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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

STEPHEN E. BLACK,
MONCLAIR HENDERSON-EL, and
TYRAY ROBERSON,

04-CR-162-S

Defendants.

REPORT

Before the court for report and recommendation are defendant Henderson-El's motion to suppress statements (dkt. 27), motion to suppress and ion track test (dkt. 28), a joint motion with defendant Roberson to strike prejudicial surplusage from the indictment (dkt. 32), defendant Roberson's motion to suppress ion tracking (dkt. 34),Roberson's motion to quash the search warrant as overbroad (dkt. 35) and defendant Black's motion to quash the search warrant for lack of probable cause (dkt. 39).[1] For the reasons stated below, I am recommending that this court grant the motions to suppress the ion tracking but deny the other motions.

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[1] Early next week I will be entering a separate order ruling on Roberson's motion for severance (dkt. 33), which Black has adopted (dkt. 52).

Dockets 28 & 34: Henderson-El and Roberson's motions to suppress ionic tracking

During the investigation of this crack cocaine trafficking case, Officer Kristine Boyd of the Madison Police Department used an ionic tracking device to determine that cocaine ions were present inside two different Lincoln Navigators used by defendant's Henderson-El and Roberson. The government has determined that nothing of evidentiary value resulted from the ionic track testing, so it does not intend to offer the test results in its case in chief. To perfect their record, Henderson-El and Roberson would like rulings on their motions. Under the circumstances, the government does not oppose granting the motions to suppress, although it does not concede the arguments on which the defendants based their motions.

Accordingly, I am recommending that the court grant the two motions to suppress the results of the ionic track testing. Because the government is reserving the right to offer the tests as impeachment or rebuttal evidence, defendants might file a motion in limine challenging ion track testing under the principles of *Daubert*. That is a dispute for another day.

Docket 32: Henderson-El and Roberson's Motion to strike prejudicial surplusage from the indictment

As a place holder while the Supreme Court ponders *United States v. Booker*, Henderson-El and Roberson have filed a motion to strike the sentencing allegations from the indictment. They fully understand this court's position, announced in previous cases, that under the law

of the Seventh Circuit, the government must present its sentencing allegations in the grand jury's indictments. Indeed, defendants didn't even brief the motion, which could be viewed as a waiver. But, because this court can easily generate a substantive answer, I will consider the motion on the merits and recommend that this court deny it.

Defendants have moved to strike the sentencing allegation from the indictment, claiming that it's prejudicial surplusage, the government does not have statutory authority to include sentencing allegations in an indictment, and third, that presenting sentencing allegations to a jury violates the non-delegation doctrine.

Pursuant to *United States v. Booker*, 375 F.2d 508, 513 (7th Cir.), *cert. granted*, ___ U.S. ___, 2004 WL 1713654 (2004), the Sixth Amendment provides criminal defendants the right to have a jury determine beyond a reasonable doubt all facts (such as drug amounts) that affect a defendant's guideline range, and hence his maximum sentence. The government disagrees with this ruling, but is bound by it unless and until the Supreme Court reverses it.

The Seventh Circuit observed in *Booker* that if the facts the government would seek to establish at Booker's subsequent sentencing hearing were elements of a statutory offense, then those facts "would have to be alleged in the indictment" and would present a double jeopardy concern in his case; but it then ordered Booker's case remanded to the district court for a post-trial sentencing hearing "at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." *See* 375 F.3d at 514. This may be dicta, but it's a clear enough indication that the Seventh Circuit envisions

federal prosecutors proceeding in exactly the manner employed in the instant case. *See also United States v. Shearer*, 379 F.3d 453, 456-57 (7th Cir. 2004)(case remanded for re-sentencing including a jury determination of factual issues that will increase the defendant's sentence).

Viewed pragmatically, unless the court stays all of its pending criminal trials, the most risk-free course of action is to continue the current practice of allowing sentencing allegations in the indictment and holding a bifurcated sentencing hearing. This minimizes the possibility of a double-jeopardy problem for the government while still allowing defendants a do-over if they are entitled to one after the *Booker* decision. This probably is enough of an analysis to support my recommendation to deny the motion to strike, but I will address briefly the points argued by defendants.

