IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

03-CR-104-S

PAT FIELD,

Defendant.

REPORT

The government has indicted defendant Pat Field on a charge of possessing about 2½ pounds of marijuana with the intent to distribute it; the government also is seeking forfeiture of Field's home in rural Jackson County. Before the court are Field's motions to quash the search warrant for his home, suppress evidence seized pursuant to that search, and to suppress statements made to the officers while they executed the search. For the reasons stated below, I am recommending that this court grant Field's motion to quash the warrant for lack of probable cause. This essentially ends the analysis, but to be complete, I further recommend that this court grant Field's motion to suppress evidence seized outside the scope of the warrant, and that it deny his motion to suppress statements.

It is a close call whether the warrant affidavit submitted to the state court establishes probable cause to search Field's residence. However, this version of the affidavit is not the

most relevant because it misstates one fact and omits two others relevant to the probable cause determination. The revised affidavit definitely lacks probable cause and it cannot be rescued by the good faith doctrine of *United States v. Leon*, 468 U.S. 926 (1984).

Apart from this, the government concedes that the deputy sheriffs improperly rifled through and seized hundreds of documents from Field's home. The deputies also exceeded the scope of the warrant by entering Field's padlocked room and then opening a locked box and a safe that clearly were outside the control of the suspects toward whom the search warrant was directed. Finally, Field was not in custody for Fifth Amendment purposes while the agents searched his house, so he was not entitled to *Miranda* warnings before the agents engaged him in a self-incriminating conversation.

Over the past several years the government has presented this court with a small but accelerating stream of search warrant cases arising out of non-federal investigations in which probable cause actually was lacking, or in which this court criticized a shoddy warrant application but deferred to the minimal probable cause threshold. *See, e.g., United States v. Koerth*, 01-CR-52-C (no probable cause for warrant, but good faith doctrine applies); *United States v. Savage*, 01-CR-63-C (Seventh Circuit finds no probable cause (reversing this court), but applies good faith doctrine); *United States v. Kammerud*, 02-CR-132-S (warrant application was "ugly, conclusory [and] . . . unnecessarily shallow" but managed to meet low probable cause threshold); *United States v. Mortier*, 03-CR-4-S (good faith doctrine saves warrant in which agent wanted to search house but presented warrant application for

defendant's cars); *United States v. Olson,* 03-CR-51-S (lack of detail in warrant application demonstrated unnecessarily lax police work, but small specks of evidence might sufficiently corroborate CI's account); *United States v. Mykytiuk*, 03-CR-78-S (no probable cause for warrant but good faith doctrine applies).

The instant case may represent the nadir of this process because the shaky probable cause presentation is accompanied by a *Franks* violation and a palpably illegal seizure of the defendant's documents. The government has conceded partial error on the most egregious Fourth Amendment violation committed here, but it provides an unapologetic defense of the other improper conduct in which the Jackson County Sheriff's Department engaged.[1]

On October 16, 2003, this court held an evidentiary hearing. Having heard and seen the witnesses testify, and having considered the exhibits and affidavits submitted before and during the hearing, I find the following facts:

Facts

On May 9, 2003, sheriff's deputies in Jackson County, Wisconsin, stopped and searched a car driven by Laura Field in which her boyfriend Louis Fink was a passenger. Deputies located a backpack in which they found baggies of marijuana, capsules that turned

[1] Reminding a federal prosecutor of the hoary maxim that his "chief business is not to achieve victory but to establish justice," *Brady v. Maryland*, 373 U.S. at 87 n. 2 (1963), is like telling a wolf that his job as the food chain's top predator is to keep the rabbit population properly balanced: the wolf will agree wholeheartedly with this policy and then implement it by devouring every single rabbit into which he can sink his teeth.

out to contain methamphetamine, pot pipes, a weighing scale, and other items. The deputies arrested Field and Fink.

Later that evening, Sheriff's Detective Duane Waldera interviewed Field after providing her with *Miranda* warnings. Laura told Waldera that although she normally lives with her mother in Sparta, she and Fink had been staying with her father, Pat Field, in nearby Millston for the past two or three weeks while her car was being repaired.[2] Laura advised Detective Waldera that she and Fink had been sleeping in the living room of Field's house. It is unclear whether Laura also provided Detective Waldera with a crude map of the house in which she pointed out the rooms to which she and Fink did not have access.

Laura told Detective Waldera that the contents of the backpack seized from her car earlier that day belonged to Fink. Laura knew that there was pot in the backpack and she believed that the capsules were filled with mescaline. Laura explained that one of Fink's friends had delivered these drugs to them, and Fink had brought them back to her father's house and then weighed them and repackaged the drugs into small baggies and capsules. Laura provided other information, including the name of Fink's source, and a brief history of their drug trafficking history. According to Laura, the friend, who lived near Lake Geneva, normally brought up a ¼ pound or ½ pound of marijuana for Fink about every two weeks.

Detective Waldera asked Laura about her history of personal drug use. Laura admitted that she had been around and using drugs since she was 12 years old. Laura

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[2] I will refer to Laura Field as "Laura" and Pat Field as "Field."

advised that she used to smoke marijuana with her mother, and advised that her father used to smoke marijuana, although she did not know if he had done other drugs.

Detective Waldera asked Laura if there were any more drugs at her father's residence. Laura responded that there were "none that she knew of." Detective Waldera advised Laura that he was attempting to gather information about what she and Fink had been doing. Laura said that she did not want her father to get in trouble. She appeared nervous to Detective Waldera. Even so, he did not interpret any of this as an implication that Field kept drugs of his own at the house, and he did not consider Field to be a suspect. Detective Waldera never asked Laura if her father even knew what she and Fink had been doing in his house, because he did not think this was relevant: his focus was on Laura and Fink. Detective Waldera did not ask Laura if her father ever had been present when she or Fink had repackaged or dealt drugs.

Detective Waldera asked Laura to provide a written statement. She wrote a bland narrative that completely omitted all references to the drug trafficking activities in which she, Fink and their contacts had engaged. Detective Waldera asked Laura whether she was going to include these drug related activities in her written statement; she responded that she was not.

Detective Waldera personally drafted a search warrant affidavit seeking a warrant to search Field's residence, where Laura and Fink had been sleeping in the living room and where they had repackaged the drugs seized from the backpack. In his application Detective

Waldera sought permission to search for marijuana, methamphetamine, paraphernalia, packaging material, and monies from drug sales. He did not seek a warrant to search for any paper or electronic documents or records. In seeking this warrant, Detective Waldera was focused solely on Fink and Laura; Field was not a suspect in any illegal activity.

To establish probable cause, Detective Waldera narrated in his affidavit the salient points of the May 9, 2003 traffic stop of Laura and Fink and the discovery of marijuana and methamphetamine in the backpack. Detective Waldera also reported some but not all of the material portions of his subsequent interview with Laura. For instance, he outlined Laura's explanation of how and where Fink got the drugs and he related Laura's report that she and Fink had taken the drugs back to her father's house to repackage them. He concluded his narrative:

> The information from Laura clearly indicates that her and Fink are involved with the delivery, packaging and selling of controlled substances. Laura admitted that Fink sell drugs for money. Laura said that she has been aware of Fink and his drug activity for a long time. The most recent activity has been at her father's residence where Laura advised that they had packaged and had the drugs.

But Detective Waldera did *not* advise the court that Laura had told him that she was not aware of any drugs remaining at her father's house. Detective Waldera intentionally omitted this statement from his affidavit. He now claims that he omitted it because he did not believe Laura.

Detective Waldera briefly related Laura's admissions of personal drug use, but he changed her statement about her father, stating that "Pat Field also *smokes* marijuana," [italics added] even though Detective Waldera was aware that Laura had used the past tense, not the present tense, to describe her father's prior marijuana use. Detective Waldera is "not sure why" he changed the past tense report from Laura to present tense regarding marijuana use. Suppression hearing transcript, Dkt. 15, at 62.

Detective Waldera stated that Laura and Fink had been staying with her father for about two or three weeks but he did not report that they were sleeping in the living room of Field's house.[3]

Detective Waldera did not provide in his search warrant affidavit any reason why he believed Laura to be truthful in whole or in part, or untruthful in whole or in part, as to the statements she had made to him. For instance, he did not report in his search warrant affidavit any nervousness or apprehension exhibited or expressed by Laura relative to any portion of her statements to him. Neither did he did not report that Laura had declined to commemorate in writing the self-incriminating oral statements she had made.

Detective Waldera did not provide any corroboration of Laura's statement from any source to the court in his search warrant affidavit.

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[3] Despite knowing these things, Detective Waldera testified at the suppression hearing that he never asked Laura if her access to her father's house was limited in any way or if there were specific areas of the residence to which she was denied access, claiming that "I didn't have no reason to ask if there were specific areas of the residence where there were only designated areas." Dkt. 15 at 63-64.

The circuit court for Jackson County issued the warrant. Around 2:00 p.m. on May 10, 2003, Detective Waldera and five other deputy sheriffs drove to Field's residence. Field was standing outside next to his truck, so Detective Waldera approached him and told him that the deputies had a search warrant to search his residence for drugs and drug-related items. When Field asked what it was all about, Detective Waldera stated that he had received information "in regards to possible drug activity at his residence." In response to Detective Waldera's inquiry, Field stated that he was not aware of any drug activity going on at the house.

Detective Waldera handed Field a copy of the warrant, told Field he was not under arrest and said it would be a good idea to cooperate so that there were no problems while the deputies searched.[4] Neither Detective Waldera nor any other deputy on the scene told Field that he was free to leave. Everyone went into the house and two deputies did a security sweep, while Detective Waldera stayed in the kitchen with Field. Detective Waldera told Field he was going to read him the warrant, but Field said that it was not necessary. Field said he was nervous and needed a cigarette; Detective Waldera escorted him outside to his truck so that he could get a cigarette. Field smoked it outside, then Detective Waldera accompanied him back inside the house.

[4] In his error-ridden report, Detective Waldera actually states that "I advised Pat that at that time he was under arrest and it would be a good idea to cooperate so there would be no problems while we were there." This appears to be a genuine typo. More on this in the analysis.

The preliminary searchers reported to Detective Waldera that the house was clear, but that there was one padlocked room that they could not open. Detective Waldera told Field they needed to get into the room and asked if he would unlock it. The deputies brought Field to the room and he produced the key for the padlock. After unlocking the door, Field started to walk inside; the deputies directed him back into the hallway until they could verify that the room was clear.

At that point, Field volunteered that there was "a little bit of marijuana" on the chair in the room. Field stated that he had to lock it up so that "they don't smoke it." Inside the room, deputies found a security safe in the corner and a locked wooden box on the floor. Detective Waldera directed Field to unlock the wooden box. Field complied. Inside the deputies saw several large bags full of a green, leafy substance they suspected to be marijuana. Field declined Detective Waldera's invitation to tell him about this. At this point, Detective Waldera announced to Field that he was under arrest. It was about 2:25 p.m. Another deputy handcuffed Field and escorted him back to the kitchen.

Inside the wooden box Detective Waldera found a register of check carbons for an account in Field's name at a local bank. Detective Waldera flipped through the register and found within it a carbon for a check made out to a local Ford dealership in the amount of $27,092.72 with a memo on the check indicating "TRUK." Detective Waldera considered this to be evidence of drug activity because he did not have that kind of money himself, so he decided to seize and remove from Field's home all of Field's written records and other

documents for review and analysis later. Deputies brought Field back into the room to open the safe, from which they seized additional documents. Agents located Field's income tax records which they flipped through on the scene and took with them, along with bank statements, a social security card, and other documents. Detective Waldera and his colleagues removed approximately 1200 pages of documents without reviewing them first. Detective Waldera was not aware at the time–or to this day–whether there were any attorney-client protected documents, medical records, or other types of confidential documents among those seized. Agents also seized Field's truck and Harley Davidson motorcycle pending a complete financial review of Field.

Analysis

I. Probable Cause for the Search Warrant

A. The *Franks* Challenge

Field asked this court to hold a *Franks* hearing on his motion to quash the search warrant,[5] contending that Deputy Waldera had made material misstatements and had omitted material facts from his search warrant affidavit. To obtain a *Franks* hearing, a defendant must make a substantial preliminary showing that: 1) the search warrant affidavit contained a false material statement or omitted a material fact; 2) the affiant omitted the material fact or made the false statement intentionally, or with reckless disregard for the

[5] *Franks v. Delaware,* 438 U.S. 154 (1978).

truth; and 3) the false statement is necessary to support the finding of probable cause (or any material omissions would have affected the court's decision to issue the warrant). *See United States v. Marrow*, 272 F.3d 817, 821 (7th Cir. 2001). If a defendant makes this showing, then it is his burden at the hearing to establish these three points by a preponderance of the evidence; if he does so, then the court must quash the search warrant. *Franks*, 438 U.S. at 577. A warrant quashed under *Franks* cannot be rescued by the good faith doctrine of *United States v. Leon*, 486 U.S. 897 (1984). *See United States v. Garey*, 329 F.3d 573, 577 (7th Cir. 2003) *citing Illinois v. Gates*, 462 U.S. 213, 263-64 (1983) (White, J., concurring).

Field made his substantial preliminary showing, which the government hadn't contested to begin with because it intended to put Detective Waldera on the stand to testify in response to Field's other suppression motions. Having heard and seen Detective Waldera testify, I conclude that Detective Waldera intentionally withheld material information from his search warrant affidavit and he recklessly included a material misstatement. The warrant affidavit must be amended to include this information: 1) Laura was not aware of any drugs remaining at Field's house; 2) Laura and Fink were sleeping and staying in the living room; 3) Field's marijuana use had occurred in the past.

B. Probable Cause

A court that is asked to issue a search warrant must determine if probable cause exists by making a practical, common-sense decision whether given all the circumstances, there

exists a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001), quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982). To uphold a challenged warrant, a reviewing court must find that the affidavit provided the issuing court with a substantial basis for determining the existence of probable cause. In the Seventh Circuit, this standard is interpreted to require review for clear error by the issuing court. Reviewing courts are not to invalidate a warrant by interpreting the affidavits in a hypertechnical rather than a common sense manner. *Id.*

Put another way, a court's determination of probable cause should be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the court reasonably could conclude that the items sought to be seized are associated with the crime and located in the place indicated. Doubtful cases should be resolved in favor of upholding the warrant. *United States v. Quintanilla*, 218 F.3d 674, 677 (7th Cir. 2000), quoting *United States v. Spry*, 190 F.3d 829, 835 (7th Cir. 1999), *cert. denied*, 528 U.S. 1130 (2000).

The Supreme Court has declined to define "probable cause" precisely, noting that it is a commonsense, nontechnical concept that deals with the factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians, act. *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Despite the lack of a firm definition, the Supreme Court tells us that probable cause to search exists "where the

known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Id.* at 696, citations omitted. Probable cause is a fluid concept that derives its substantive content from the particular context in which the standard is being assessed. *Id.*, citations omitted.

"Probable cause requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity." *United States v Roth*, 201 F.3d 888, 893 (7th Cir. 2000), *quoting Illinois v. Gates*, 462 U.S. 213, 244 (1983); *see also United States v. Ramirez*, 112 F.3d 849, 851-52 (7th Cir. 1997)("all that is required for a lawful search is *probable* cause to believe that the search will turn up evidence or fruits of crime, not certainty that it will") (emphasis in original). Although people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely. *See United States v. Garcia,* 179 F.3d 265, 269 (5th Cir. 1999); *see also Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting) (probable cause exists somewhere below the 50% threshold).

At first, this case looks like just another search warrant based on an uncorroborated informant, but that's not what we've got. Laura did not snitch on her dad and Detective

Waldera did not view Field as a suspect.[6] What we've actually got is a request to search the residence of an arrested drug dealer.

Ordinarily, such a request would be analytically mundane because courts issuing search warrants are entitled to infer in a drug case that evidence likely will be found where the drug dealer lives. *United States v. Koerth*, 312 F.3d 862, 870 (7th Cir. 2002); *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999). Here, however, Laura and Fink didn't reside permanently in the home to be searched, they were there for an extended visit while Laura's car got repaired. Fink was the person who actually obtained and resold drugs, which means that the actual drug dealer in this case was just crashing at his girlfriend's dad's house. Therefore, the force of the inference is diminished. There would be no reason to think that Fink was traveling with bulky or obvious drug equipment, fruits of the drug trade (jewelry, shoe boxes of cash, etc.), or permanent records, or that he was storing them in the house of his girlfriend's father where the old man might find them, blow his stack and call the cops. This is where Detective Waldera's untrue assertion that Field "smokes" marijuana could have been a subtle and insidious influence on the court: it allowed the unfair inference that Fink actually might leave contraband lying around Field's house because Field not only wouldn't oppose it, he might actively encourage it. Field is tarred by the misinformation.

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[6] Which makes it odd that he would include the incorrect statement that Field "smokes" marijuana. On the other hand, Detective Waldera included a lot of odd, unnecessary information in his warrant affidavit. For instance, he meticulously reports that Laura and a friend watched a movie while Fink and another man smoked marijuana, then they all drove to the Kwik Trip, followed by a trip via the "back way" to the Tastie Treat ice cream stand to buy an ice cream cone.

But the government still could salvage this warrant by independently establishing probable cause to believe Fink had in fact left contraband in the house of an innocent homeowner:

> 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 the specific "things" to be searched for and seized are located on the property to which entry is sought.

United States v. Reddrick, 90 F.3d 1276, 1281 (7th Cir. 1996), *quoting Zurcher v. Stanford Daily*, 436 547, 556 (1978). So what evidence did Detective Waldera present in his affidavit that constitutes reasonable cause to believe that the deputies would find marijuana, methamphetamine, paraphernalia, packaging materials or money at Field's house? A detached exegesis of the affidavit reveals none.

Setting aside Detective Waldera's omissions and misstatements, the most logical inference to draw from his account of the previous day's activities is that the deputies already had seized Fink's drug delivery for that two-week period from the backpack *and* had recovered his drug packaging materials and paraphernalia: according to the affidavit the deputies had seized not only baggies full of marijuana, they had seized a small drug scale, pot pipes and "other items." The drugs had arrived two days earlier, had been packaged recently, and Laura did not report any resales by Fink that would have generated drug proceeds. So what evidence or contraband related to Fink's (or Laura) could the deputies reasonably expect to find back at Field's house? At the suppression hearing, Detective Waldera suggested that at a minimum he expected to find paraphernalia. But what paraphernalia

would remain? He already had the scale, the pot pipes and "other items." Perhaps a box of sandwich baggies remained at the house, but even that might have been recovered from the backpack. Under the *Zurcher* test, it was not reasonable for the deputies to expect to find any additional evidence or contraband at Field's house.

But since the warrant starts with a presumption of validity, the government is entitled to have this court consider the less logical inferences that could be drawn from Detective Waldera's affidavit. For instance, one might infer that perhaps Fink had left some of his marijuana or methamphetamine back at the house. However, Laura told Detective Waldera that she was not aware of any more drugs remaining at the house. This statement directly negates any inference that one could expect to find more drugs at the house. Therefore, a reasonable person would consider such a statement material to the probable cause determination. Nevertheless, Detective Waldera intentionally chose to exclude it.

Why? Because he decided Laura was lying about this due to her nervousness and her wish to keep her father out of trouble. Detective Waldera's decision to exclude and his reasoning are both illogical and presumptuous.

Illogical first because Laura manifested nervousness in other ways about other statements that did not cause Detective Waldera to doubt their veracity. For instance, Laura made a complete oral confession implicating other people in drug use and trafficking but then she wrote a narrative that excluded absolutely every act of investigative interest to the sheriff's department. The most logical explanation for this dichotomy is that Laura was

nervous about getting her friends in trouble and then being branded a snitch. But Detective Waldera did not conclude from this that any of those statements were untrue, nor did he see fit to advise the state court that Laura already had provided an arguably inconsistent (and therefore possibly exculpatory) statement that contradicted the information he was presenting to the court in his affidavit.

Illogical second because Detective Waldera claims that Field was not an investigative target, and he told Laura this that night. Since Laura already had explained that all the drugs of which she was aware belonged to Fink, why would she lie about whether there were any drugs remaining at the house?

In hindsight, we all know that Field actually had marijuana stashed in the padlocked room and Laura knew about it. But Detective Waldera didn't know this at the time, and he continues to claim to this day that Field was not an investigative target at the time he obtained the search warrant. So there can be no logical reason for him to have doubted Laura's statement.

Unless, of course, Detective Waldera *did* suspect Field of having drugs at his house and welcomed the opportunity to poke around his house to find out. Detective Waldera had absolutely no evidence of this, other than his hunch that Laura was nervous about a search of her father's house, but he didn't even share this hunch with the court. Instead, he simply omitted Laura's potentially pivotal statement from his affidavit, thereby depriving the court

of the opportunity to make its own neutral and detached determination whether there was probable cause to search Field's house.

Detective Waldera's conscious decision to omit was, to put it charitably, presumptuous. Detective Waldera intentionally withheld from the court information tending to negate probable cause and he did so based on his self-interested determination that this information was less reliable than other equally impeachable information that tended to support probable cause. Although this omission clearly was intentional, it was not malicious: Detective Waldera was simply trying to do his job the way he understood it was supposed to be done: "I gave [the court] the information I thought was needed to obtain a search warrant." Hearing Transcript, dkt. 15, at 50. Unfortunately, Detective Waldera, like the agents in the *Koerth, Savage, Kammerud, Olson and Mykytiuk* cases, did not really understand what the Fourth Amendment required of him or why.

Lack of malice, however, is not a factor in the Fourth Amendment calculus. To paraphrase Judge Coffey's observation in *United States v. Koerth*, although law enforcement agents are to be commended for ferreting out and apprehending criminals, federal courts cannot water down the probable cause standard in the name of fighting crime. 312 F.3d at 868. Successful ends do not justify improper means.[7]

[7] Perhaps not grasping this point, the government asked Deputy Waldera at the suppression hearing "and did you find what you expected to find at the house?" Hearing Transcript, dkt. 15, at 90. Obviously, it is irrelevant to the probable cause and *Franks* analyses whether contraband was found during the subsequent search. In any event, the answer almost has to be "yes": we don't hold suppression hearings in cases where the searchers didn't find anything. Deputy Waldera answered "I actually found more than we expected." *Id.* In this particular case, this answer actually is incorrect: he was not expecting to find *any* contraband belonging to Field because Field ostensibly was not a suspect. A more accurate and honest answer would be that he found *nothing* that he expected because none of the evidence seized could be attributed to Fink or Laura. What he found was entirely *unexpected* because it all belonged to Field.

In this case, I suspect that Detective Waldera's hidden agenda was to investigate Field in addition to Laura and Fink, notwithstanding the detective's myriad denials at the suppression hearing. But let's take the detective at his word. This means that all the deputies knew before the search was that Field was a law-abiding citizen who was doing his daughter a favor by letting her and her no-good boyfriend sleep on the floor of his living room for a few weeks while his daughter got her car repaired. The no-good boyfriend, while so accommodated, accepted one of his bi-weekly drug deliveries, then brought the drugs back to Field's house to weigh and repackage. The no-good boy friend and the drug-using, aiding & abetting daughter took the repackaged drugs, scale and other items out of the house in a backpack while going to visit friends, only to get caught by the police. These facts could not possibly support a search warrant for the law-abiding father's house.

But these aren't the facts that Detective Waldera presented to the reviewing court in his attempt to secure a search warrant. By misstating Field's drug use and by withholding other relevant evidence, Detective Waldera jiggered the court's probable cause determination in his favor. Even the slanted affidavit is a wobbler; the more accurate, edited warrant does not come close to establishing probable cause to search Field's home. Therefore, the search warrant is not valid.

Normally this conclusion is only part one of a two part analysis that would segue to a review of the good faith doctrine. As noted above, however, when a search warrant affiant has recklessly or intentionally misstated or omitted material facts, the government is

foreclosed from salvaging a deficient warrant by means of the good faith doctrine. That means that this court should grant Field's motion to quash the search warrant.

II. Scope of the Search Warrant

If this court quashes the warrant, then there is no need to consider Field's other suppression motions. As is my practice in reports and recommendations, I will address all of the pending motions even though I am recommending that the court grant Field's linchpin motion.

Field contends that the search warrant obtained by the deputies was too broad from its inception and that even if it was proper when issued, its overbreadth became manifest once the deputies encountered the padlocked room inside Field's house. Specifically, Field contends that the agents knew that Fink and Laura had no access to certain parts of his home and that they withheld this information from the court in seeking a warrant for the entire house. Second, he contends that once the deputies encountered the room padlocked from the outside, they should have realized that their warrant did not cover that room, or at least sought further direction from the issuing court.

Normally, a warrant to search a residence authorizes the police to search any closet, container or other closed compartment in the building that is large enough to contain the contraband or evidence for which they are looking. *United States v. Evans*, 92 F.3d 540, 543 (7th Cir. 1996). Where, however, what at first appears to be a single residence turns out to

be two or more residences, the police cannot search any premises not associated with the target of their search or the probable cause authorizing the search. *See, e.g.,Jacobs v. Chicago*, 215 F.3d 758, 770 (7th Cir. 2000). *See also Mena v. City of Simi Valley*, 226 F.3d 1031, 1038-39 (9th Cir. 2000) (in a home designed for one family but shared by many individuals who padlocked their individual rooms for privacy, police with a search warrant for the home had to treat each padlocked room as a discrete living unit and search only those for which they had probable cause). Probable cause in this context means that the officers must have cause to believe that illegal activity is taking place in a particular location. *Id.* If the error does not become apparent until the police are executing their warrant, the warrant itself is not void *ab initio*; however, "once the mistake is discovered, the government cannot use the authority of the warrant to conduct a search they know is unsupported by probable cause or is otherwise outside the scope of the Constitution." *United States v. Ramirez,* 112 F.3d 849, 851-52 (7th Cir. 1997) (a Title III case).

Field's overarching challenge to the warrant's overbreadth is premised on two facts, one clearly established, one not. The clearly established fact is that Laura told Deputy Waldera that she and Fink were sleeping in her father's living room and that they were visiting for two or three weeks. Deputy Waldera did not put this information in his search warrant affidavit and he initially testified at the evidentiary hearing that he did not know that Laura and Fink were sleeping in the living room until the deputies executed the search warrant. *See* Hearing Transcript, Dkt. 15, at 26. On cross-examination, however, Deputy

Waldera admitted that this testimony was not accurate: his written report of his interview with Laura, which pre-dated the search, reflected that Laura had told him that she and Fink slept in the living room. *Id*. at 87-88. (Indeed, in his report of the subsequent search, Deputy Waldera amplified this: "In the living room I observed a made-up bed on the floor . . . The information I received from Laura appeared to be accurate. It appeared that Laura and Fink had been staying in the living room area at the residence." Gov. Ex. 1 at 3). Deputy Waldera, however, had not included this information in his search warrant affidavit. Therefore, the court had no information that might cause it to question the scope of the warrant it was about to issue.

The second, more hotly contested fact is whether Laura went a step further and mapped out for Deputy Waldera the areas of the house to which she and Fink had access and the areas of the house to which they did not. Detective Waldera testified that Laura never had told him this. Laura submitted an affidavit swearing that she had, and she was willing so to testify, but Field declined to call her as a witness at the hearing after the government declined to promise that she would not become an investigative target of their investigation in the future. Hearing Transcript, dkt. 15, at 108-09, 115. This results in dueling versions of events that pits the written affidavit of the defendant's daughter against the convincingly-impeached memory of a law enforcement officer who withheld material facts from a court while seeking a search warrant. Unfortunately, there is no principled way for me to determine from this record whether Laura did or did not present the home-

demarcation information to Deputy Waldera. So, I find that Field has not met his burden of establishing this omission by a preponderance of the evidence.

As noted in the *Franks* section above, Deputy Waldera should have advised the court that Laura and Fink were sleeping in the living room. For purposes of the instant analysis, this court should add this fact to the warrant affidavit. Even so, this would not be enough to conclude that the warrant was overbroad. Absent clearer evidence that Field's house was divided into separate living units, there would be no reason for the court to limit the reach of a search warrant for Field's residence. The usual rule, cited in *Evans*, 92 F.3d at 543, would apply and the deputies would be free to search anywhere and any thing in the house that could contain the contraband and other evidence specified in the warrant.

But the situation changed once the deputies arrived on the scene, confirmed the living room sleeping arrangement, then found the padlocked door to an interior room. If Field had been the investigative target, then the usual rule still would apply and the deputies would have had no obligation to check with the court before entering the locked room and opening every container located therein. But Field was not the investigative target, so pursuant to *Ramirez*, the deputies were required to clarify the situation before proceeding. *Cf. Jacobs*, 215 F.3d at 770 (it is the officers' burden to show that they had probable cause to search plaintiffs' apartment; it is not plaintiffs' burden to show that their apartment should not have been searched). The information they learned on the scene indicated that Laura and Fink did not have access to the padlocked room.

When Deputy Waldera presented Field with the search warrant for his house, he told Field that Laura and Fink had been arrested, and he outlined the information he had received that had led him to seek a warrant. This put Field on notice that the search was aimed at Laura and Fink, and it should have prompted Field to educate the deputies as to the limits of Fink and Laura's access to his home.

Which Field did when the deputies directed him to open the padlocked room: he told them that he had locked this room to keep Fink and Laura out. If Field had had left it at that, then the deputies would have been obliged not to enter the locked room until they clarified with the court whether their probable cause to search extended to a room that the innocent owner had locked in order to keep out the criminal suspects. The answer from the court would have been (or at least should have been) "No," and the deputies could not have searched the padlocked room.

But Field told the deputies that he had padlocked the room so that Laura and Fink wouldn't smoke his marijuana, which he kept in a tin on his office chair. Did this change the calculus? Not really: this admission could not serve to expand the scope of the warrant issued to uncover drugs and contraband belonging to Fink and Laura; it merely gave the deputies probable cause to believe that Field had his own marijuana in what they now knew was *his* section of the house. Pursuant to *Ramirez*, *supra*, and *Maryland v. Garrison*, 480 U.S. 79, 85 (1987), the deputies had a duty to advise the court and obtain an additional warrant before entering Field's section of the house and seizing his contraband. On these facts, there

was no plain view or exigent circumstance that would allow the deputies to bull ahead with a search of Field's locked room without first obtaining the court's imprimatur.

Even if it was reasonable for the police to enter the locked room to seize the marijuana Field told them was on the office chair, it was not reasonable for them then to compel Field to open his locked safe and locked wooden box. The deputies had no evidence that could lead them reasonably to believe that Fink or Laura had any access to that room, or to any container stored in that room. To the contrary, every indication was that Field had denied them access to this room because it's where he kept his stuff. So, the search warrant gave the deputies no additional authority to open closed containers ensconced within the padlocked room. Nor did finding what appeared to be Field's personal use marijuana on the chair vest the deputies with *carte blanche* to pry open every box, safe, folder and file in the room. From that point on, the deputies were freelancing, searching outside the scope of the warrant, without probable cause, and without an articulated exception to the warrant requirement. They had no authority to direct Field to unlock his safe or to unlock the large wooden box on the floor in which they found the marijuana that caused them finally to arrest Field.

At the suppression hearing, Deputy Waldera defended the scope of the search by noting, accurately, that he had a warrant authorizing the search of Field's entire house. But as the case law cited above indicates, a search warrant isn't a universal solvent. The Fourth

Amendment requires law enforcement officers to remain attuned to altered circumstances that might change the valid scope of their search. The deputies did not do that here.

It was unreasonable for the deputies to open the padlocked room. It was unreasonable for them to open Field's safe and Field's large wooden box. I am recommending that this court grant Field's motion challenging the scope of the search warrant. Anything seized from inside the padlocked room, the safe or the large wooden box should be suppressed.

III. Motion To Suppress Statements

Finally, Field contends that he was in custody from the moment the deputies first contacted him to execute their warrant, and that his statements in response to their actual and constructive questioning must be suppressed because the deputies never provided him with a *Miranda* advisal.

A suspect is entitled to be advised of his *Miranda* rights prior to any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). A suspect is in custody for Fifth Amendment purposes if he is subject to a restraint on his freedom of movement of the degree associated with formal arrest. *United States v. Wyatt*, 179 F.3d 532, 535 (7th Cir. 1999). Factors to consider in making this determination include whether the encounter takes place in a public place, whether the suspect consents to speak to the officers, whether the officers inform the suspect that he is free to leave, whether the suspect is moved to

another area, whether there is a display of force or numbers by the officer(s), whether the officers deprive the suspect of papers needed to go on his way, and whether the officer's tone of voice was such that his request likely will be obeyed. *Id.* *Miranda* warnings are not required just because a persons is the focus of a criminal investigation or because the questioning takes place in a coercive location like a police station. *Id.*

Field premises his claim of custody primarily on Deputy Waldera's written report of the search in which he states that he told Field when he first approached him "that he was under arrest." At the suppression hearing, Deputy Waldera claimed that this was a typographical error, and that he meant to include the word "not" between "was" and "under." Although this appears pretty self-serving, it makes sense in context, since later in his report Deputy Waldera reports placing Field under arrest after finding the marijuana. And, as Deputy Waldera testified at the hearing, Field was not the target of his investigation or the search warrant; there was, at the beginning, no evidence whatsoever that Field had committed any crime for which he could be arrested.

So the question becomes whether the totality of circumstances would have caused a reasonable person in Field's position to believe he was in custody. They would not. Despite the presence of a number of officers, despite the apparent use of a deputy to shadow Field during the search, and despite the deputies "escorting" Field back and forth to open locked doors, safes and boxes, Deputy Waldera told Field he was not under arrest, no one touched him or put cuffs on him, no one displayed weapons or harassed him, no one prevented him

from leaving (although no one told him he could try) and despite the large number of deputies present, most of them ignored him as they executed the search warrant. In short, Field was not in custody and he was not entitled to a *Miranda* advisal prior to engaging in conversation with Deputy Waldera. The court should deny Field's motion to suppress statements.

Conclusion

The Fourth Amendment's reasonableness requirement and good faith doctrine are very forgiving. Rarely does this court grant motions to suppress evidence in a criminal case, even when the government has erred in some fashion. Perhaps as a result, the government persists in presenting questionable searches to this court. The purpose of the exclusionary rule is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). This is one of those rare cases in which application of the rule is necessary.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court:

1) Grant defendant's motion to quash the search warrant for lack of probable cause;

2) Grant defendant's motion to suppress evidence seized outside the scope of the search warrant; and

3) Deny defendant's motion to suppress statements.

Entered this 7th day of December, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge