U.S.C.A. No. 07-10567

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL CLAY PAYTON,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of California

Honorable Oliver W. Wanger
United States Senior District Judge

U.S.D.C. No. 1:05-cr-00333 OWW

OPENING BRIEF OF APPELLANT

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I.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. A final judgement of conviction and sentence was entered on November 5, 2007. CR 72, ER 61-67.[1] The appellant, Michael Clay Payton, filed a notice of appeal on November 7, 2007. CR 71, ER 68. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. DID THE DISTRICT COURT ERR IN DENYING MR. PAYTON'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE SEARCH OF MR. PAYTON'S COMPUTER EXCEEDED THE SCOPE OF THE SEARCH AUTHORIZED IN THE WARRANT?

B. DID THE DISTRICT COURT ERR IN DENYING MR. PAYTON'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT WAS ISSUED WITHOUT PROBABLE CAUSE?

C. DID THE DISTRICT COURT ERR IN DENYING MR. PAYTON'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT AFFIDAVIT INCLUDED MISSTATEMENTS AND OMISSIONS OF MATERIAL FACTS?

III.

SUMMARY OF ARGUMENT

The search of Mr. Payton's computer exceeded the scope of the warrant because the warrant itself failed to authorized the search of any computers. The affiant requested permission to search computers only in the probable cause

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1"ER" refers to Excerpts of Record, "CR" refers to the Clerks Record.

statement, but he neglected to place this request in the list of items to be searched, and this request was not authorized by the magistrate. While the magistrate testified that he was aware of the request to search computers, and that he intended to authorize such a search, it is undisputed that he did not actually do so. Nor did he affirmatively indicate to the affiant that the search of computers was authorized. Consequently, despite the magistrate's stated intent, it was objectively unreasonable to believe that the search of computers was authorized by the warrant. The good faith exception to the warrant requirement does not apply because, objectively, it is clear that the search of computers was not authorized.

The warrant also failed to state probable cause for the search of Mr. Payton's computer for evidence of drug sales because the affiant's conclusion that 2.7 grams of methamphetamine, possessed by a roommate of Mr. Payton, was possessed for for sale was based primarily on a bare assertion of "complaints received from neighbors of drug sales at 544 Spur Court." The assertion contained no supporting facts, and no information regarding the tipsters veracity or their basis of knowledge. The good faith exception does not apply because there is no appreciable indicia of probable cause absent the unreliable complaint.

The warrant also failed to state probable cause for the search of Mr. Payton's computer for evidence of drug sales because the affidavit contained false information and omissions that mislead the magistrate and, absent this information the remaining material was insufficient to establish probable cause. The good faith exception to the warrant requirement does not apply in cases where the contains false information and omissions that mislead the magistrate.

IV.

BAIL STATUS

On November 5, 2007, the district court sentenced Mr. Payton to a total term of 63 months imprisonment, 120 months of supervised release, and a $100 penalty assessment. CR 72, ER 61-67. He is currently in the custody of the Bureau of Prisons at the Federal Correctional Institution in Beaumont, Texas. His projected release date is March 24, 2010.

V.

STATEMENT OF THE CASE

A two count indictment was filed on September 15, 2005, charging Mr. Payton with two counts of possession of material involving the sexual exploitation of a minor, in violation of 18 U.S.C. § 2252(a)(4). CR 8, ER 337-339. Count One alleged that Mr. Payton possessed such materials on or about July 30, 2004. Count Two alleged that he possessed such materials on or about September 2, 2005. Mr. Payton entered pleas of not guilty at his arraignment on September 16, 2005. CR 9

On October 17, 2006, Mr. Payton filed a motion to suppress evidence. CR 39, ER 298-336. The motion addressed three separate search warrants issued on three separate dates. This appeal addresses only the first warrant, which was issued on July 30, 2004.[2] This warrant was challenged on the grounds that (1) the warrant was facially invalid as it did not authorize the search of Mr. Payton's

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2 Unless otherwise specified, all references to the warrant refer to the July 30, 2004 warrant. The motion addressed two additional warrants, issued on October 4, 2004 and September 1, 2005. All evidence seized pursuant to the later warrants was ordered suppressed. CR 63-64.

computer; (2) the four corners of the warrant failed to establish probable cause to believe that evidence of drug trafficking would be found on Mr. Payton's computer; and (3) the warrant affidavit included intentional and/or reckless material misrepresentations. ER 298-299.

On January 30, 2007, an evidentiary hearing was held concerning the assertion that the warrant failed to authorize the search of Mr. Payton's computer. CR 47, ER 186-235. After the hearing the court requested supplemental briefing. On May 8, 2007, by written order, the court denied Mr. Payton's motion to suppress on the ground of facial invalidity. CR 56, ER 15-39, *United States v. Payton*, 2007 U.S. Dist. LEXIS 37277.

On June 5, 2007, an evidentiary hearing was held concerning the assertion that the warrant failed to establish probable cause to believe that evidence of drug trafficking would be found on Mr. Payton's computer and that the warrant affidavit included intentional and/or reckless material misrepresentations. CR 58, ER 76-123. At the conclusion of the hearing the court denied the motion on these grounds. CR 58, ER 2-14.

On August 24, 2007, Mr. Payton entered a conditional plea of guilty to Count One of the indictment. CR 66, ER 72-75. He preserved the right to challenge the denial of his suppression motion. CR 67, ER 69-71, 74-75.

On November 5, 2007, the court sentenced Mr. Payton to a total term of 63 months imprisonment, 120 months of supervised release, and a special assessment of $100. CR 72, ER 61-67. Mr. Payton filed his notice of appeal on November 7, 2007. CR 71, ER 68.

VI.

STATEMENT OF FACTS

1. Background

A state warrant authorizing the search of Mr. Payton's residence was issued and executed on July 30, 2004.[3] It was issued to search for evidence of drug trafficking, at 544 Spur Court, Merced, California.[4] The warrant did not authorize the search of any computer. However, the affiant, Merced Police Officer Jeffrey Horn, did request permission to search computers in his probable cause statement.

During the execution of the warrant, Officer Horn searched Mr. Payton's computer and seized the computer after viewing an image of a nude child lying on a bed. Based upon this discovery Mr. Payton was eventually charged with the possession of child pornography.

Mr. Payton filed a motion to suppress all evidence resulting from the search of his computer. He challenged the search on the ground that it exceeded the scope of the warrant . ER 298-309. He also challenged the existence of probable cause for the search of the computer, and further asserted that the statement of probable cause was bolstered with material misstatements and omissions. ER 309-320.

2. The Scope of the Warrant

The face of the warrant began with a boilerplate provision which provided that the attached affidavit established probable cause to search for the property

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3 Two additional warrants were issued on later dates. All three warrants were challenged by Mr. Payton. This appeal pertains solely to the July 30, 2004 warrant.

4 No evidence of drug trafficking was discovered during the execution of the warrant.

"described below." ER 288. The warrant then "commanded that the dwelling located at 544 Spur Court be searched: FOR THE FOLLOWING PROPERTY/PERSON: Melinda Reyes Fuentes ... and the property listed in attachment A. ER 288. Attachment A, provided a detailed list of items to be searched. It did not include computers. ER 289. Officer Horn described his failure to include computers in attachment A as an oversight. ER 295-296.

An evidentiary hearing was held on January 30, 2007. The issuing magistrate, Merced County Superior Court Judge John Kirihara, testified regarding the issuance warrant. Officer Horn presented him with a single document consisting of the face sheet, attachment A, and his statement of probable cause. ER 193-194. Kirihara's typical procedure when presented with a request for the issuance of a search warrant is to first review the face sheet of the warrant and then look for specifics in terms of the place to be searched. He then reviews the attachment to make sure it's consistent with the probable cause statement, and then he reads the probable cause statement to see if, in his view, it shows probable cause ER 194-195.

After reading the probable cause statement, Judge Kirihara asks the officer questions, if there are any. Occasionally, he asks the officer to interlineate some items that he may have missed. He did not do so in this case. He then administers the oath and has the officer sign the affidavit, before he signs the warrant himself and actually issues the warrant. He believes he followed the procedure "in this case, as in every case." ER 195.

Judge Kirihara testified that he authorized the police to search only the property listed in attachment A. ER 197-199. However, he also testified that he was conscious of the fact that the probable cause statement requested permission

to search computers and that he intended to authorize such a search. ER 199. He neglected to see that the request to search computers was not included in attachment A. ER 199. Judge Kirihara signed the warrant as presented. He did not advise Officer Horn that the search of computers was authorized. ER 194-199.

Judge Kirihara considers the face sheet, attachment A, and the probable cause statement a single document, all of which constituted the warrant. ER 195. In the state system the search warrant and attached affidavit are typically taken to the location of the search but they are not left at that location. Rather, the police retain possession of the warrant and it comes back with the officers. ER 195-196.

3. Probable Cause to Search Mr. Payton's Computer

Information in the four corners of the July 30, 2004 affidavit pertaining to possible drug trafficking at 544 Spur Court consisted of the following:

> On 07-29-04 at approximately 1658 Hrs. I went to 544 Spur Ct. in the City of Merced. I went to the house to serve an arrest warrant on Melinda Fuentes. When I went to the door I was told that Fuentes was inside and I entered the house to arrest her. Once inside I found and arrested her for the warrant. I checked the area where Fuentes was standing and found a black bag that she said belonged to her. After checking the bag I located a glass pipe commonly used to smoke CNS stimulants. I tried to get consent to search the house but was denied by both Fuentes and other residence (sic) of the house.
>
> When I arrived at the jail I found that Fuentes was in possession of approximately 2.7 grams of suspected methamphetamine. The suspected drugs were safety pinned to the inside of her bra. She was charged with possession, possession for sales, smuggling a narcotic into a jail, drug paraphernalia, and her warrant.
>
> After booking I drove to the Merced Police Department central station and looked at the drugs. I weighed the drugs and looked at the way it was packaged. It was packaged in two separate bags inside of a slightly larger bag. I also noticed that the weight was almost what is called an "8-ball." *Because of my experience and*

> *training I believe that these drugs were possessed for sales. This opinion is based on complaints received from neighbors of drug sales at 544 Spur Court, the way the drugs were packaged, and the amount possessed.*

ER 290-291 (emphasis added).

Officer Horn had no idea whether any computer was located in the residence. ER 93. The probable cause statement requested permission to search any computer that might be located in the residence was based entirely on Horn's assertion:

> Because of my experience and training, I know that drug dealers will have evidence of sales on their computers. I would ask that this Warrant allow me to look at computer files, and seize the computer if it shows evidence of criminal behavior.

ER 292.

4. Material Misrepresentations

A *Franks* hearing was held on June 5, 2007 to address the allegation that Officer Horn's affidavit included material misrepresentations. While the affidavit stated that neighbors had complained of "drug sales," Officer Horn testified that, as far as he knew, no neighbor had ever complained of drug sales at 544 Spur Court.[5] ER 101. Rather, a neighbor complained of suspected drug use at the location and provided a videotape of suspicious activity to the police. Horn watched only a short portion of the video himself, but discussed it with officers who viewed the entire tape. When asked about his basis for stating there were "complaints by neighbors of drug sales," Officer Horn testified:

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5 Officer Horn testified he was cultivating an informant, who was *not* a neighbor of 544 Spur Court. ER 102. The informant was working off a narcotics charge and advised Horn that Melinda Fuentes was dealing narcotics. ER 88. The informant also advised that Melinda Fuentes had a misdemeanor warrant and could be found at 544 Spur Court, where she was staying. ER 88. Officer Horn intentionally excluded this information from his affidavit. ER 102.

> In addition to actually seeing people use narcotics, there were complaints of people coming and going at all hours of the day and night, staying for a short amount of time and none leaving immediately. Because of my training and experience, that's common indicators of drug sales at a residence.

ER 194. During cross-examination, the following exchange occurred.

> Q: Officer Horn, "I want to go back to the allegation concerning complaints of drug sales at the address.
>
> Now, my understanding, based on your testimony on direct examination, was that other officers were viewing a videotape that someone brought in to the Merced Police Department. And on that videotape you believe you observed people using methamphetamine in front of the house.
>
> And based on your conversations with other officers, that the person complained of many people coming and going, and it's my understanding that based on that, you believed it was consistent with drug sales, is that correct?
>
> A: Yes.
>
> Q: Okay. But the complaint wasn't actually of drug sales, that was your conclusion based on conversations with other officers?
>
> A: Yes, as far as I know. I wasn't actually in there. I didn't actually talk to the complaining party.
>
> Q: Okay. So as far as you know, there was no complaint from the neighbor of drug sales?
>
> A: No, just like I said, I had formed that opinion based on what was said.
>
> Q: So that was your opinion, but that was not the content of the complaint as far as you know?
>
> A: As far as I know.

ER 101-102. Rhonda Espinoza was the neighbor who videotaped 544 Spur Court. She did so because she believed that drug use was occurring at the residence. ER

332-333.[6] When she viewed the videotape with police, she complained about the amount of traffic to and from the house, the type of people that constituted the traffic, and her suspicion that illegal drugs were being used at the house. ER 333. She did not advise the police that she had observed drug sales at Payton's residence, or that she believed drug sales were occurring at the location. ER 103-104, 333.

None of the actual facts or activities observed in the video or reported by Ms. Espinoza were presented to the magistrate. Rather, Horn advised the magistrate only that neighbors had complained of "drug sales at 544 Spur Court." The government did not contest the accuracy of anything in Ms. Espinoza's statement. Nor did it assert that any neighbor had actually complained of drug sales.

The defense also asserted that the affiant's statement regarding drug evidence on computers was misleading. Officer Horn stated that he had been a police officer for approximately 7 years when he requested this warrant. ER 82-83. He claimed extensive narcotics related experience in his affidavit and avowed:

> Because of my experience and training, I know that drug dealers will have evidence of sales on their computers. I would ask that this Warrant allow me to look at computer files, and seize the computer if it shows evidence of criminal behavior.

ER 333.

At the *Franks* hearing Officer Horn testified that when he requested the warrant, neither he nor anyone he worked with had ever discovered drug evidence on a computer. ER 106.

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6 Ms. Espinoza also believed that Melinda Fuentes and her boyfriend were responsible for the theft of electronic items from Espinoza's garage.

This was the first search warrant where Horn ever requested permission to search a computer for evidence of drug sales. ER 92. The request was based on information he received at a Department of Justice training course he attended shortly before requesting the warrant. During the course, the class was advised that evidence of drug trafficking could be found on computers. ER 83-84, 92-93.

VII.

ARGUMENT

A. THE DISTRICT COURT ERRED IN DENYING MR. PAYTON'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE SEARCH OF MR. PAYTON'S COMPUTER EXCEEDED THE SCOPE OF THE SEARCH AUTHORIZED IN THE WARRANT .

1. Standard of Review

Whether a search is within the scope of a warrant is a question of law subject to de novo review. *United States v. Hurd, 499 F.3d 963, 965 (9th Cir. 2007); United States v. Cannon*, 264 F.3d 875, 878 (9th Cir. 2001). The district court's factual findings are reviewed for clear error. *United States v. Howard*, 447 F.3d 1257, 1262 n.4 (9th Cir. 2006).

2. Argument

a. Officer Horn Violated the Fourth Amendment When He Searched Mr. Payton's Computer, Which was Not Listed in Attachment A or Otherwise Authorized by the Issuing Magistrate.

The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized."

The Fourth Amendment requires particularity in the warrant, not in the supporting documents. *Groh v. Ramirez,* 540 U.S. 551, 557 (2004). "[U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no *written* assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit. *Id.* at 560 (emphasis added). The scope of the authorized search is determined by the language in the search warrant, not by the unincorporated affidavit. *See, e.g., Doe v. Groody*, 361 F.3d 232, 241 (3rd Cir. 2005), *cert. denied*, 543 U.S. 873 (2004) ("[t]he warrant provides the license to search, not the affidavit").

"It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted." *Groh,* 540 U.S. at 560. This "is not a duty to proofread; it is, rather, a duty to ensure that the warrant conforms to constitutional requirements." *Id.*, n6.

The "possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). It is well established that "the purpose of the particularity requirement is not limited to the prevention of general searches." *Groh,* 540 U.S. at 561 (citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)). "A particular warrant also 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Id.* (citing *United States v. Chadwick*, 433 U.S. 1, 9 (1977), abrogated on other grounds, *California v. Acevedo*, 500 U.S. 565 (1991)).

The Fourth Amendment requires that a search conducted pursuant to a warrant not exceed the strict bounds of the warrant. *Bivens v. Six Unknown Agents*, 403 U.S. 388, 394 n.7 (1971). "As to what is to be taken, nothing is to be

left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). An examination of the books, papers, and personal possessions in a suspect's residence is an especially sensitive matter, calling for careful exercise of the magistrate's judicial supervision and control. *United States v. Rettig*, 589 F.2d 418, 422-423 (9th Cir. 1978) (citing *Stanford v. Texas*, 379 U.S. 476 (1965).

A court may construe a warrant with reference to a supporting application or affidavit only "if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh*, 540 U.S. at 558-559. These words must affirmatively indicate that the items set forth in the supporting affidavit are subject to search. *See, e.g., United States v. Towne*, 997 F.2d 537, 539 (9th Cir. 1993); *United States v. Fannin*, 817 F.2d 1379, 1381(9th Cir. 1987); *In re: Property Belonging to the Talk of the Town Bookstore*, 644 F.2d 1317, 1319 (9th Cir. 1981) (warrant commanded officers "to seize only the above specified property as described in the Affidavits attached to this Search Warrant").

Here, when denying the facial validity challenge to the motion to suppress, the district court ruled that "the particularity requirement of the Fourth Amendment was satisfied even though the statement of probable cause was not incorporated by suitable words of reference into the description of items to be seized." ER 27. It based this ruling upon its conclusion that "the failure to include computers in attachment A was the result of mistake and oversight." ER 27-39.

Doe v. Groody is factually similar to the instant case. There, the Third Circuit pronounced:

> We are mindful that search warrants and affidavits are often prepared under time pressure and should not be subjected to microscopic dissection. But the warrant

> plays a critical role under the Fourth Amendment. At some point, flexibility becomes breakage. The warrant must be written with objective definition, or its scope will not be discernable to those who are bound to submit to its authority, whether they are police or subjects of the search. By the same token, without a clear reference to the affidavit in the warrant, the former cannot simply be assumed to broaden the latter.

361 F.3d at 243. In *Groody*, the search warrant identified only John Doe as the person to be searched, while the attached affidavit sought permission, in three separate instances, to search all occupants of the residence. *Id.* at 236. The affiants who executed the warrant mistakenly believed that they were authorized to search all occupants of the residence. *Id.* at 238-239. In addition to Doe, they searched his wife and their daughter. The Court found that the omission of the two female occupants from the list of people to be searched was not a technical error because the language of the warrant was inconsistent with the affidavit and to find otherwise would impermissibly expand the scope of the warrant. *Id.* at 240.

Here, other than the Judge Kirihara's statement that he intended to authorize the search of computers but inadvertently failed to do so, the situation is identical. The warrant is narrower than the affidavit and omits any reference to the computer that the affidavit sought permission to search.

This is a significant "difference as to scope" as, despite the magistrate's stated intent, objectively, the search of Mr. Payton's computer clearly was not authorized. When a warrant is not ambiguous or contradictory on its face, it is not appropriate to look to a separate affidavit to "clarify" the warrant. *Id.* at 240.

While a warrant must be read in a common sense, non-technical fashion, it may not be read in a way that violates its fundamental purposes. *Id.* at 239. As the text of the Fourth Amendment itself denotes, a particular description is the

touchstone of a warrant. *Id.* The requirement of a particular description in writing does not merely memorialize what search or seizure the issuing magistrate intended to permit. It also confines the discretion of the officers who are executing the warrant, and "*inform[s] the subject of the search what can be seized.*" *Id.* (emphasis added). For these reasons, a warrant "must be sufficiently definite and clear so that the magistrate, police, and search subjects can objectively ascertain its scope." *Id.* at 240.

This is not a warrant with some sort of ambiguity or obvious clerical error which can be clarified by inspecting the affidavit. The affidavit is not being used to rectify a "minor irregularity." *See, United States v. Johnson*, 690 F.2d 60, 65 n.3(1982) (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965). Rather, the unincorporated affidavit is being used to expand the scope of a facially valid warrant.

The warrant to search Mr. Payton's home is perfectly clear. It contains no ambiguous or contradictory terms on its face. Rather, the language of the warrant is inconsistent with the language of the affidavit because the former does not grant what the latter sought -- permission to search any computers that might be present at the residence. That is not a discrepancy as to form; it is a difference as to scope.

This is not a situation where the magistrate affirmatively indicated that the search of computers was authorized. Given the circumstances, while Officer Horn may have *subjectively* believed he was authorized to search computers – *objectively*, however, this belief was unreasonable. Neither he, nor any officer who read the warrant, could *objectively* believe that the search of computers was authorized. Nor could any person subject to the search have been informed that the officers executing the warrant were authorized to search any computers.

Because the search of Mr. Payton's computer exceeded the scope of the warrant, all evidence derived from the search must be suppressed. *Weeks v. United States*, 232 U.S. 383, 398 (1914). *Wong Sun v. United States*, 371 U.S. 471 (1963).

3. The Good Faith Exception Does Not Apply

Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. *Groh*, 540 U.S. at 564. Where a warrant is facially deficient, in that it fails to particularize the place to be searched or the things to be seized, the executing officers cannot reasonably presume it to be valid. *Id.*; *Groody*, 361 F.3d at 244.

Because Officer Horn's search of Mr. Payton's computer exceeded the scope of the warrant, he could not reasonably relied upon it in objective good faith and the search cannot be saved by *Leon*.

B. THE DISTRICT COURT ERRED IN DENYING MR. PAYTON'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT WAS ISSUED WITHOUT PROBABLE CAUSE

1. Standard of Review

Motions to suppress are reviewed de novo. *See United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir. 2003); *United States v. Fernandez-Castillo*, 324 F.3d 1114, 1117 (9th Cir. 2003); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002). This Court reviews de novo whether the good faith exception to the exclusionary rule applies to a search warrant. *United States v. Howe*, 848 F.2d 137, 139 (9th Cir. 1988); *United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006).

The trial court's factual findings are reviewed for clear error. *See Fernando-Castillo*, 324 F.3d at 1117; *Gorman*, 314 F.3d at 1110; *United States v. Jones*, 286 F.3d 1146, 1150 (9th Cir. 2002). The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Celestine*, 324 F.3d 1095, 1100 (9th Cir. 2003); *United States v. Wright*, 215 F.3d 1020, 1025 (9th Cir. 2000); *United States v. Bowman*, 215 F.3d 951, 963 n. 6 (9th Cir. 2000).

2. Argument

a. The Affidavit Failed to Provide the Magistrate With a Substantial Basis to Determine that there was a Fair Probability that Evidence of Drug Sales Would Exist on Computers Located at 544 Spur Court

The Fourth Amendment requires that a warrant be issued only "upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place." This requirement "safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Steagald v. United States*, 451 U.S. 204, 213 (1981). Here, the only issue is whether probable cause existed to search computers that might be at Mr. Payton's residence for evidence of drug sales

"All data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath." *United States v. Gourde*, 440 F.3d 1065, 1067 (9th Cir. 2000) (en banc) (quoting *United States v. Anderson*, 453 F.2d 174, 175 (9th Cir. 1971) (internal quotation marks omitted).

"Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239. Wholly conclusory statements fail to meet this requirement. *Id.*

> The task of the issuing magistrate is . . . to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238 (1983); *United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006).

The information supporting probable cause must be "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210 (1932).

Officer Horn requested this search warrant after arresting Melinda Fuentes at 544 Spur Court with 2.7 grams of methamphetamine pinned to the inside of her bra. Horn opined that drugs were possessed for sales based upon " complaints received from neighbors of drug sales at 544 Spur Court, the way the drugs were packaged, and the amount possessed." ER 290-291.

The affidavit states only that the quantity was 2.7 grams. There is nothing inherent in this quantity that is indicative of sales. Officer Horn himself testified that 2.7 grams is also consistent with personal use. ER 95. No information was provided to support Horn's opinion that the quantity was indicative of sales, and no information was provided which would allow the magistrate to form his own opinion regarding whether the 2.7 gram quantity was truly indicative of sales.

Similarly, the fact that the drugs were packaged in two separate bags inside a slightly larger bag is of marginal significance. No information was provided concerning the relative weights of the two packages, or whether they were in quantities that are normally sold, or whether the type of packaging was indicative of sales. This bare fact provided the magistrate with no basis to form his own opinion whether the packaging was truly indicative of sales.

Any determination that probable cause existed to believe that drugs were being sold at 544 Spur Court rested primarily upon Officer Horn's avowal that neighbors had complained of drug sales. Mr. Payton does not contest that substantiated or reliable complaints of drug sales from neighbors would be sufficient to infer that the drugs possessed by Melinda Fuentes were possessed for sale. However, the affidavit failed to establish that any substantiated or reliable complaints existed.

Regarding the complaints, affidavit states only that there were "complaints received from neighbors of drug sales at 544 Spur Court." The assertion is devoid of supporting facts or circumstances.

There is no information concerning what the "neighbors" claimed to have observed, or what activities the allegation of drug sales was based upon. There is no information regarding the neighbor's veracity or reliability, or whether they were identified, or even truly a neighbor. It cannot be determined whether the information is stale because there is no information concerning the timing of the purported complaints. And there is no indication that the police corroborated any details that were provided, or that they observed activity consistent with drug sales. In short, the alleged complaint is a bare bones assertion worthy of no weight.

"The task of the issuing magistrate is ... to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates,* 462 U.S. at 238; *Luong*, 470 F.3d at 902.

Officer Horn's request to search for evidence of sales is based on his boilerplate recitation of how drug dealers behave. Absent the allegation that

neighbors complained of drug sales, the affidavit fails to provide any substantial basis to believe that drug sales were occurring at 544 Spur Court. Absent this allegation, there's simply no probable cause to believe that drug sales were occurring at the location, much less that evidence of drug sales would be found on any computer that might be present. *See*, *United States v. Weber*, 923 F.2d 1338, 1344 (9th Cir. 1991) (boilerplate recitation of how child molesters, pedophiles, and child pornography collectors behave insufficient to establish probable cause absent evidence indicating that defendant was any of these things).

Given all the circumstances set forth in the four corners of the affidavit, including the "veracity" and "basis of knowledge" of the purported neighbors who complained of drug sales, it was not possible to reasonably conclude that there was a fair probability that evidence of a drug sales would be found on Mr. Payton's computer. The magistrate's issuance of the warrant was clearly erroneous.

Because the affidavit failed to establish probable cause to believe that evidence of drug sales would be found on Mr. Payton's computer, all fruit of the search of his computer must be suppressed. *Weeks*, 232 U.S. at 398; *Wong Sun*, 371 U.S. 471.

3. The Good Faith Exception Does Not Apply.

"*Leon* established that for the good faith exception to apply, the officer's affidavit must establish at least a colorable argument for probable cause. The Supreme Court framed the inquiry as whether the affidavit is 'sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause.'" *Luong*, 470 F.3d at 903 (internal citations omitted). Here, the affidavit fails to meet this threshold showing because it contains no appreciable indicia of probable cause.

As in *Luong,* the critical deficiency in the affidavit is its reliance on an unverified tip as the lynchpin for the theory of probable cause. "For an anonymous tip to be accorded any weight, 'officers must provide some basis to believe that the tip is true.'" *Id.* (citing *United States v. Clark*, 31 F.3d 831, 834 (9th Cir. 1994). "The tip must include a 'range of details' and it must predict future actions by the suspect that are subsequently corroborated by the police.'" *Id.* (citing *United States v. Morales*, 252 F.3d 1070, 1075 (9th Cir. 2001).

C. THE DISTRICT COURT ERRED IN DENYING MR. PAYTON'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT AFFIDAVIT INCLUDED MISSTATEMENTS AND OMISSIONS OF MATERIAL FACTS

1. Standard of Review

The district court's finding that an affidavit did not contain purposefully or recklessly false statements or omissions is reviewed for clear error and the determination that the misleading omissions or false information did not undermine a finding of probable cause is reviewed de novo. *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003).

2. Argument

a. The Affiant Intentionally and/or Recklessly Mislead the Magistrate with False Information and Omissions.

Officer Horn's probable cause statement includes material misstatements and omissions. First, Horn avowed that police had "received complaints from neighbors of drug sales at 544 Spur Court" when he knew that no such complaints had been received. Second, he avowed that he knows that dealers will have evidence of sales on their computers, based on his "experience and training," when neither he, nor any officer he worked with had ever discovered evidence of drug sales on a computers.

A hearing is required on the truthfulness and completeness of factual statements made in an affidavit supporting a search warrant when "the defendant makes a substantial preliminary showing that a statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978).

Franks extends to deliberate or reckless omissions of material facts as well as to affirmative misstatements. *United States v. Tham*, 948 F.2d 1107, 1111 (9th Cir. 1991). When "omitted facts cast doubt on the existence of probable cause they rise to the level of misrepresentation." *United States v. Garza*, 980 F.2d 546, 551 (9th Cir. 1992). If, after hearing, it is determined that the affidavit was afflicted with falsehoods or omissions, then the affidavit is to be judged for probable cause without the falsehoods and with the recklessly omitted material. *Franks v. Delaware*, 438 U.S. at 172; *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990); *United States v. Reinholz*, 245 F.3d 765, 774 (8th Cir. 2001). If the resulting affidavit is not sufficient to establish probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156.

Whether an officer could have written a truthful affidavit that supplied probable cause is not relevant. *Franks* does not permit a court to "correct" the affidavit after the fact. Rather, it directs the court to delete the false statements and examine the remaining information. See *United States v. Davis*, 714 F.2d 896, 900 (9th Cir. 1983) ("The fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error.")

When an officer has all of the relevant facts at his disposal, his inclusion of false or misleading information in a search warrant affidavit exhibits a reckless

disregard for the truth and requires suppression. *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997); *United States v. Stanert*, 762 F.2d 775, 783, amended by 769 F.2d 1410 (9th Cir. 1985).

b. Neighbors Purported Complaints of Drug Sales

At the *Franks* hearing Officer Horn testified that, as far as he knew, no neighbor had ever complained of drug sales at 544 Spur Court. Rather, a neighbor complained of suspected drug *use* at the location and he interpreted the information and presented it to the magistrate as a complaint of *sales.*

After the *Franks* hearing, the district court acknowledged that no neighbors had actually complained of drug sales at 544 Spur Court, ER 9-13. However, it found that Officer Horn was entitled to interpret Ms. Espinoza's complaint of suspected drug use and present it to the court as a complaint of "drug sales." The court ruled:

> the court intends its oral statement of decision to be its statement of decision and denies the motion to suppress the search warrant. The Court believes -- the Court doesn't find that there's an intentional omission here, or a knowing or purposeful omission. The officer interpreted the neighbor's complaint about drug activity in the front yard and put it in the affidavit. He did use the exact words, "complaints received from neighbors of drug sales," however, there is no question that there were complaints about drug activity and a videotape of such activity.
>
> The way the drugs were packaged were honestly presented. The amount possessed was honestly presented. And even if we excised and consider the entire warrant without a complaint of neighbors of drug sales, the affidavit is still sufficient for the magistrate to authorize a search of a residence where obvious drug activity with people who are under the influence, it looks like, to use the vernacular, a crack house or a place where narcotics are used. So the officers would be derelict, quite frankly, if they didn't seek a search warrant and attempt to get to the bottom of what was going on at this house.

So for all those reasons, the motion ... is denied.

ER 13-14.

Officer Horn's testimony was an admission that neighbors had complained only of suspected drug *use*. His avowal that neighbors had complained of drug *sales* was false. He knew that what he stated in the warrant application was not true and there was no accident or mistake on his part.

In *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990) the court found that where the officer, "by his own testimony, admitted that in his affidavit were untrue statements that clearly are material to the affidavit, we find that the district court's determination that there were no false statements nor any statements made in reckless disregard for the truth was clearly erroneous. *See United States v. Henson*, 848 F.2d 1374, 1381 (6th Cir. 1988). Where, as here, the officer admits making statements that he concedes are false, those statements should be excised from the warrant and probable cause determined without them, without recourse to the to the good faith exception.

At the very least, Horn's affidavit clearly demonstrated a reckless disregard for the truth. Recklessness exists when false statements are made with a "high degree of awareness of probable falsity." *United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998); *see also, United States v. Stanert*, 762 F.2d 775, 780-82 (9th Cir. 1985) (holding an agent's false statements reckless because she was aware of the true facts surrounding the suspect's arrest), amended by, 769 F.2d 1410 (9th Cir. 1985); *United States v. Chesher*, 678 F.2d 1353, 1360-62 (9th Cir. 1982) (holding that an agent's omission of evidence that was readily available to him constituted a substantial preliminary showing of recklessness).

Here, Officer Horn did not describe in his affidavit what he observed in the video, or what other officers had told him regarding Ms. Espinoza's complaint ,

and opine that the circumstances were indicative of drug sales. Instead, he withheld the details and falsely informed the magistrate only that neighbors had complained of drug sales. In so doing, Officer Horn usurped the authority of the magistrate and violated the requirements of the Fourth Amendment. It was not the magistrate who determined that probable cause existed to search Mr. Payton's computer for evidence of drug sales. Rather, it was Officer Horn.

Under *Franks*, if the defendant proves by a preponderance of the evidence that the police officer did deliberately or recklessly make false statements that were material to the probable cause finding, the search warrant must be voided and the fruits of the search excluded. *See, Franks*, 438 U.S. at 156. The review of the sufficiency of an excised affidavit is not deferential. *See, e.g., United States v. Elkins*, 300 F.3d 638, 651 (6th Cir. 2002); *United States v. Kolodziej*, 712 F.2d 975, 977 (5th Cir. 1983). *See also, United States v. Bishop*, 264 F.3d 919, 924 (9th Cir. 2001) (noting that once an affidavit is purged of illegally obtained information, the court determines whether the remaining facts still afford a substantial basis for concluding that the search warrant was supported by probable cause).

The district court's finding that there was no intentional or knowing omission was contrary to the testimony of Officer Horn and clearly erroneous. Once Officer Horn's affidavit is purged of intentional and/or reckless allegation that neighbors had complained of drug sales, the remaining facts are insufficient to provide a substantial basis to conclude that probable cause existed to search any computers located at 544 Spur Court for drug trafficking evidence.

c. Officer Horn's Asserted Knowledge that Evidence of Drug Sales Will Be Found on Computers

Officer Horn's request to search computers was based upon his avowal that because of his "experience and training," he "know[s] that drug dealers will have evidence of sales on their computers." However, he testified that, despite his extensive experience, neither he nor anyone he worked with had ever discovered drug evidence on a computer. ER 106.

In contrast to the broad, definitive assertion in Officer Horn's affidavit, his request actually rested entirely on a tip he received at a recently attended training course. Horn had never previously requested permission to search a computer for drug evidence and he had no idea whether computers were even present at Mr. Payton's residence. Per Officer Horn, he made the request because, at the training: "They recommended anytime that we go and serve a search warrant for narcotics that we request to look at the computer for evidence." ER 105.

Officer Horn requested permission to search computers only because of his recent training and there was no particularized reason why he suspected evidence would be found on Mr. Payton's computer. Neither Horn, nor anyone he worked with had ever discovered drug evidence on a computer. Had the magistrate been so informed, there is a distinct possibility he would not have intended to authorize the search of any computer that might be present. This is especially true given that: "for most people, their computers are their most private spaces." *Gourde*, 440 F.3d at 1077(en banc) (Kleinfield, J., dissenting).

3. The Good Faith Exception Does Not Apply

Once the false statements are excised the material omissions included, what remains is insufficient to establish probable cause to search all computers at the residence for evidence of drug sales. Because the affidavit contained material

misstatements and omissions, the good faith exception to the exclusionary rule does not apply. *See Leon*, 468 U.S. 987, 914, 923 (1984); *United States v. Johns*, 948 F.2d 599, 604-05 (9th Cir. 1991)." *Luong*, 470 F.3d at 902.

VIII.

CONCLUSION

The motion to suppress evidence should have been granted by the district court.

Mr. Payton entered a conditional plea of guilty to Count One of the indictment. The matter should be remanded to the district court and Mr. Payton should be permitted y to withdraw his conditional plea of guilty.

DATED: March 10, 2008

Respectfully submitted,

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Michael Clay Payton

IX.

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending in this Court within the meaning of Circuit Rule 28-2.6.

DATED: March 10, 2008

Respectfully submitted,

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X.

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(B) AND NINTH CIRCUIT RULE 32-1 FOR CASE NO. 07-10567

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the word processing program WordPerfect X3 in 14 point Times New Roman type style.

DATED: March 10, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MICHAEL CLAY PAYTON, *Defendant-Appellant.*	U.S.C.A. No. 07-10567 U.S.D.C. No. 1:05-cr-00333 OWW

The undersigned hereby certifies that she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers. On March 10, 2008, she personally served a copy of the original of the attached:

OPENING BRIEF OF APPELLANT

on the plaintiff and interested parties by placing a copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at Fresno, California, as follows:

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DATED: March 10 , 2008

Sofia Puentes