government filed a sur-reply brief addressing 1) whether the Defendant abandoned his belongings in the Fargo, ND apartment and 2) clarifying its basis for probable cause of the July 2, 2005 3:05 p.m. search warrant.

On January 22, 2008 the Court held a hearing on the motion where the parties offered testimony and evidence followed by arguments from the parties. The Court took the matter under advisement. Having considered all of the foregoing the Court now finds as follows.

I. May 24, 2005 Fargo, North Dakota Search Warrant

The defense argues this search warrant “failed to state with sufficient particularity the things to be seized” because the warrant and attachment “directed the police to seize the targeted items without narrowing the scope to a particular person, criminal offense, or time period.” (Dkt. No. 120, p. 23). The warrant, the Defendant contends, lacks narrowing language such as limiting the records to the time period following the charge or otherwise tying the searchable items to the charges. In particular, the defense points to the seizure of the 1997 immigration document showing the Defendant’s travel to Mexico; dated eight years before the alleged 2005 abandonment and flight by the Defendant. The Government argues

this warrant was reasonably specific at the time it was issued as to the Defendant's "whereabouts, travel plans, records of whereabouts and travel plans and modes of transportation" as they related to the Defendant's apparent absence and flee.

A. Particularity

The Fourth Amendment requires that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. This clause prohibits the issuance of a general warrant. See Boyd v. United States, 116 U.S. 616, 625 (1886); Andresen v. Maryland, 427 U.S. 463, 478 (1976). "The requirement that a warrant not be a general one is in part a function of the probable cause rule and is in part derived from the fourth amendment requirement that warrants be ones 'particularly describing the place to be searched, and the persons or things to be seized.'" United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982). It is clear a warrant can not be broader than the probable cause upon which it is based. United States v. Weber, 923 F.2d 1338, 1346 (9th Cir. 1991) (citations omitted).

"To determine specificity, [the Court] examine[s] both the warrant's breadth and particularity." United States v. Wong, 334 F.3d 831, 836-37 (9th Cir. 2003) (citing United States v. Kow, 58 F.3d 423, 426 (9th Cir. 1995)). The Court considers "one or more of the following to determine specificity: (1) whether there was probable cause to seize particular items in the warrant, (2) whether the warrant sets out objective standards by which executing officers can determine which items are subject to seizure, and (3) whether the government could have described the items more particularly when the warrant was issued." Id. (citing United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986)); see also United States v. Hay,

231 F.3d 630, 637 (9th Cir. 2000).

Here, the warrant application was made from a standardized form and sought authority to search the Defendant's apartment for certain items listed in Exhibit A and based upon the affidavit of Investigator Gregory S. Esposito attached as Exhibit B. (Dkt. No. 120, Ex. K). Exhibit A identified nine categories of items subject to search and seizure from the apartment which had to do with the Defendant's travel plans, mode of travel, and general whereabouts namely:

1. Letters of correspondence to or from friends and or family as to his whereabouts.
2. Letters form [sic] credit card company's showing recent purchases.
3. Letters from Phone Company's showing recent to and from calls.
4. Computer files showing email messages to or from persons stating his travel intentions.
5. Indicia of occupancy of apartment.
6. Records of vehicle rental agreements.
7. Record of ownership of vehicle registered to him. Bearing vehicle identification number of 1G2NW14NXNC294064.
8. Airline, train, or bus tickets.
9. Travel Plans.

(Dkt. No. 120, Ex. K). Investigator Esposito's affidavit, Exhibit B, detailed the information law enforcement had obtained at that time regarding the unknown whereabouts of the Defendant including the outstanding warrant for criminal sexual conduct and the pick up order for violations of conditions of release. Upon this information, the Magistrate Judge issued the warrant. (Dkt. No. 120, Ex. L).

Defendant's argument here is that the attachment to the warrant application, Exhibit B, was not referenced nor attached to the warrant itself nor did the warrant allege the crimes suspected. It is true that "[a]n affidavit providing more guidance than an over-board warrant

may cure the warrant's overbreadth only if (1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search." United States v. Bridges, 344 F.3d 1010, 1018 (9th Cir. 2003) (citing Kow, 58 F.3d at 429 n. 3); see also Hillyard, 677 F.2d at 1340. Exhibit B is referred to but no particulars from it were included in the warrant and it was not attached to the warrant.

In viewing the warrant as a whole, the Court finds the warrant was not sufficiently particular to meet the demands of the Fourth Amendment. The warrant failed to properly limit the executing officers' discretion by listing or otherwise identifying the details contained in Exhibit B and the crimes alleged and/or attaching Exhibit B to the warrant itself. Though Exhibit A provides a list of items sought and subject to seizure, without knowing the crimes alleged against the Defendant, this list of items is far too general to narrow the search in any way. Given the nature of the investigation up to that point, the Court does not believe the descriptions of the items listed in Exhibit A could not have been more particularly described. However, the warrant was without any information as to what crimes that list of items pertained. This situation is akin to the cases where the Ninth Circuit has deemed a warrant unconstitutional because it was without limitations as to the items that could be seized and how they relate to the specific criminal activity. See Kow, 58 F.3d at 426 (citing Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747, 750 (9th Cir. 1989); United States v. Stubbs, 873 F.2d 210, 211 (9th Cir. 1989)). As such, the Court finds the search warrant was insufficiently particular to limit the officers' search of the apartment to information as to the Defendant's location.

B. 1997 Immigration Document

As to the 1997 immigration document in particular, the Government notes that it was found, not during the execution of this search warrant, but in boxes the landlord had removed from the Fargo apartment after the Defendant had abandoned it in 2005. (Dkt. No. 167, p. 9, n. 2). At the hearing, the Defendant challenged whether abandonment was proven, highlighting the express terms of the lease agreement for the apartment and the testimony of the landlord, Jeff Ware.

The Government maintains that the Defendant abandoned his Fargo apartment in 2005 relying upon substantially the same facts as were alleged in the search warrant affidavit: he had not been at his apartment for about a month, his rent check had bounced, his neighbor had received an email asking her to take care of his cats and indicating he would not return, he had rented and not returned a vehicle, the rental car key tag and receipt were found at a park in Wyoming, Minnesota, authorities had issued a nationwide pickup for the Defendant for violating the conditions of his pretrial release, there was an outstanding warrant for the Defendant for criminal sexual conduct, and the Defendant was a registered sex offender. In addition, the Government points to the condition of the Defendant's apartment, that the Defendant had cleaned out his bank accounts, his former boss could not contact him, the rental car agency could not locate him, his probation officer was unsuccessful in locating him, it was determined the Defendant was not attending classes at North Dakota State University, and an internet blog posted by the Defendant indicating he was a fugitive.

“It is firmly established that warrantless searches of abandoned property do not violate the Fourth Amendment.” United States v. Burnette, 698 F.2d 1038, 1047 (9th Cir. 1983)

(citing Abel v. United States, 362 U.S. 217, 240-41 (1960) and other cases). “Only a person whose privacy is invaded by a search has standing to object to it under the exclusionary rule as codified in F.R.Crim.P. 41(e). If a person has voluntarily abandoned property, he has no standing to complain of its search or seizure.” United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976) (citations omitted). “Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.” Id. (citations omitted). “The majority of previous cases in which the courts have upheld a finding of abandonment have involved both a denial of ownership or interest in the property and a physical relinquishment of the property.” Burnette, 698 F.2d at 1047 (citing United States v. Kendall, 655 F.2d 199 (9th Cir. 1981); United States v. Canady, 615 F.2d 694 (5th Cir. 1980); United States v. Jackson, 544 F.2d 407 (9th Cir.1976)).

Regardless of the terms of the written lease agreement, the Court finds based on the testimony presented at the hearing and the facts known by law enforcement at the time, that the Defendant had abandon his apartment and the items left therein. The landlord removed the items in June of 2005, nearly two months after the Defendant was last known to be at his apartment and over a month after he last paid his rent. Efforts to contact the Defendant were unsuccessful. In addition, the Defendant had contacted a neighbor and indicated he was not returning. As such, the Defendant had relinquished any legitimate privacy interest in the apartment and cannot now challenge the officers’ search of the boxes removed from the

apartment where the 1997 immigration document was found. Accordingly, the motion to suppress evidence as to this search is denied.

II. July 2, 2005, 8:16 a.m. State of Idaho Search Warrant

Officers applied for this search warrant on the morning of July 2, 2005 requesting authorization to search the 2005 Red Jeep Grand Cherokee Laredo discovered when the Defendant was apprehended. Defendant argues 1) the search warrant was overbroad as to the Dell laptop computer, microdrives, and GPS unit located in the 2005 Jeep and 2) the police exceeded the scope of this search warrant.

A. Government's Motion to Dismiss

Because the Fourth Amendment protects “people, not places,” Katz v. United States, 389 U.S. 347, 351 (1967), a defendant must first demonstrate that he personally had a “legitimate expectation of privacy” in the place searched or the thing seized. Rakas v. Illinois, 439 U.S. 128, 143 (1978). The Government has filed a motion to dismiss this aspect of the Defendant’s motion to suppress due to the fact that the 2005 Jeep was stolen and, therefore, the Defendant is without a legitimate expectation of privacy.

The Defendant rented the 2005 Jeep in Minnesota on April 15, 2005 from Enterprise Car Rent-a-car (“Enterprise”). Under the rental agreement the car was to be returned on April 20, 2005. The car was not returned on time and Enterprise made several attempts to contact the Defendant and to charge the Defendant’s credit card for the overdue fee.¹ The

¹ Enterprise was able to later successfully charge the Defendant’s credit card. Defendant argues this fact establishes that there was an on-going lease arrangement and the vehicle was not stolen.

car was eventually reported as stolen. On May 3, 2005 a United States Park Ranger notified the rental car agency that a key chain and Enterprise fleet sticker had been discovered in a campsite in the Bighorn Canyon National Recreation Area with identification numbers matching the 2005 Jeep. Following the Defendant's arrest, Enterprise contacted the Kootenai County Sheriff's Department claiming ownership of the vehicle. The Defendant has now plead guilty to theft of the 2005 Jeep.

Because the 2005 Jeep was stolen, as evidenced by the Defendant's guilty plea to transportation of a stolen vehicle, he has no legitimate expectation of privacy in the vehicle and, therefore, is unable to challenge the search of the 2005 Jeep. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("where defendant lacked standing to challenge search warrant because automobile was stolen and defendant knew it was stolen."); United States v. Wanless, 882 F.2d 1459, 1462 (9th Cir. 1989) ("as a general rule, only the owner of the vehicles or an individual with a legitimate privacy interest in the vehicles may challenge an allegedly illegal search."); see also Rakas v. Illinois, 439 U.S. 128, 134 (1978) (a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed); United States v. Miller, 84 F.3d 1244, 1250 (10th Cir. 1996) (defendant has no reasonable expectation of privacy in a vehicle unless he proves he had lawful ownership or possession of the vehicle at the time of the search) *rev'd other grounds*, United States v. Holland, 116 F.3d 1353 (10th Cir. 1997); United States v. Betancur, 24 F.3d 73, 77 (10th Cir. 1994) (defendant had no standing to object to search of a vehicle where he had failed to establish lawful ownership or possession of the vehicle);

United States v. Arango, 912 F.2d 441, 446 (10th Cir. 1990); United States v. Erwin, 875 F.2d 268, 271 (10th Cir. 1989).

Though the Defendant points out that Enterprise charged his credit card, it is clear from the Defendant's actions of removing identifying marks on the car and his guilty plea that he intended to and did in fact steal the vehicle. Further, Enterprise believed it was stolen and pursued legal action to recover the vehicle. The fact that Enterprise charged the Defendant's credit card in an effort to recoup money owed to them does not outweigh or overcome the evidence of the theft of the car. that Accordingly, the Government's motion to dismiss the motion to suppress as to the search of the 2005 Jeep is granted.

B. Defendant's Motion to Suppress

Alternatively, if the Court were to have determined that the Defendant possessed a legitimate expectation of privacy in the 2005 Jeep, the Court would still conclude that the warrant and search of the vehicle were valid.

1. Probable Cause

In assessing the validity of a search warrant, this Court must determine whether the magistrate judge had a "substantial basis" to conclude that probable cause existed to issue the warrants. Illinois v. Gates, 462 U.S. 213, 236 (1983). "Probable cause is determined by looking at the totality of circumstances." Wong, 334 F.3d at 838 (citing Gates, 462 U.S. at 230-31). "Probable cause exists if 'it would be reasonable to seek the evidence in the place indicated in the affidavit.'" Id. (citation omitted). The Magistrate Judge's determination of probable cause is afforded great deference. United States v. Hay, 231 F.3d 630, 633 n. 4 (9th Cir. 2000) (citing United States v. Clark, 31 F.3d 831, 834 (9th Cir. 1994)). The Magistrate

Judge's "responsibility in determining whether to issue a search warrant is 'simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Id. (citing Gates, 462 U.S. at 238). "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that specific 'things' to be searched for and seized are located on the property to which entry is sought." Id. (citing Zurcher v. The Stanford Daily, 436 U.S. 547, 556 (1978) (citation omitted)).

In support of the warrant application, here Detective Brad Maskell provided to the Magistrate Judge a recorded oral testimony that detailed law enforcement's investigation to that point and the information S.G. had provided to them after she was recovered. (Dkt. No. 120, Ex. O). The warrant requested the authorization to search and seize several types of forensic evidence in addition to other listed items, namely: computer and disks, camera and film, firearms, ammunition, tools, duck tape, zip ties, clothes papers, rental lease agreements, receipts, wallets, keys, maps, chains, cell phones, duffel bags, bank statements, and gloves. (Dkt. No. 120, Ex. P). The warrant alleged the crimes of kidnapping, rape, and murder.

The search violated the Fourth Amendment, the Defendant argues, because there was no probable cause for the seizure of all items from the interior of the 2005 Jeep. The oral testimony, the Defendant asserts, "reveals nothing that establishes that the computer or these other devices constituted the fruits of a crime" because there was no information given to the Magistrate Judge linking these particular items to the alleged criminal activity such as the photos S.G. referred to in their conversation. (Dkt. No. 120, p. 30). The Court disagrees and

finds the information provided to the Magistrate Judge in this case is sufficient to support the probable cause determination to seize the digital media in the 2005 Jeep.

“For probable cause, an affidavit must establish a reasonable nexus between the crime or evidence and the location to be searched.” United States v. Crews, 502 F.3d 1130, 1136-37 (9th Cir. 2007) (citing United States v. Chavez-Miranda, 306 F.3d 973, 978 (9th Cir. 2002)). “It need only be reasonable to seek the evidence at the location indicated in the affidavit.” Id. (citing United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir.1993)). “[A]n affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions....” United States v. Bridges, 344 F.3d 1010, 1015 (9th Cir. 2003) (finding the affidavit of an IRS agent which relies upon evidence gathered by other federal agents was properly relied upon by the court in determining probable cause) (citing United States v. Ventresca, 380 U.S. 102, 108 (internal quotation marks and citations omitted)).

“In making its determination, ‘the court issuing the warrant is entitled to rely on the training and experience of police officers.’” United State v. Parks, 285 F.3d 1133, 1142 (9th Cir. 2002) (citation omitted). The Magistrate Judge can draw “reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense.” United States v. Elliott, 322 F.3d 710, 717 (9th Cir. 2003) (citing United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir.1986)).

Detective Maskell’s oral testimony discussed how the evidence identified in the warrant related to the crimes alleged. In particular, S.G.’s statements to law enforcement

regarding the Defendant's use of a digital camera during her abduction. (Dkt. No. 120, Ex. O, pp. 83, 85).

Maskell: Shasta also spoke about uh, during the time that she was uh, held in custody, uh, by Mr. Duncan that uh, he had possession of a digital camera. And uh, Shasta spoke about him having taken pictures uh, of the kids with his digital camera while – while there – there in custody. And uh, claims that she has actually seen in the view finder of the camera some of the pictures that he has taken uh, that depict her and – Dylan actually with uh, Mr. Duncan uh, during the period of time that they were uh, held captive.

I'm asking for uh, a search warrant to collect all uh, digital media uh, that's contained in that vehicle. Additionally there's a computer uh, that located in that vehicle that is a lap top uh, computer that's wired into uh, electrical system of the uh – the vehicle through a uh, cigarette lighter jack. Uh, that uh, computer us, is a – an item that the man uh, appears to have been used.

I'm asking to seize that computer and all digital information from that computer.

Judge: Detective Maskell, you're not only asking for probable cause to seize the digital camera and the computer, but also to investigate and search its contents?

Maskell: That's correct.

Judge: Okay. Of the digital camera and the laptop?

Maskell: That's correct.

Judge: Okay. Is this part of your search warrant application as well to uh, exercise special means or extraordinary means, whatever it takes to –

Maskell: Computer discs –

Judge: – get the contents of the laptop?

Maskell: – uh, camera and film is listed on my search warrant.

Judge: Okay. Uh, would it be your intent to use an outside investigation agency to perhaps to – to uh, forensically investigate the contents of the laptop and perhaps the digital camera?

Maskell: Yes.

(Dkt. No. 120, Ex. O, p. 75).

Detective Maskell's oral testimony provided ample basis for probable cause linking the digital devices found in the 2005 Jeep to the alleged crimes of kidnapping and murder. S.G.'s statements that the Defendant had taken digital photos of the children and that she had viewed the photos on the camera view finder go directly to the kidnapping charge.² The Magistrate Judge had sufficient probable cause to issue the warrant to secure evidence of that charge and the related charges. Because the photos were digital it was also reasonable for the Magistrate Judge to infer that there was a fair probability, if not a strong probability, that evidence of the crimes listed on the warrant would likely be found on the digital devices located within the 2005 Jeep, including the laptop and 4GB microdrive.³ One would have to ignore reality to reach a contrary conclusion. In today's society when an individual takes a digital picture and is in possession of a computer and/or other digital storage devices there is a fair probability that those devices would be employed to store the digital data. The oral testimony adequately demonstrates that the Defendant used such devices in conjunction with the crimes alleged and, therefore, that there is a fair probability that evidence of the crimes

² The Government has acknowledged that S.G.'s statements referring to "good" and "bad" photos was not included in the warrant application. Accordingly, the Court has considered only the evidence contained in the warrant application and warrant itself in ruling on this motion.

³ As to the 4GB microdrive in particular, the Government argues that by giving it to S.G. the Defendant relinquished any privacy interest in that item. This is a disputed point and the evidence offered at the hearing and in the briefing does not resolve the dispute either way. Because the Court has concluded that probable cause existed for the issuance of the search warrant as to this item, the Court need not rule on this argument.

would be found thereon.

Defendant also challenges the search warrant as to the discovery of the GPS device, binoculars, sleeping bag, radar detector, two tents, Missouri license plates, night vision goggles, and GPS case. (Dkt. No. 120, p. 28). The warrant application and oral testimony of Detective Maskell, which included S.G.'s rendition of what occurred during her abduction, provided probable cause for the search and seizure of these items. (Dkt. No. 120, Ex. O). S.G.'s declaration to law enforcement as told to the Magistrate Judge included the Defendant's statements that he had watched the Groene home for two days prior to the murders and had entered the home at night, which provides a reasonable inference that the night vision goggles and binoculars may be evidence of the crimes of murder and kidnapping as alleged in the warrant. In addition, S.G. conveyed that she and the Defendant had traveled a long distance in the vehicle and were staying at a campground during their abduction. These facts provide probable cause to the GPS device, radar detector, tents, sleeping bag, and related items. Detective Maskell also testified before the Magistrate Judge as to the investigation of this case up to that time which included that the 2005 Jeep had been stolen and the Missouri license plates were stolen; thus providing probable cause to seize the license plates.

2. Particularity

The Defendant argues even if Detective Maskell's oral testimony clarified the targeted items in the warrant application, the warrant itself did not and, therefore, it is facially invalid because it lacks sufficient particularity.

As stated previously, the Fourth Amendment prohibits the issuance of a general

warrant and requires that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. See Boyd v. United States, 116 U.S. 616, 625 (1886); Andresen v. Maryland, 427 U.S. 463, 478 (1976). “The requirement that a warrant not be a general one is in part a function of the probable cause rule and is in part derived from the fourth amendment requirement that warrants be ones ‘particularly describing the place to be searched, and the persons or things to be seized.’” United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982). It is clear a warrant can not be broader than the probable cause upon which it is based. United States v. Weber, 923 F.2d 1338, 1346 (9th Cir. 1991) (citations omitted).

“To determine specificity, [the Court] examine[s] both the warrant’s breadth and particularity.” Wong, 334 F.3d at 836-37 (citing Kow, 58 F.3d at 426). The Court considers “one or more of the following to determine specificity: (1) whether there was probable cause to seize particular items in the warrant, (2) whether the warrant sets out objective standards by which executing officers can determine which items are subject to seizure, and (3) whether the government could have described the items more particularly when the warrant was issued.” Id. (citing United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986)); see also Hay, 231 F.3d at 637.

Here, the warrant was sufficiently specific to direct the executing officers to the place to be searched and items to be seized given the crimes alleged, the list of items to be seized, and the attached impound notice describing the 2005 Jeep. The search warrant specified certain categories of evidence to be seized as: forensic evidence including but not limited to fingerprints, hair, semen, blood, DNA, computers and discs, camera and film, firearms, tools,

duct tape, zip ties, clothes, personal hygiene items, papers, rental agreements, receipts, wallets, keys, maps, chains, cell phones, duffel bags, 2005 Jeep, bank statements, and gloves which property is the fruits of the crimes of kidnapping, rape, and murder. (Dkt. No. 120. Ex. P). The warrant specified that the property was located at the Kootenai County Sheriff's impound yard and the attached impound notice described the 2005 Jeep. The warrant stated that the officers were authorized to "search the above described [X] premises and/or [X] vehicle within [] 14 day(s)...for the above described property...." (Dkt. No. 120, Ex. P).

The Court finds the warrant was sufficiently particular as to the listed items given what was known to the officers at the time the warrant was sought; in particular that S.G. had been recovered only hours prior and law enforcement was still attempting to determine whether D.G. was alive and his location. The warrant alleged three specific crimes and identified a general list of items linked to those crimes which the Magistrate Judge properly determined probable cause existed. The list included camera, film, computer, and discs, which authorized the officers to search and seize the digital devices. The Fourth Amendment does not require the level of specificity asserted by the defense that would require a warrant to list each and every potential electronic storage device available in this day in age. The use of such electronic and digital devices is prevalent in today's society.

3. Whether the Officers' Search Exceed the Scope of the Warrant

The Defendant argues law enforcement "exceeded the scope of this warrant by seizing property from a place not authorized by its plain language" because the warrant only authorized the officers to search for the 2005 Jeep, rather than inside the vehicle. The warrant, Defendant contends, "failed to identify the 2005 Jeep as the location where the listed

property sought would be found; therefore, it did not grant the officers the power to take objects from inside the vehicle.” (Dkt. No. 120, p. 27). The resulting search and seizure of the items inside the 2005 Jeep were, the Defendant contends, warrantless and unreasonable under the Fourth Amendment.

The Fourth Amendment requires that a search conducted pursuant to a warrant not exceed the strict bounds of the warrant. See Bivens v. Six Unknown Agents, 403 U.S. 388, 394 n. 7 (1971). “Whether a search exceeds the scope of a search warrant is an issue we determine through an objective assessment of the circumstances surrounding the issuance of the warrant, the contents of the search warrant, and the circumstances of the search.” United States v. Hitchcock, 286 F.3d 1064, 1071 (9th Cir. 2002) (citing United States v. Rettig, 589 F.2d 418, 423 (9th Cir.1978) (“In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution.”). “The subjective state of mind of the officer executing the warrant is not material to our inquiry.” Id. (citation omitted). Neither a warrant nor search can be broader than the probable cause upon which it is based. United States v. Weber, 923 F.2d 1338, 1346 (9th Cir. 1991) (citations omitted).

In viewing the objective circumstances surrounding the issuance of the warrant, the Defendant’s argument fails. When considering the complete warrant, it is clear that the search warrant authorized the officers to search inside the vehicle, particularly given that the listed categories of items to be seized.

The Defendant further argues the officers exceeded the scope of the warrant by removing not only the items listed in the search warrant but by removing all property from

the 2005 Jeep which do not fall within the type of objects listed in the warrant including: the 4 GB microdrive, 4GB microdrive chip, GPS, Wireless PC card, binoculars, sleeping bag, radar detector, two tents, Missouri license plates, night vision goggles, and GPS case. The Government counters that these items fall within the warrant's listed items and the crimes alleged. The Court agrees. Though these items may not have been specifically identified on the warrant, they each fall within the warrant's list of items. As discussed in the above particularity section, the microdrive, microdrive chip, and wireless PC card fall under the items listed for computer and disc's listing. The tents, sleeping bag, and duffle bag are likewise consistent with the kidnapping charge as supported by the probable cause determination given by S.G.'s account that they had camped in a forest in Montana. At the very least, these items would relate to the murder charge and contain potential forensic evidence of hair, semen, blood, and/or DNA which the warrant specifically authorized. At the hearing, Detective Swanson testified that it was necessary to remove everything from the 2005 Jeep in order to search the vehicle itself for forensics evidence, as listed on the warrant.

The GPS, radar detector, and night vision goggles were not specifically listed on the warrant. However, the officers could reasonably conclude that these items were linked to the charges alleged on the warrant of kidnapping, murder, and rape. The night vision goggles, GPS, and radar detector could have reasonably been used to facilitate the activities making up these crimes and/or could contain forensic evidence in the way of hair samples and fingerprints.

Even if these items were deemed to be outside of the search warrant's listed items, their discovery was inevitable given the 2005 Jeep was in the custody of the Kootenai

County Sheriff's Office and that the procedure would require that the vehicle and its contents be inventoried when a driver is arrested. (Gov. Exhibit 12, Hearing on Motion to Suppress). “[O]nce a vehicle has been impounded, the police may conduct an inventory search.” United States v. Wanless, 882 F.2d 1459, 1463 (9th Cir. 1989) (citing South Dakota v. Opperman, 428 U.S. 364, 369 (1975)). “The reasons for conducting the inventory search are threefold: (1) the protection of the vehicle owner's property; (2) the protection of police against claims by the owner; and (3) the protection of the police from potential danger.” Id. “However, in order to ensure that the inventory search is ‘limited in scope to the extent necessary to carry out the caretaking function,’ it must be carried out in accordance with the standard procedures of the local police department.” Id. (citing Opperman, 428 U.S. at 375 and Colorado v. Bertine, 479 U.S. 367, 374 n. 6 (1987); but see People v. McKay, 41 P.3d 59 (Cal. 2002)(“so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest--even one effected in violation of state arrest procedures-- does not violate the Fourth Amendment.”).

The defense further argues Detective Fred Swanson began searching the 2005 Jeep prior to physically receiving the search warrant and began seizing everything inside the vehicle. Detective Swanson testified that upon receiving a phone call informing him that the warrant had been obtained, he began photographing the 2005 Jeep and that no items were removed from the vehicle until the warrant had physically been delivered to the officers executing the search warrant. Detective Maskell and Agent Gneckow both corroborated this testimony by stating that when they arrived with the warrant the officers present were preparing to search the 2005 Jeep and taking exterior photographs. Shortly after officers

arrived with a copy of the warrant, the exterior photographing of the vehicle was completed and officers began searching the 2005 Jeep and removing items found therein. The Court finds the officers' conduct to be appropriate.

4. Search of the Contents of the Personal Items

Defense argues that he retained a reasonable expectation of privacy in the contents of the items located within the 2005 Jeep and that this warrant never authorized the search of the contents of the Dell laptop. During Detective Maskell's testimony, the Magistrate Judge clarified that the officer was requesting that they be allowed to search the contents of the laptop computer. (Dkt. No. 120, Ex. O, p. 76). It was clear from the transcript that the Magistrate Judge anticipated that the warrant would allow officers to search the contents of the items discovered in the 2005 Jeep. Additionally, this Court finds that there was probable cause for the Magistrate Judge to approve such a search given the statements of S.G. and the officers' investigation of the Groene/McKenzie murders as testified to before the Magistrate Judge.

III. July 2, 2005, 3:05 p.m. State of Idaho Search Warrant

During the initial July 2, 2005 search of the 2005 Jeep, officers discovered several items including a GPS system, video camera, and related media devices. In an abundance of caution, the officers returned to the court seeking a second search warrant to allow for the officers to search the contents of the laptop computer, digital camera, video camera, GPS,

and related media and digital devices.⁴ Based upon the testimony previously provided by Detective Maskell and the information contained in the second warrant application, the Magistrate Judge granted the search warrant. The Defendant argues this second July 2, 2005 warrant 1) was tainted by the unlawful search pursuant to the earlier warrant, 2) the police exceeded the scope of the warrant, and 3) the search warrant was overbroad.

A. Taint of the First Warrant

The Defendant argues the second warrant was tainted by the Fourth Amendment Violations of the first warrant. "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" United States v. Pulliam, 405 F.3d 782 (9th Cir. 2005) (citations omitted). "It 'extends as well to the indirect as the direct products' of unconstitutional conduct." Id. (quoting Wong Sun v. United States, 371 U.S. 471, 484 (1963)). Suppression is not justified unless the evidence is "in some sense the product of illegal governmental activity." United States v. Crews, 445 U.S. 463, 471 (1980). Evidence should not be excluded as fruit of the poisonous tree "unless the illegality is at least the 'but for' cause of the discovery of the evidence." Segura, 468 U.S. at 815. Because the Court has determined that the initial July 2, 2005 warrant did not violate the Fourth Amendment, this argument fails.

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At the hearing on this motion the defense argued the fact that the officers went back to obtain this second warrant on July 2, 2005 raises a possible inference that the officers knew the first July 2, 2005 search warrant was invalid or insufficient. Given the publicity of this case and the circumstances at the time, the Court finds the more reasonable inference is that law enforcement sought this second warrant in an abundance of caution.

B. Probable Cause, Particularity, and Exceeding the Scope of the Warrant

Police exceeded the scope of the second July 2, 2005 warrant, the Defendant argues, because the warrant applied to items located “within” the 2005 Jeep and many of the items at issue had already been removed from the Jeep prior to the second search warrant being issued. (Dkt. No. 120, p. 34). Defendant continues the argument that the officers began their search and removal of items prior to receiving the search warrant. The Government disagrees arguing the second search warrant was “inherently connected to the earlier warrant,” authorized the officers to search the content of those items located within the 2005 Jeep and that the officers did not search the items’ contents until after the second July 2, 2005 warrant had been obtained.

The defense also challenges the breath of the warrant arguing that Detective Maskell’s testimony did not provide probable cause for search and seizure of the GPS unit, laptop computer, and microdrives found in the 2005 Jeep. The Defendant contends that the warrant failed to link these items to the alleged criminal conduct of the Defendant in this case. In particular, the Defendant asserts that the generalized characterizations of those involved in child pornography was not made relevant to the facts of this particular Defendant nor linked to the items seized during the search. The Government argues that the warrant was sufficiently particular as to the items whose contents were to be searched.

The Court finds that based on the information presented, the warrant was sufficient to meet the Fourth Amendment requirements. Though not a model of clarity, the warrant application provided information from which the Magistrate Judge was able to reasonably infer that the computer, microdrive, and GPS device would contain evidence of child

pornography, murder, and kidnapping.

The second July 2, 2005 warrant application contained general information regarding child pornography, computers, the internet, and seizing/searching computers that discussed the characteristics of individuals engaged in collecting, viewing, and disseminating child pornography. (Dkt. No. 120, Ex. S). In particular, the warrant application discussed at length the use of the internet and computers by such persons to pursue their interest in child pornography. The warrant application went on to explain the need for the seizure of all related digital and electronic devices in order for law enforcement to fully retrieve data in such cases.

Following this generic information section, the warrant application provided a probable cause statement which explicitly relied upon the prior testimony and evidence used to obtain the first July 2, 2005 search warrant and the fact that in the execution of that warrant officers had discovered the GPS unit, video camera, and other related items. (Dkt. No. 120, Ex. S). The warrant application then identified the items to be searched as:

Any and all computers, computer hardware, software, documentation, passwords, and data security devices; any data-processing devices (such as central processing units, memory typewriters, and self-contained “laptop” , “notebook computers, or “PDA” computers); internal and peripheral storage devices (such as fixed disks, external hard disks, floppy disk drives and diskettes, tape drives and tapes, Zip and/or Jaz drives and disks, optical storage devices); transistor-like binary devices (such as keyboards, printers, scanners, plotter, video display monitors, and optical readers); and related communications devices (such as modems, cables and connections, recording equipment, RAM or ROM units, acoustic couplers, automatic dialers, speed dialers, programmable telephone dialing or signaling devices, and electronic tone-generating devices); as well as any devices, mechanisms, or parts that can be used to restrict access to computer hardware (such as physical keys and locks). Digital camera devices, photos, memory sticks/cards and flash cards. GPS unit, video camera, video tapes, and their contents, accessories, adaptors,

connectors, hardware, and peripheral items.

(Dkt. No. 120, Ex. S) (underlined portion is handwritten). The warrant application summary then states:

Based on the foregoing information, your affiant submits that probable cause exists to seize and search the computer, hard drive, digital camera and memory stick/card which is currently found in a 2005 Jeep Grand Cherokee Laredo bearing Missouri License Plate 355REP currently housed in Kootenai County Sheriff's impound yard located at Government Way and Dalton, Couer d'Alene [sic], Kootenai County, Idaho.

Id.

This warrant application is not one upon which law enforcement should model future warrants in that it lacks a statement, on its face, connecting the lengthy generalized statements regarding child pornography and the investigation in this case. The probable cause statement merely concludes that probable cause exists. There is no reason why the officers could not have been clearer on the face of the warrant itself as to the connections between the items sought to be searched and the crimes alleged. Though the officers were undoubtedly under stress and time constraints, the Fourth Amendment's requirements are not lessened. Careful and thorough police work at the beginning of every case goes a long way toward achieving justice in the end. The shortcuts taken here, however, do not invalidate the warrants. In applying for the second July 2, 2005 warrant, Detective Maskell again testified on the record before the issuing Magistrate Judge and specifically asked the Judge to take judicial notice of the testimony and evidence previously given on the other warrants in this case. The Magistrate Judge agreed to do so and, thereupon, granted the warrant application. The statements given on the first July 2, 2005 warrant are ample to provide a basis for

probable cause as to the items that are the subject of this motion.

The testimony of S.G.'s statement provides probable cause for the items listed on the warrant itself including the GPS unit, video camera, video tapes, computer, digital camera and electronic data, records, files, images, records, documents, materials and information (as defined by their ordinary meaning and as defined in the attachment hereto) and their contents, accessories, adaptors, connectors, hardware, and peripheral items. (Dkt. No. 120, Ex. T). The warrant identified the items as being located "at the Kootenai County Sheriff's impound yard within a 2005 Jeep Cherokee Laredo (for which a search warrant has already been issued on today's date)." (Dkt. No. 120, Ex. T). The warrant itself identified these items as fruits of the crimes of: homicide, kidnapping, child sexual abuse, and possession of child pornography. (Dkt. No. 120, Ex. T). Given the list coupled with the crimes alleged on the face of the warrant, the warrant was sufficiently particular and the officers' search was reasonable.

Based on the foregoing, the Court finds that this warrant was based on a proper finding of probable cause and was sufficiently particular. In addition, the officers did not exceed the scope of the warrant during their search. The listed items covered each of the items that were ultimately found and removed from the vehicle. The motion to suppress is denied.

IV. August 1, 2005 Forensic Examinations:

On August 1, 2005 the Federal Government obtained a search warrant to search digital evidence seized from the search of the 2005 Jeep on the morning of July 2, 2005. This search included a forensic search of the Dell laptop and 4GB microdrive found in the 2005 Jeep. Defendant argues these searches were illegal because they were tainted by the prior unlawful search warrants. The Government maintains that the earlier search warrants were valid and the August 1, 2005 application for the forensic search was supported by probable cause. In addition, the Government argues that the search of the contents of the digital evidence was authorized by both of the July 5, 2005 search warrants. Because the Court has determined above that the Defendant's Fourth Amendment rights were not violated by the issuance or execution of the prior search warrants, the Defendant's argument that the prior warrants tainted this warrant fails.

Defendant also argues the examinations exceeded the time limit imposed by the Magistrate Judge in the warrants. As to the timeliness of the search, the Government contends that the laptop and microdrive were imaged by computer forensic examiners within the time frames required by the search warrants and that the subsequent examinations of those imaged drives did not exceed the scope of the warrants. The defense points to United States v. Brunette, 76 F.Supp.2d 30, 42 (D.M.E. 1999) in support of its position that the Government's searches of the digital devices, and/or the copied image of those devices, after the warrants' expressed time frames requires the suppression of any evidence discovered in those searches. In Brunette, the Government had been granted a total of sixty-days in which to conduct its search of the seized computers. Id. Because the Government failed to

commence its search within those sixty-days and provided no legitimate basis for their failure, the Court suppressed the evidence. In doing so, the Brunette court noted:

It is settled law that the search and seizure of evidence, conducted under a warrant, must conform to the requirements of that warrant. Massachusetts v. Sheppard, 468 U.S. 981, 988 n. 5 (1984); United States v. Upham, 168 F.3d 532, 536 (1st Cir. 1999). “The element of time can admittedly affect the validity of a search warrant.” United States v. Bedford, 519 F.2d 650, 655 (3d Cir. 1975); see also Fed.R.Crim.P. 41(c)(1). “A search warrant must be executed and returned to the judge or commissioner who issues it within [the time frame specified in the warrant]; after the expiration of this time the warrant, unless executed, is void.” Sgro v. United States, 287 U.S. 206, 210, (1932). “If the police were allowed to execute [a] warrant at leisure, the safeguard of judicial control over the search which the Fourth Amendment is intended to accomplish would be eviscerated. Thus, a search pursuant to a stale warrant is invalid.” Bedford, 519 F.2d at 655.

While the Court acknowledges the concerns expressed by the Brunette court in the above quoted language, the facts here are different. In this case the Government has demonstrated that it began imaging the seized digital devices before the deadline set in the warrants. The Court finds the Government’s continued examination of the imaged copies since that time does not violate the Fourth Amendment.

In researching this question, the Court finds the more recent case of United States v. Syphers, to be more compelling. 426 F.3d 461, 469 (1st Cir. 2005). In Syphers the defendant argued that the police held the seized computer for an unreasonable amount of time violating Federal Rule of Criminal Procedure 41(e)(2)(A), which requires a warrant to be executed within ten days. The First Circuit upheld the district court’s granting of a one-year extension of time to complete the search, stating that it was a reasonable extension of

time.

In Syphers, the court stated “the Fourth Amendment, not federal rules or state law, governs the admissibility of evidence obtained by state officers but ultimately used in a federal prosecution.” Syphers, 426 F.3d at 469 (citing United States v. Clyburn, 24 F.3d 613, 616 (4th Cir. 1994); see also United States v. Jones, 185 F.3d 459, 463 (5th Cir.1999) (“The question that a federal court must ask when state officials secure evidence to be used against a defendant accused of a federal offense is whether the actions of the state officials violated the Fourth Amendment of the United States Constitution.” (internal quotations and citation omitted)). “The Fourth Amendment itself ‘contains no requirements about when the search or seizure is to occur or the duration.’” Syphers, 426 F.3d at 469 (quoting United States v. Gerber, 994 F.2d 1556, 1559-60 (11th Cir. 1993). “However, ‘unreasonable delay in the execution of a warrant that results in the lapse of probable cause will invalidate a warrant.’” Id. (quoting United States v. Marin-Buitrago, 734 F.2d 889, 894 (2d Cir. 1984)).

In analyzing the impact of the time restrictions contained in Federal Rule of Criminal Procedure 41 on the admissibility of evidence the Syphers court determined that the rule exists “not only ensure that probable cause continues to exist, but also that it is the neutral magistrate, not the executing officers, who determines whether probable cause continues to exist. The policy...is to prevent the execution of a stale warrant. ‘A delay in executing a search warrant may render stale the probable cause finding.’” Id. (quoting United States v. Gibson, 123 F.3d 1121, 1124 (8th Cir. 1997)). The court went on to note that “[a] delay in execution of the warrant under Rule 41 does not render inadmissible evidence seized, absent

a showing of prejudice to the defendants resulting from the delay.” Syphers, 426 F.3d at 469 (citation omitted).

This line of reasoning has recently been applied by a state court. See State v. Grenning, 2008 WL 73403 *5 (Wash. App. Div. 2, January 8, 2008) (“A search is constitutionally timely so long as it begins before the expiration of a warrant and as long as probable cause continues through completion of the search.”). There the state court advised that “[t]he Fourth Amendment does not provide for a specific time limit in which a computer may undergo forensic examination after it has been seized with a valid search warrant.” Grenning (citing United States v. Hernandez, 183 F.Supp.2d 468, 480 (P.R. Dec. 2002). “If the delay is reasonable, it does not violate the Fourth Amendment.” Id. The Court finds instructive here the conclusions of these courts that the purpose of placing time restrictions on the execution of a search warrant is to ensure the probable cause upon which the warrant was based continues to exist to justify the search and the defense is not prejudiced.

Particularly relevant to this case are these courts’ consideration of searches of computers. The Syphers court stated that “Courts have permitted some delay in the execution of search warrants involving computers because of the complexity of the search.” Syphers, 426 F.3d at 469 (citing United States v. Gorrell, 360 F.Supp.2d 48, 55 n. 5 (D.D.C. 2004) (ten-month delay in processing of computer and camera seized, although “lengthy,” “did not take the data outside the scope of the warrant such that it needs to be suppressed”); United States v. Triumph Capital Group, Inc., 211 F.R.D. 31, 66 (D.Conn.2002) (“[C]omputer searches are not, and cannot be subject to any rigid time limit because they

may involve much more information than an ordinary document search, more preparation and a greater degree of care in their execution.”)). Likewise in Grenning, 2008 WL 73403 *5, the search was of information stored on imaged copies of defendant's hard drives which the court concluded “store permanent, static, and unchanging data. Due to the nature of the material seized, the passage of time did not affect probable cause determination.” Id. The Grenning decision further stated that “[b]ecause computer searches usually occur at a different location than where the computer was seized, involve more preparation than an ordinary search, involve a greater degree of care in the execution of the warrant, and contain more information than ordinary searches, delays are expected and reasonable.” Id. (citing Syphers, 426 F.3d 469 (acknowledging that in Syphers, “the five- month delay in execution of a warrant did not invalidate the search of the defendant's computer since there was no showing that: (1) the delay caused a lapse in probable cause; (2) it created unfair prejudice to the defendant; or (3) officers acted in bad faith.).

The case cited by the Government, United States v. Hernandez, 183 F.Supp.2d 468, 480-81 (D. Puerto Rico, 2002), also supports this line of reasoning as it applies to searches of computers. There the court stated that “[i]n cases where the warrant directs agents to seize broad categories of records, or even all records, courts have upheld the “carting off” of whole file cabinets containing pounds of unsorted paper, to be searched off-site. [cites omitted] The rationale that searches can be executed off-site because of the volume of information has been extended to include computers.” Id. (citing United States v. Snow, 919 F.2d 1458, 1461 (10th Cir. 1990); United States v. Henson, 848 F.2d 1374 (6th Cir. 1988). “These and other

cases express the proposition that, because off-site computer searches are reasonable, it may be necessary, by implication, for the return of the warrant to be filed with the court before such off-site searching can be completed. Courts have recognized that the search of computer data involves more preparation than an ordinary search and a greater degree of care in the execution of the warrant; and that the search may involve much more information.” Id.

In this case, the search of the 2005 Jeep and imaging of the contents of the digital devices found therein took place within the time designated in the warrants. It was perfectly reasonable for the Government to continue its investigation of the copied images given the nature of the media and the volume of material found on the devices. More importantly, the Defendant has not demonstrated prejudice from the Government’s continued search of the imaged devices or any bad faith. Therefore, the evidence recovered will not be suppressed on the basis of untimeliness.

V. Good Faith Exception:

In the event the Court does find some or all of the warrants to be invalid, the Government argues the challenged evidence should be admitted due to exigent circumstances; noting that law enforcement was undertaking significant efforts to locate D.G. at the time these warrants were issued and the evidence located in the 2005 Red Jeep and on the computer, digital, and GPS devices located therein were critical to that search. This was believed due in large part to the statements provided by S.G. following her recovery. Thus, the Government asserts the good faith exception to the warrant should apply.

“Evidence seized pursuant to a facially valid search warrant which later is held to be

invalid may nevertheless be admissible if officers conducting the search acted in good faith and in reasonable reliance on the warrant.” United States v. Kow, 58 F.3d 423, 428 (9th Cir. 1995) (citing United States v. Leon, 468 U.S. 897, 926 (1984)). This exception applies in “only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.” Leon, 468 U.S. 918. The burden is upon the Government to show the officer’s reliance on the warrant was objectively reasonable. Kow, 58 F.3d at 428 (citation omitted). The good faith exception to the exclusionary rule, however, is inapplicable when the warrant is “so facially over-board as to preclude reasonable reliance by the executing officers, ... or when the officers do not act in good faith.” United States v. Luk, 859 F.2d 667, 676 (9th Cir. 1988) (citations omitted). The Ninth Circuit has been steadfast in rejecting this exception where the warrants were so obviously over-board that agents could not reasonably rely upon the warrant. See Kow, at 428 (citation omitted).⁵

The exclusionary rule should “only be applied on a case-by-case basis, balancing the costs and benefits of suppression.” Luk, 859 F.2d at 676 (citing Illinois v. Krull, 480 U.S. 340 (1987); Leon, 468 U.S. at 918). In Krull the Supreme Court imposed a balancing test between the “likelihood of [future unlawful police conduct] deterrence against the costs of withholding reliable information from the truth-seeking process.” Id. (citing Krull, 480 U.S. 346). “The Court noted three factors that determined whether the exclusionary rule should

⁵ In Kow, the Ninth Circuit declined to apply the good faith exception because “there [was] absolutely no evidence...that the officers who executed the warrant, although instructed to read the affidavit, actually relied on the information in the affidavit to limit the warrant’s overbreadth.” Kow, 58 F.3d at 429.

be applied: (1) whether suppression would affect the group conduct that the exclusionary rule was designed to punish, i.e., police misconduct; (2) the source of the error in the particular case and whether any evidence suggested that the source, e.g., issuing magistrates, was “inclined to ignore or subvert the Fourth Amendment;” and (3) the basis for believing the exclusion of evidence will have a significant deterrent effect upon the source of the error.” Id. (citations omitted). The Ninth Circuit has recognized that the Krull approach “indicates that a realistic and pragmatic approach to the exclusionary rule is required.” Id.

“For the good faith reliance exception to apply, the officers must have relied on the search warrant in an objectively reasonable manner.” United States v. Crews, 502 F.3d 1130, 1136 (9th Cir. 2007) (citation omitted). “The affidavit ‘must establish at least a colorable argument for probable cause’ for the exception to apply.” Id. (quoting United States v. Luong, 470 F.3d 898, 903 (9th Cir. 2006)). “Therefore, if there is a colorable argument that the search...was supported by probable cause, [then] the officer's reliance on the search warrant was objectively reasonable. This ends the inquiry without having to belabor the issue of whether the affidavit stated probable cause.” Id.

“There are four circumstances in which the good faith exception does not apply because reliance is per se unreasonable: (I) where an affiant misleads the issuing magistrate or judge by making a false statement or recklessly disregarding the truth in making a statement; (ii) where the magistrate or judge wholly abandons her judicial role in approving the warrant, acting only as a “rubber stamp” to the warrant application rather than as a neutral and detached official; (iii) where the warrant is facially deficient in detail as to the place to

be searched or the things to be found that the officers could not reasonably presume it to be valid; or (iv) where the affidavit upon which the warrant is based is so lacking in indicia of probable cause that no reasonable officer could rely upon it in good faith.” Crews, 502 F.3d at 1136 (citing Leon, 468 U.S. at 923-26).

“Where the affidavit itself lacks all indicia of probable cause, it would unduly undermine the foregoing rule to permit extrinsic indicia of probable cause to be presented through an unsworn, unrecorded oral colloquy. Related to the foregoing, the Constitution also requires that probable cause be established ‘by Oath or affirmation.’ If unsworn, unrecorded oral colloquies, which may not be used to establish probable cause, are admissible to establish good faith, the constitutional and prudential standards for showing probable cause will be undermined. In effect, the good faith exception would swallow the Fourth Amendment rule.” See United States v. Luong, 470 F.3d 898, 904 (9th Cir. 2006) (finding that because the underlying affidavit is entirely lacking in indicia of probable cause, the facts orally conveyed to the magistrate judges do not cure the officers’ reliance on the warrant such that the good faith exception does not apply) (internal quotation marks and citations omitted)).

In this case, the Court finds that the warrants were not so facially illegal so as to preclude the application of the exclusionary rule and that the good faith exception would apply in this case. The facts included in the warrants and generally known to law enforcement were such that their reliance on the warrants was justified. The Government points out, following S.G. recovery, law enforcement undertook an extensive search for D.G.

as it was unknown whether he was still alive. The Ninth Circuit held in United States v. Weber that it would consider any time pressures or constraints that the affiant was under in determining the applicability of the good faith exception. 923 F.2d 1338, 1346 (9th Cir.1990); see also United States v. Luong, 470 F.3d 898, 904 (9th Cir. 2006). Given the nature of the crimes and the facts known to the officers at the time, it is clear that law enforcement was under a considerable time pressure in its search for D.G. whom they hoped was still alive. In balancing the “likelihood of deterrence against the costs of withholding reliable information from the truth-seeking process” in light of the three factors identified in Krull, this Court concludes admission of the evidence outweighs any deterrence, which would be minimal, that would be accomplished by excluding the evidence.

ORDER

Based on the foregoing the Court HEREBY ORDERS as follows:

- 1) Defendant’s Motion to Suppress Evidence (Dkt. No. 120) is **DENIED**.
- 2) Government’s Motion to Dismiss (Dkt. No. 221) is **GRANTED**.



DATED: **January 31, 2008**

A handwritten signature in black ink, appearing to read "Edward J. Lodge".

Honorable Edward J. Lodge
U. S. District Judge