First, they contend that the sentencing allegation is prejudicial surplusage which must be stricken pursuant to F. R. Cr. P. 7(d). If this were true, then the jury need not learn of the sentencing allegation until after it returns a guilty verdict. Evidence and argument relevant solely to the sentencing allegation will not be presented during the guilt phase of trial. Therefore, the sentencing allegation could not possibly affect the trial on the criminal charges.

In this case, the facts underlying the sentencing allegation necessarily will be part of the government's evidence during the guilt phase of the trial. Thus, this is a case in which including the sentencing allegation during the guilt phase could not unfairly prejudice the

defendant. Indeed, by virtue of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), juries often are *required* to consider evidence about the amount of drugs involved then answer a special verdict question on precisely this issue. This is a case in which it could make sense to incorporate the cascading special verdict question militated by *Booker* into the guilt phase verdict form in place of more usual *Apprendi* "Yes or No" special verdict question.

Second, defendants argue that F. R. Cr. P. 7(c)(1) does not allow the government to include sentencing allegations in an indictment because they cannot be considered "essential facts constituting the offense charged." This argument is a variation on the maxim "expressio unius, exclusio alterius est" which is palpably inapplicable to a Rule 7(c)(1) review of an indictment. Rule 7©) does not require the government to do more than allege the "essential facts" constituting the offense, which customarily are thought of as the elements. But the grand jury often returns "speaking" indictments and no one would suppose that this runs afoul of Rule 7©); in fact, defense attorneys usually complain that the grand jury doesn't return enough speaking indictments. *Cf. United States v. Webster* 125 F.3d 1024, 1030-31 (7th Cir. 1997)(court finds bankruptcy fraud indictment "minimally sufficient" despite lack of detail and asks "why the government filed such a scanty indictment.") Contrary to the Miesian aesthetic espoused by Defendants, in the case of indictments, more is more.

The more detail the grand jury provides in the indictment, the more information is available to defendants about the government's theory of prosecution, and the more tightly

the government locks itself in at trial. The fact that Defendants does not want this much detail in *his* indictment is irrelevant to the question whether such detail violates Rule 7(c)(1). Clearly, it does not. Additionally, as the government observes, if *Booker* is correctly decided at the circuit level, then sentencing allegations may have become "essential facts" under Rule 7(c)(1) and the Sixth Amendment. Until the upper courts have sorted it all out, the best course for a trial court is to leave the sentencing allegations in the indictment.

Third, defendants contend that the practice of charging sentencing allegations in an indictment illegally confers legislative authority on the Sentencing Commission, a body of the judicial branch. *See* 28 U.S.C. § 991(a). Although *Booker* might change things, this premise currently is incorrect. The Sentencing Commission exercises power delegated to it by Congress; "in contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the guidelines as it sees fit either within the 180-day waiting period or at any time." *United States v. Booker*, 375 F.3d at 511, quoting *Mistretta v. United States*, 488 U.S. 361, 377, 393-94 (1989). Additionally, what *Booker* requires is that the petit jury find *facts* that might be used to increase a sentence. Obviously the jury does not actually impose a sentence, or even determine the exact fashion in which any found fact will be used. It simply separates the supportable allegations from those that cannot be proved beyond a reasonable doubt; the rest is up to the sentencing judge. This cannot be equated with the creation of new "elements" of criminal offenses by

the Sentencing Commission; indeed, in a bifurcated trial, sentencing allegations don't even enter the mix until the jury has found the genuine elements beyond a reasonable doubt.

The Supreme Court already has rebuffed a challenge to the sentencing guidelines under the nondelegation doctrine. *See Mistretta*, 488 U.S. at 396. Defendants contend that pursuant to *Blakely* and *Booker*, the Sentencing Commission now has the authority to define the elements of crime. This may turn out to be correct, but not until the Supreme Court says so. Until the Supreme Court decides *Booker*, the best way to protect both sides' interest in federal criminal prosecutions is to continue with the court's current practice. If it turns out that Defendants are correct, or if the guidelines are stricken for some other reason, then the court always can hold a new sentencing hearing.

Defendants' arguments are well taken up to a point and might have prevailed absent the Seventh Circuit's unequivocal embrace of sentencing hearings. But even if this court were writing on a blank slate, there is nothing unfair about allowing a jury to determine whether the government has proved beyond a reasonable doubt facts relevant to sentencing. Indeed, this procedure provides defendants with more protection from high sentences than they've ever had, pre- or post-Guidelines.

This court should deny the motion to strike prejudicial surplusage.

Docket 27: Henderson-El's motion to suppress post-arrest statements

Defendant Henderson-El has moved to suppress statements made to authorities following his detention on September 30, 2004, during execution of a search warrant at his apartment. The government concedes that all but one of the statements obtained by the agents violated Henderson-El's rights under *Miranda*. Therefore, the government does not intend to offer these statements in its case in chief, but reserves the right to use them to impeach or for rebuttal. Henderson-El does not contend that his statements were involuntary, so this would be a proper use of the statements. Therefore, with the exception noted below, this court should grant the motion to suppress.

Henderson-El made one statement that the government contends was volunteered as opposed to in response to custodial interrogation. Henderson-El disagrees, claiming that the statement was in response to the functional equivalent of questioning. On December 3, 2004, this court held an evidentiary hearing on this motion. Having heard and seen the witnesses testify, and having judged their credibility, I find the following facts.

Facts

On December 30, 2004, at approximately 3:00 p.m., agents of the Dane County Narcotics and Gang Task Force executed a state search warrant for defendant Monclair Henderson-El's residence at Apartment 12, 266 Junction Road, Madison, Wisconsin.

Approximately a dozen officers and agents participated in the entry and subsequent search. Among them was DEA Agent Craig Grywalski, serving as the federal liaison.

The entry team secured the residence and upon finding Henderson-El at home, took him into custody by handcuffing him. Agent Grywalski and Madison Police Detective Tom Helgren attempted to interview Henderson-El. Henderson-El declined to answer questions until he consulted with an attorney. Helgren and Grywalski ceased their interview attempt and moved Henderson-El back to a chair in the dining area, which was separated from the kitchen by a half-wall and counter.

At least one task force agent was always present in the room with Henderson-El for routine officer security. At some point, Agent Grywalski volunteered to assume this duty and took a seat at the dining room table with his back toward the kitchen. Henderson-El sat in front of him but across the table. The men did not interact. Meanwhile, the searching agents discovered at least three sets of keys and several cell telephones in various locations throughout the apartment, all of which they deposited on the dining room table while they continued searching.

Simultaneously, Officer Paige Valenti of the Madison Police Department was searching the kitchen. In the pan storage drawer under the stove she found a small Brinks safe. She removed it from the drawer, set it on the stove top and announced her find to the other officers, some of whom gathered to observe. Agent Grywalski remained in the dining room facing Henderson-El and the table on which the cell phones and keys were heaped.

The safe was not locked, and when Officer Valenti opened it, she found a large quantity of what appeared to be (and later tested to be) crack cocaine. One of the other officers in the kitchen wondered aloud whether there was a key to the safe. A Brinks safe key is a distinctive stubby, hollow-shafted cylindrical key, similar in appearance to a Kryptonite bicycle lock key.

Agent Grywalski heard the question while he was looking at the pile of key rings on the table in front of him. As the owner of a Brinks safe himself, Agent Grywalski knew what a Brinks key looked like, and he saw one on one of the key rings lying on the table in front of him. Agent Grywalski picked up the key ring by the Brinks key, pivoted slightly in his seat and announced to the officers in the kitchen "Here's the key!" He was not directing his comment to Henderson-El. Agent Grywalski had no idea whose key ring he was holding.

Henderson-El cleared that up by volunteering "Those are my keys." Agent Grywalski pivoted in his seat to face Henderson-El, who nodded in confirmation. Henderson-El said nothing else, and Agent Grywalski did not attempt to follow up. No one came out of the kitchen to retrieve the key (because the safe already was unlocked), so Agent Grywalski simply put it back on the table.

Analysis

By its own terms, *Miranda v. Arizona*, 384 U.S. 436 (1966) does not apply to volunteered statements, *see* 384 U.S. at 478, but it does apply to the functional equivalent of express questioning, which the Court defines as "any words or actions on the part of the

police (other than those normally attendant to arrest and custody) likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980). The latter portion of this definition focuses primarily on the perceptions of the suspect, rather than the intent of the police. *Id; see also United States v. Payne*, 954 F.3d 199, 202 (4th Cir. 1992), quoted with approval in *United States v. Jackson*, 189 F.3d 502, 510 (7th Cir. 1999) (agent's declaration to defendant that police had found a gun in defendant's house did not constitute interrogation so as to require *Miranda* warnings). As the court noted in *Payne*, "the *Innis* definition of interrogation is not so broad as to capture within *Miranda*'s reach all declaratory statements by police offers concerning the nature of the charges against the suspect and the evidence relating to those charges." 954 F.2d at 202.

Agent Grywalski's act of holding up the Brinks key and statement "here's the key" were not the functional equivalent of a question to Henderson-El. There had been no interaction or conversation between the two men while they sat in the dining room killing time while others searched. Indeed, after Henderson-El invoked his right to counsel, Agent Grywalski acknowledged by deed and word that the attempted interrogation was over. Nothing that occurred while the two men sat in the dining room would have changed that. For instance, as searching officers deposited keys and cell phones in a pile on the dining room table, Agent Grywalski did not attempt to cozen Henderson-El into admitting ownership of any of these items; neither did he wonder aloud, upon discovery of the safe, "Gee, I wonder who that belongs to?"

Agent Grywalski's sole act and sole statement regarding the evidence clearly were in direct response to statements made by a police officer behind him in the kitchen, whom he turned to address; he did not direct his act, statement or attention toward Henderson-El. There was no reason in the world to believe that Officer Valenti's recovery of the safe from inside the oven, an unknown officer's rhetorical inquiry as to whether the key had been recovered, and Agent Grywalski's recognition of a Brinks key in the key pile would lead Henderson-El to admit ownership of the key. Winning the Lotto has shorter odds. That's because no reasonable person confronted by this set of events would have inferred that he was being questioned, and no reasonable person in Henderson-El's situation would have said anything *at all*, let alone confess ownership of the safe key. Regardless of the direction from which one approaches these facts, the conclusion remains clear: no one subjected Henderson-El to the functional equivalent of questioning.

So why did he blurt out an incriminating response? We can only speculate, but regardless whether it was calculation, stupidity, panic or something else, the statement was volunteered and this court should not suppress it.

Dkt. 35: Roberson's motion to quash the search warrant as overbroad

The drug task force sought and obtained from the Circuit Court for Dane County a warrant to search Apartment 12 at 266 Junction Road in Madison. (A copy of the search warrant and the affidavit in support of the request are attached to defendant Black's motion

to suppress, dkt. 39). Found during the search was a cellular telephone belonging to Roberson. Police searched the phone's memory and found not only alphanumeric data but also streaming video of Roberson in Apartment 12 identifying a bedroom as his, and of a large pile of cash. Roberson seeks to suppress the evidence seized from his cell phone's memory by challenging the breadth and particularity of the warrant.

In his affidavit seeking a search warrant, Detective Tom Helgren of the Madison Police Department stated that, based on his training and experience, he has learned the following facts, among other things:

> s. That individuals who engage in narcotics trafficking often take electronic equipment in trade for narcotics.
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> t. That individuals engaged in narcotics trafficking and their associates often possess electronic devices, such as pagers, computers, and cell phones, which are utilized by narcotics traffickers and their associates; that pagers, computers, and/or cell phones often have electronic memory capabilities, and that such electronic memory often contains evidence of narcotics trafficking, such as telephone numbers and/or other information of other individuals who assist the narcotics traffickers in the distribution and/or purchases of narcotics; that these telephone numbers and other memory information provide additional information to law enforcement concerning the extent of any narcotics trafficking activities as well as identifying other individuals engaged in narcotics trafficking with the individual possessing the electronic devices.

See Attachment to docket 39. The court issued the warrant and authorized a search for

> Certain things, to-wit: cocaine, cocaine base . . . Also additional items tending to evidence drug trafficking, including but not limited to, U.S. currency, cocaine cut, and other containers associated with the sale and distribution of controlled substances. Any and all firearms. Also, electronic equipment and devices, including but not limited to pagers, computers, and cellular phones and any memory data contained therein.

Attachment to dkt. 39.

Roberson starts generally, arguing that because the warrant defines electronic equipment and devices to be seized as "including but not limited to" pagers, computers and cellular phones, it is too broad. *See, e.g., United States v. Bridges*, 344 F.3d 1010, 1017-18 (9th Cir. 2003). Honing in a bit, Roberson also argues that it was improper for the court to authorize an unlimited search of the memory data in his cell phone because "cell phones are computers," (dkt. 51 at 4) and no one would suppose that police have *carte blanche* to search the entire contents of a personal computer pursuant to a drug warrant. As a corollary to this, Roberson points out that the police were not expecting to find video clips in the cell phone; therefore, they shouldn't have looked at them. Roberson labels this "exploratory rummaging" of the sort forbidden by the Fourth Amendment's particularity requirement.

Although cell phones aren't synonymous with computers (yet), they definitely aren't just for phone calls anymore. *See, e.g.,* "Cellphones Become 'Swiss Army Knives' as Technology Blurs," Wall St. J., 1/4/05 at B1 (cutting edge cell phones now contain 1.3

megapixel cameras, video players and MP3 music players; others can monitor the blood sugar levels of diabetics and send the results to a physician). Add into the mix PDAs, fax machines, *etc.* and it is clear that police must be as precise and thorough as circumstances permit when seeking to search electronic equipment, and courts must scrutinize such search requests with care.

All that being true, Roberson has little room to complain in this case. His complaint regarding the "including but not limited to" language may be valid in theory (more on this below): if the police had found a telefax machine, a PDA, or some other electronic device not actually listed in the warrant, then there would be problem. But they didn't. They found Roberson's cell phone. Detective Helgren specifically sought permission to seize any cell phones and review their electronic data for evidence of drug crimes, and he provided probable cause to grant his request. The resulting warrant mirrored this particularity as to cell phones and their "memory data" related to drug crimes, thereby limiting police discretion and preventing the exploratory rummaging forbidden by the Fourth Amendment. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 480 (1976); *see also United States v. Vanichromanee*, 742 F.2d 340, 347 (7th Cir. 1984) (warrant sufficiently specific by authorizing search for "documents, papers, receipts and other writings which are evidence of a conspiracy to violate 21 U.S.C. Section 963").

Roberson argues that warrant's authorization to search any seized cell phones for"any memory data contained therein" is absolutely unlimited, and therefore overbroad. I disagree.

Although the warrant should have been drafted more carefully, it is sufficiently clear that the phrase "additional items tending to evidence drug trafficking . . ." applies to and limits everything that follows it, including the seizure of memory data from cell phones. Thus, had the police found in Roberson's cell phone his medical records or visual images of clearly innocuous events, then they could not have reviewed them further.

Circling back to Roberson's first point, he would have a more legitimate beef if the police had seized and searched a Palm Pilot or some other unspecified type of electronic equipment pursuant to the "including but not limited to" language of their warrant. Then, perhaps, Roberson would have a valid suppression argument, but only because the evidence was seized pursuant to a term that the court should not have included in its warrant. But because police seized Roberson's cell phone pursuant to a valid portion of the warrant, Roberson cannot suppress the cell phone on the ground that warrant allowed the police to seize something else that the warrant had not described with particularity. *Cf. Franks v. Delaware*,438 U.S. 154, 171-72 (1978)(warrant remains valid despite inclusion of false information if there is still probable cause to search after false information is removed); *United States v. Buckley*, 4 F.3d 552, 557-58 (7th Cir. 1993) (seizure of evidence within the valid scope of a warrant is severable from any invalid portion of the search).

Roberson also challenges the scope of the search actually conducted of his cell phone. He maintains that the police, upon finding his cell phone, should not have searched its contents, or at least not watched the video, which was beyond the scope of what they had

included in their warrant request. This is a potentially valid argument in theory but the specifics of this warrant hoise it. Recall that Detective Helgren averred that

> these telephone numbers and *other memory information* provide additional information to law enforcement concerning the extent of any narcotics trafficking activities as well as identifying other individuals engaged in narcotics trafficking with the individual possessing the electronic devices [emphasis added].

This led the court to authorize the seizure of

> additional items tending to evidence drug trafficking to wit . . .. Also, . . . cellular phones *and any memory data contained therein* [emphasis added].

Perhaps, as Roberson argues, the police subjectively were not expecting to find video clips in Roberson's cell phone. But their lack of prescience doesn't transform the video images into something other than "memory data" contained within the phone, and obviously these images "tend to evidence drug trafficking;" therefore, they fit squarely within the terms of the sufficiently-particular warrant. To avoid challenges of the sort mounted here, hopefully the task force will edit their boilerplate to clarify the scope of the term "memory data," but the unadorned term is sufficiently clear and particular so as to limit the police to the search and seizure of evidence relevant to their drug investigation.

If this warrant had authorized the search of a file cabinet for "documents evidencing drug trafficking" and the police were expecting to find alphanumeric drug ledgers, they would not exceed the scope of the warrant by opening a folder labeled "photographs" for a cursory

check whether the photos evidenced drug trafficking.[2] So long as police adequately attempt to minimize their review of the irrelevant documents, they do not exceed the scope of their warrant if they open every file folder and look at a few of the documents–alphanumeric or visual–in each folder. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 482 n. 11 (1976) (it's not unreasonable for some innocuous documents to be examined during a document search so long as all concerned minimize unwarranted intrusions on privacy); *Dalia v. United States*, 441 U.S. 238, 257 (1979) ("it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant"); *United States v. Pritchard*, 745 F.2d 1112, 1122 (7th Cir. 1984)(police may conduct a "thorough and extensive search . . . to locate the items described in the warrant."); *United States v. Buckley*, 4 F.3d at 557 (7th Cir. 1993)(searching residence "with a fine tooth comb" to uncover evidence listed in the warrant is not "exploratory rummaging" of the sort forbidden by Fourth Amendment:); *United States v. Wuagneux*, 683 F.2d 1343, 1352 (11 Cir. 1982) (thoroughness is not the same as unreasonableness; although a search always is governed by the terms of the warrant, it may be as extensive as reasonably required to locate the items described in the warrant).

[2] Analogizing photographs is more accurate than analogizing a video because in the telephone, the video could be viewed by entering commands, just like the alphanumeric information could be accessed. In a file cabinet, a photograph can be viewed just like alphanumeric documents, while a DVD or videotape would have to be played in a separate machine.

The computer search cases cited by the parties follow the same principles. For instance, Roberson cites *United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001) for the proposition that citizens have a legitimate expectation of privacy in their computer files that forbids "sweeping, comprehensive search[es] of a computer's hard drive." But that's equally true of a citizen's documents. So too with the court's admonition in *United States v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999) that courts not oversimplify and ignore the realities of massive modem computer storage: the court suggests that when computer searches are authorized, the agents sort the documents and then only search the ones specified in the warrant. Again, this is nothing new: this technique has been used for decades to govern hard copy searches of large volumes of documents. *See, e.g., United States v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982). Finally, as the government observes, in both of these Tenth Circuit cases, the court's concern arose when the agents deviated from the specific terms of their warrants to review evidence of different crimes not covered by their warrants. That clearly is not the situation in Roberson's case.

In sum, the police acted within the scope of a warrant that, as executed, was sufficiently particular. Therefore, the court should not suppress Roberson's cell phone or the data, including the video, seized from it.

As a fallback, the government invokes the safety net of the good faith docrine established in *United States v. Leon,* 468 U.S. 897 (1984). Roberson contends that *Leon* should not apply to a warrant that is too broad, but he has no authority for that position.

In *Franks v. Delaware*, *supra*, the Court held that it would not automatically quash a search warrant to punish the police even if they had included intentionally false information; the question was whether the falsehoods were material to the probable cause determination. 438 U.S. at 171-72. In *Leon* itself, the Court employed broad language to describe the application of the good faith doctrine to allegedly deficient warrants. *See* 468 U.S. at 924-25; *see also United States v. Koerth*, 312 F.3d 862, 868 (7th Cir. 2002)(observing in dicta that the good fath doctrine may be used when a defendant "establish[es] the invalidity of the search warrant"). This would make sense, given the chary application of the exclusionary rule in this circuit. *See United States v. Espinoza*, 256 F.3d 718, 728 (7th Cir. 2001)(because the exclusionary rule exacts an enormous price from our society and our system of justice, courts should not apply it except when necessary). Accordingly, if it were necessary to reach the issue, this court should apply the good faith doctrine to the challenged warrant in this case.

In *Leon* the Court stated that

> In a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.
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> * * *
>
> We have . . . concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination. Deference to the magistrate, however, is not boundless.

Having so stated, the Court then held that

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Id. at 926.

Such determinations must be made on a case-by-case basis with suppression ordered "only in those unusual cases in which exclusion will further the purpose of the exclusionary rule." 468 U.S. at 918. When the officer's reliance on the warrant is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule because it is

> painfully apparent that the officer is acting as a reasonable officer would and should act in similar circumstances. . . . This is particularly true . . . when an officer acting with objective good faith has obtained a search warrant from a judge . . . and acted within its scope. . . . Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the [court's] error rather than his own cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 920-21, internal quotations omitted.

The Court noted the types of circumstances that would tend to show a lack of objective good faith reliance on a warrant, including reliance on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or reliance on a warrant so facially deficient that the officer could not reasonably presume it to be valid. *Id*. at 923. The Court observed that "when officers have acted pursuant

to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *Id*. at 924. *See also Arizona v. Evans*, 514 U.S. 1, 11-12 (1995)(reaffirming the Supreme Court's reluctance to suppress evidence obtained in good faith but in violation of a defendant's Fourth Amendment rights).

In the instant case, Roberson makes an arguably valid argument against the use of the term "including but not limited to" in the search warrant. At least the Ninth Circuit has ruled that such language is unacceptably broad; neither side has cited any Seventh Circuit case law on this point. Roberson's challenge to the police review of the video on his cell phone is of less concern, but this search least arguably could have exceeded the scope of the warrant.

The law is not yet clear on either point. If anything, it was up to the issuing court to decline to issue a questionable warrant; it did not do so, and perhaps it acted correctly. The salient points however, are that the police had the court review and approve their application, it was not a plainly deficient warrant, it was not unreasonable for the police thereafter to rely on it, and they acted within the warrant's scope. What more could they do?

The task force now is on notice that it should tighten up its affidavits and draft warrants in the fashion addressed by this order. Law enforcement officers, and courts for that matter, soon will understand more clearly the acceptable contours of a warrant for electronic equipment. Today, however, the police cannot be faulted for having seized and

searched Roberson's cell phone pursuant to the court's warrant. Therefore, this court should deny Roberson's motion to suppress.

Dkt. 39: Black's motion to quash the search warrant for lack of probable cause

Black claims that this court should quash the search warrant for Apartment 12 at 266 Junction Road for lack of probable cause. He contends that this deficiency was so apparent that the good faith doctrine cannot save the warrant. Black asserts that he had a reasonable expectation of privacy in the searched apartment and the government does not contest that assertion.

The warrant affidavit is attached to Black's motion and it speaks for itself. Black first asserts that there is no evidence that Apartment 12 was his "residence." Next, he asserts that the evidence was stale because there is no evidence he lived at the apartment on September 30, 2004. Third, he asserts that Detective Helgren's general observations are improperly broad and imply that there always will be probable cause to search a drug dealer's home.

As explained by the government (dkt. 54 at 2, n. 1) although there were four drug sales, the search warrant affidavit refers only to the first three. By way of brief synopsis, an informant, acting at police direction and under police surveillance, bought crack cocaine from Black on August 26, September 9 and September 15, 2004. On August 26 police observed Black leaving the apartment building at 266 Junction Road and drive to the sale in a 1994 Cadillac. On September 9, 2004, police saw Black leave 266 Junction Road and

drive to the sale in a 1997 Buick Riviera. On September 15, 2004, police saw a man not then identified leave 266 Junction Road and drive to the sale in the Cadillac.

Police interviewed the manager of the apartment complex who advised that she believed the Cadillac was associated with Apartment 12. She had seen Monclair Henderson-El driving it, and Henderson-El was the signatory on the lease for Apartment 12. The manager also stated that in July 2004 a man who identified himself to her as Stephen Black told her he was staying at 266 Junction Road Apartment 12 and asked her to notify him when a UPS package arrived.

Detective Helgren also made the usual averments based on his training and experience, including the fact that drug dealers routinely keep materials of evidentiary value at their residences.

The court issued the warrant on September 30, 2004, and the officers executed it after making a fourth cocaine purchase and arresting Black.

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).

As for staleness, the existence of ongoing criminal activity makes the passage of time less important and allows the inference that evidence remains at a location despite the passage of time. *See, e.g., United States v. Chapman*, 954 F.2d 1352, 1372-73 (7th Cir. 1992); *United States v. Certain Real Property*, 943 F.3d 721, 724 (7th Cir. 1991).

Finally, in drug investigations, courts issuing search warrants are entitled to infer in a drug case that evidence likely will be found where the drug dealer lives. *See United States*

v. Koerth, 312 F.3d 862, 870 (7th Cir. 2002); *United States v. McClellan*, 165 F.3d 535, 546 (7th Cir. 1999).

The evidence in the affidavit establishes probable cause that Black and the other unknown drug dealer were at least "staying" in Apartment 12. Clearly, they were staying *somewhere* in the apartment building, and the apartment manager was able to connect them to Apartment 12 with two different pieces of evidence: Black's own statement to her, and the leaseholder (Henderson-El's) connection to the Cadillac. This wasn't evidence beyond a reasonable doubt, but it didn't have to be. The facts known to the officers and presented to the court made it probable that Apartment 12 was the locus of the drug sales.

Black's staleness argument has no teeth. There were three drug sales between August 26 and September 15, and the warrant issued on September 30. Connecting the dots leads to the reasonable, almost inexorable conclusion that the drug dealers still were operating on September 30 just as they had been on August 26, September 9, and September 15.

Finally, it was not improper for Detective Helgren to use boilerplate averments to set forth his knowledge of the way drug dealers operate. Well crafted boilerplate is useful and efficient. (As noted in the previous section regarding electronic devices, keeping boilerplate well-crafted is a continuous operation). Black takes issue with the implication that police always will find evidence of drug dealing where drug dealers live. But it is sufficient to find that such evidence *probably* will be present, and this notion is so widely-accepted that it is part of the law of this circuit.

In short, there was probable cause to support the warrant and none of Black's challenges are meritorious.

Again as a fallback, the government invokes the good faith safety net of *Leon*. If it were necessary to apply the good faith doctrine to this warrant, then the government would prevail: this was not a bare bones affidavit, there is no indication the judge abandoned his neutral role, and there were no palpable deficiencies with the warrant that would have made police reliance on it unreasonable. This court should deny Black's motion to quash the search warrant.

RECOMMENDATION

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

1) Deny the motion to suppress statements (dkt. 27);

2) Grant the motions to suppress and ion track test (dkts. 28 & 34);

3) Deny the motion to strike prejudicial surplusage (dkt. 32);

4) Deny the motion to quash the search warrant as overbroad (dkt. 35); and

5) Deny the motion to quash the search warrant for lack of probable cause (dkt. 39).

Entered this 7th Day of January, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge